
(1949) 11 PRI CK 0013

In the Privy Council

Case No : Privy Council Appeal No. 80 of 1947

Manaka and others

APPELLANT

Vs

Madharao and others

RESPONDENT

Date of Decision : 29-11-1949

Acts Referred:

Citation : (1950) AIR(PC) 25

Hon'ble Judges : Lionel Leach, Lord Radcliffe, Lord Simonds, JJ.

Advocate : T.L. Wilson and Co., Dingle Foot, for the Appearing Parties.

Judgement

Sir Lionel Leach, J.

This is an appeal from a decree of the High Court of Judicature at Nagpur allowing an appeal from a decree of the Additional Judge of Chanda. The appeal has arisen out of a suit filed by Arjuna (the husband of appellant 1 and the father of appellants 2, 3 and 4) and appellants 5, 6 and 7 (the brothers of Arjuna) to enforce payment of the sum of Rs. 12,553.0.3, claimed to be due on a mortgage executed in their favour by Mt. Bajabai, her son Saoji (father of respondent 1 and the husband of respondents 2 and 3), and respondents 4 and 6 (Saoji's brothers) and on behalf of certain minors. Arjuna, Bajabai and Saoji have died during the course of the litigation. The Additional District Judge held that the minor defendants had no interest in the property mortgaged and this finding has not been challenged. Consequently, they have not been made parties to the appeal.

2. The respondents' case is that in the month of December 1934, the mortgagees agreed to accept the sum of Rs. 9500 in settlement of the amount due under the mortgage, that on 17th January 1935, Rs. 9300 of the agreed amount was paid to Govinda (plaintiff 2 now Appellant 5) who received it on behalf of all the mortgagees, that thereupon Saoji made an endorsement of payment on the mortgage deed and that the endorsement was signed by Govinda in acknowledgement. The reason given by the respondents for the fact that the only acknowledgment of payment was the endorsement was that

Govinda said that a receipt could not be given until his brothers were present and that a question remained to be settled with regard to a sum of Rs. 100.

3. The mortgagees, who had formed a joint Hindu family but had become divided before the alleged payment, denied that they had ever agreed to accept Rs. 9500 in settlement, they denied that Rs. 9300 had in fact been paid, they maintained that Govinda had no authority to, accept payment on their behalf and they averred that there was no endorsement on the mortgage when it was filed in Court at the time of the institution of the suit.

4. The Additional District Judge found that there was nothing to indicate that the endorsement had come into existence after the institution of the suit and he formed the opinion that it must have been made when the deed was in transit to or from the two petition writers who were consulted with regard to the drafting of the plaint. In the first place the deed was sent to a petition writer named Shrinivas, who was instructed to prepare the plaint, but he returned the document to the mortgagees as he was not practising at Chanda where the suit was to be filed. It was then sent to a petition writer named Balaji, who drafted the plaint. It was presented to the Court by a pleader named Deshmukh, who also filed the mortgagee deed.

5. The respondents alleged that Rs. 9300 had been raised by the sale of jewellery owned by Bajabai and of certain grain. The Additional District Judge disbelieved this story. He also disbelieved the evidence with regard to the agreement for settlement and the payment of Rs. 9300. He held that the plaintiffs were entitled to Rs. 13,445-2-9, including costs, and he passed a decree for this amount.

6. On appeal the High Court concurred in the finding of the Additional District Judge that the endorsement was on the deed of mortgage when it was filed in Court. The learned Judges did not believe the evidence that the mortgagees had agreed to accept Rs. 9500 in full settlement of their claim and considered that the evidence with regard to the payment of Rs. 9300 was weak, but they held that once the endorsement of payment on the mortgage deed was accepted as being genuine the defendants' case must in the main be accepted as being true. Therefore, treating the Rs. 9300 as a payment to account, they held that the plaintiffs were entitled to Rs. 3967-9-9 and they passed a decree for fore-closure in respect of this sum.

7. The plaintiffs have appealed, and ask for the restoration of the decree of the Subordinate Judge.

8. Their Lordships agree with the High Court that if the endorsement of the payment of Rs. 9300 was on the mortgage deed when it was filed in Court, the defendants' case must in the main be true. Both the Courts in India have held that the endorsement was made before the document was presented to the trial Court by the plaintiffs and there being here concurrent findings of fact, the appellants are not now in a position to challenge the validity of the endorsement

which is the determining factor in the case.

9. This disposes of the main question raised in the appeal, but as it has been contended by Mr. Dingle Foot that the learned Judges of the High Court misdirected themselves on the question of onus of proof, their Lordships will deal with the argument raised in this connection, Mr. Foot has suggested that the learned Judges misconceived the position when they said that the burden of explaining away the endorsement on the mortgage deed was on the plaintiffs. Inasmuch as all the relevant evidence had been given (so it was said) the case fell within the observations of Lord Dunedin in *Robins v. National Trust Co. Ltd.*, 1927 AC 515 at p. 620 : (96 LJ PC 84) and the Court should have regarded the question of onus of proof as (being of no importance.

10. All the relevant evidence had not been called by the plaintiffs. They did not call the messengers who had taken the deed to and from the petition writers engaged in the case and what is more they did not call the pleader who filed the document in Court. He was responsible for the case and it is reasonable to suppose that he would have carefully read the document on which the suit was based. On the other hand, the defendants led independent evidence in support of the factum of payment and the making of the endorsement. Their Lordships consider that in these circumstances there is no basis for the suggestion of misdirection.

11. The only other question is whether Govinda had authority to accept payments on behalf of the mortgagees. The deed had been kept in the custody of the eldest brother, Arjuna, and the fact that it was produced by Govinda when payment of Rs. 9300 was made, certainly points to the conclusion arrived at by the High Court that he had authority to act on behalf of his co-mortgagees. There was no suggestion of fraud on Govindas" part.

12. Their Lordships will humbly advise His Majesty that the appeal should be dismissed. As the respondents have not appeared there will be no order as to costs.