(1917) 03 PAT CK 0001

In the Patna High Court

Kishun Chand @ Kariman and Others APPELLANT

Vs

Mosafir Mistry and Others RESPONDENT

Date of Decision : 29-03-1917

Acts Referred:
Evidence Act, 1872 — Section 114

Citation : AIR 1917 Patna 226

Hon'ble Judges : Edward Chamier, C.J;Sharfuddin, J

Bench : Division Bench

Judgement

Edwaed Chamier, C.J.—This was a suit upon a mortgage made on May 24th, 1901, by defendants Nos. 1--6 in favour of one Baijnath, Who was impleaded as the 7th defendant to the suit and is now represented before us by his heirs. It appears that plaintiffs Nos. 1--8 and defendant No. 7 constituted a joint family and it may be taken that at the dale of the transaction in question Baijnath was karta of the family. The plaintiffs'' case was and is that they and defendant Nos. 7--9 were entitled to the sum secured by the mortgage and they alleged that Baijnath refused to join in the suit and, therefore, they made him a defendant. Defendants Nos. 1--6, who are the mortgagors, pleaded that they had paid to Baijnath the whole amount due under the mortgage and they produced the mortgage with five endorsements on it, which purport to show that various sums were paid in the years 1901, 1902, 1903, 1904 and 1911. Notwithstanding the production by defendants Nos. 1--6 of the mortgage deed bearing these endorsements and the admission of Baijnath that he received payment of all the money due on the mortgage, both Courts below have found that payment of the mortgage money has not been proved.

2. In second appeal it is contended that the lower Appellate Court placed the burden of proof upon the wrong party. We were referred to Section 114, illustration (i), of the Evidence Act and reliance was placed on the decision of their Lordships of the Privy Council in the case of Mohammad Mehdi Hasan Khan v. Mandir Das 17 Ind. Cas. 396 : 34 A. 611 : 12 M.L.T. 392 : 15 O.C. 278 :

(1912) M.W.N. 1053 : 14 B L.R. 1073 : 10 A.L.J. 373 : 17 C.W.N. 49 : 16 C.L.J. 629 : 23 M.L.J. 741 : 39 I.A. 68 (P.C), as showing that the Subordinate Judge was not entitled to put aside the presumption allowed by that section on the ground on which he did put it aside. As I understand the judgment of the Subordinate Judge he holds that in the first place, Section 114, illustration (i), applies only as between mortgagor and mortgagee and secondly, that the presumption is a rebuttable presumption and every case must be considered with reference to its own peculiar features and circumstances. He refers to the fact that there was a suit for partition between the plaintiffs and Baijnath in which Baijnath pleaded, inter alia, that this mortgage-bond was his own separate property but nevertheless plaintiffs Nos. 1--8 obtained a decree for partition against him. The Subordinate Judge also notes that the mortgagor Kishen Chand was a close neighbour of the parties to the partition suit and that from the evidence of Kishen Chand it is clear that he knew of the partition suit and what decree had been made in it. The Subordinate Judge also examined the endorsements on the mortgage-deed and said that it was quite clear that all five endorsements were made on one and the same day with the same pen and ink. Here I may say that I think that no one can look at the endorsements without seeing that they were not made at long intervals of time as suggested by the mortgagor in this case. The Subordinate Judge also records a definite finding, in agreement with the Court of first instance, that the statement of Kishen Chand to the effect that he paid the mortgage-money to the mortgagor is not worthy of credit. The Subordinate Judge then comes to the conclusion that payment has not been proved. I understand him to hold that Section 114 does not apply, first, because persons other than the mortgagor and mortgagee are concerned in the case, and secondly, because the presumption is a rebuttable one and has been rebutted. The argument addressed to us to-day practically comes to this that the Subordinate Judge was bound to make the presumption. It is suggested that he has allowed the presumption to be rebutted by what the Privy Council called in the case cited a possibility based on surmises. With reference to the decision of their Lordships it must be remembered that the facts were open to discussion. The case did not come, before them as the present case has come before us, i.e., as a second appeal in which we are obliged to accept findings of fact. It was open to them to go into the facts and to decide all questions of fact for themselves. The Subordinate Judge had decided one way and the Court of Appeal had decided the other. Their Lordships say that the Judges of the Court of Appeal, having disbelieved the evidence on both sides, set aside the presumption u/s 114 by a possibility based on surmises and that it is a settled principle that suspicion, though a ground for scrutiny, cannot be made the foundation of a decision and that that was what appeared to have happened in that case. These remarks must be taken with reference to their Lordships'' opinion on the evidence which had already been given. The rule laid down by their Lordships does not question the rule laid down in Section 114 of the Evidence Act, that in considering whether the maxims laid down in the body of that section do or do not apply to the particular case the Court may have regard to other facts. The section itself provides, with reference to the presumption that when a document creating an obligation is in the hands of the obligor, the obligation has been discharged, that the Court may have regard to the fact that although the bond is in the possession of the obligor the circumstances of the case are such that he may have stolen it. In the present case the circumstances strongly suggest that Baijnath may have returned the bond without receiving payment of all sums due under it. It has already been pointed out that Baijnath was a party to a suit for partition brought against him by the plaintiffs in the present case and that he failed to satisfy the Court that he was the sole owner of this mortgage-bond, Baijnath had nothing to lose by returning the deed on receiving his share of the mortgage-money and that is certainly a fact which should be taken into consideration when the Court is considering whether the possession of the deed by the mortgagor shows that the money has been paid off. The presumption of payment is certainly rebuttable and both Courts below have held that it has been rebutted. The facts lie within a very narrow compass and I may say that, in my opinion, the decisions of the Courts below are correct.

3. Then we were asked to hold that inasmuch as Baijnath had in his written statement in the present case admitted having received payment of the money, a decree should be passed against him and not against the mortgagor. It is impossible to do that in a case where it has been found that the mortgagor has failed to prove payment. Indeed the findings of the Courts below in this case really amount to this that Baijnath and the mortgagor have conspired together to defeat the plaintiffs'' claim. In my opinion we are bound, to accept the findings of the lower Appellate Court and I would dismiss this appeal with costs.

Sharfuddin, J.

4. I agree.

