

(1912) 07 AHC CK 0036
In the Allahabad High Court

Krishna Jiva Tewari and Others

APPELLANT

Vs

Bishnath and Others

RESPONDENT

Date of Decision : 15-07-1912

Acts Referred:

Evidence Act, 1872 — Section 69
Transfer of Property Act, 1882 — Section 59
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Transfer of Property Act, 1882 — Section 59

Citation : 16 Ind. Cas. 392

Hon'ble Judges : Rafique, J;Piggott, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. This was a suit for sale upon a mortgage of August the 9th, 1883, brought by the heirs and representatives of the original mortgagee against the heirs and representatives of the four mortgagors, together with some subsequent transferees. The Court of first instance decreed the plaintiff's claim, exempting 1/5th share in the property originally mortgaged from the operation of the decree. An appeal by the defendants was dismissed by the District Judge of Ghazipur. Coming to this Court in second appeal, the defendants, or rather six defendants out of a large number who were impleaded in the Court of first instance, have raised substantially five points. For convenience sake, we deal with them in the order in which they were raised. The first point taken is that the evidence on the record is not legally sufficient to prove the execution of the deed in suit, regard being had to the provisions of Section 59 of the Transfer of Property Act, IV of 1882, and Sections 68 and 69 of the Indian Evidence Act, I of 1872. This point was not taken in the Court of first instance, and there was nothing in the memorandum of appeal in the lower Appellate Court to warn the plaintiffs that objection was being taken to the technical sufficiency of their evidence. The deed in suit purports to be signed by four marginal witnesses of

whom two are literate and two are illiterate. The scribe of the deed has signed his own name at the foot, and has written the names of the two illiterate witnesses, The plaintiffs produced one witness to prove execution of the deed in suit by the mortgagors who has been accepted as a reliable witness by the Courts below, and " we must hold that his deposition, sufficiently meets the requirements of Section 69 of the Evidence Act, so far as concern proof of the signatures of the executants. There is evidence that all the marginal witnesses, and also the scribe, are dead, and we must presume that this evidence has been accepted by the Courts below as it would have been impossible for them otherwise to hold the document proved. The plaintiffs have proved the handwriting of the scribe, both as regards his own signature at the foot of the deed, and as regards the signatures *of the witnesses, Babu Lal and Sundar Rai, which are in the handwriting of the said scribe. In the case of Radha Kishen v. Fateh Ali Ram 20 A. 532 it was held by this Court that the scribe of a deed, who had signed his name at the foot thereof, though not explicitly described as an attesting witness, could give evidence on the same footing as an attesting witness, provided he could prove that the deed was in fact executed in his presence. There is a fair presumption to be drawn from the fact that the signatures of two of the attesting witnesses in this case were written by the pen of the scribe, that the said scribe was present at the execution of the deed. We are of opinion, therefore, that the requirements of Section 69 of the Indian Evidence Act, with reference to proving the attestation of at kast one attesting witness, when all the attesting witnesses are dead, have been sufficiently complied with in this case by proof of the handwriting of the scribe and by tie fact that two of the attesting witnesses appear to have signed by the pen of the said scribe.

2. The second point taken is the most substantial point in this case. The bond in suit was executed by four brothers, Umrao, Sheo Person, Hari and Gopal. It is an admitted fact that at the date of the execution, these four were members of a joint undivided Hindu family. It is also admitted that there was living at that time a fifth brother named Bhondhu, who was also a member of the joint Hindu family. Some evidence has been offered on behalf of the plaintiffs to prove that Bhondhu would have been asked to join in the execution of the deed, but for the accident that he was lying ill at the time. The contention for the defendants-appellants is that four of the brothers had no right to hypothecate any portion of the joint family property without the authority of the 5th and that in consequence of Bhondhu's not having joined in the execution of this deed, the mortgage in suit is not binding even as against the interests of the four mortgagors in the joint family property. There are two circumstances in the case which appear to us decisive. In the first place, the deed in suit was executed for legal necessity, namely, to pay off ah antecedent debt due from the father of the four executants, a debt for the payment of which the four mortgagors and their borthor Bhondhu were all liable because of their pious duty as Hindu sons. In the second place, it is to be noticed that the suit as now brought is not against a

joint family. The joint family has been broken up, and the defendants, who are the legal representatives of the original mortgagors, form a number of separate groups, the members of which are joint amongst themselves but separate from the rest. Without any general discussion of the questions of law that have been argued before us, we are content to say that, under these circumstances, we are satisfied that the mortgage in suit is enforceable at least against the shares of the four executants of the mortgage-deed. The question whether the Courts below were right in exempting Bhondu's 1/5th share is not before us, as the plaintiffs never challenged the correctness of the decree of the first Court on this point.

3. It appears that one of the groups of defendants before us included a father and son, and that one Bam Prasad, a minor son of the latter defendant, was not impleaded in the suit at all. It is contended on behalf of the appellants that this omission is fatal to the entire suit, it being conceded that Ram Prasad cannot now be added as a defendant, the period of limitation for a suit against him having expired. On the principles laid down by the latest rulings of this Court in *Hori Lal v. Nimman Kunwar* 9 A.L.J. 819 : 15 Ind. Cas. 126 and *Nathi Lal v. Lala* 9 A.L.J. 410 : 14 Ind. Cas. 35 it appears to us that the Courts below were right in holding that the minor Ram Prasad was sufficiently represented in the suit by his father and grandfather. We would refer to the remarks of Mr. Justice Chamier on page 417 of the report in the second of the rulings above referred to. In cases in which all the adult members of a joint family appeared on the record as plaintiffs it was held that this alone justified the presumption that they were acting as managers on behalf of themselves and of the minor members of their family who had not joined in the suit. We think the same principle applies to the case of defendants.

4. The 4th point taken refers to a payment of Rs. 125 admitted in the plaint. It is sufficiently met by the fact that the interest claimed in the plaint is simple and not compound and there is nothing in the pleadings or evidence to suggest that this payment of Rs. 125 could or ought to have credited to principal.

5. The 5th point is the last point taken on behalf of the appellants, and it refers to an issue raised in the written statement of Baij Nath Rai, defendant No. 23. The scanty information available on the record makes it difficult for us to understand the precise circumstances on which this plea is based, Baij Nath Rai was impleaded in the plaint simply as a subsequent mortgagee, no details being given of his mortgage. In his written statement, this defendant pleaded that a portion of the property in suit had been hypothecated to the Baij or Bijai Rai under a deed of August the 1st, 1886. He added that the said Bijai Rai had brought a suit upon his mortgage in the year 1898, impleading Raja Ram, whom he described as the ancestor of the plaintiffs, as a mortgagee subsequent to himself. The contention is that as the said Raja Ram made no defence to that suit, the plaintiffs are estopped in the present suit from claiming priority for their mortgage as against that in favour of Bijai Rai. The Courts below have contented

themselves with remarking that even if this plea were effective as against Raja Ram, there was nothing to show that Raja Ram represented all the present plaintiffs in that suit of 1893 and that there were still remaining a number of plaintiffs entitled to maintain the suit as brought, be far as we can gather from the materials on the record, this finding appears to be correct. There does not seem to be anything on the record to show how the defendant Baij Nath Rai comes to have any interest in the mortgage in favour of Bijai Rai, or that he was impleaded as a defendant because of this mortgage of August 1st, 1886. Again, the decree of September 9th, 1898 which is the only evidence on the record on this point, merely shows that Raja Ram was impleaded as son and heir of Amrit Lal, and that the suit brought by the plaintiff Bijai Rai was decreed. It does not even show in what capacity Raja Ram was impleaded, or what interest he had in the subject-matter of the suit. It w incumbent on a defendant who raises the plea of res judicata to lay before the Court adequate materials, for a full and proper appreciation of that plea and a proper decision thereon. This has certainly not been done in the present case. For these reasons, we overrule all the objections taken on behalf of the appellants and dismiss the appeal with costs including fees on the higher scale.