

(1926) 05 AHC CK 0005
In the Allahabad High Court

Musammat Daulat Bibi and Others

APPELLANT

Vs

B. Gajadhar Prasad Singh and Others

RESPONDENT

Date of Decision : 12-05-1926

Acts Referred:

Citation : (1926) 05 AHC CK 0005

Final Decision : Dismissed

Judgement

1. This appeal arises out of a suit which was brought for the redemption of four mortgages. The substantial defence to the suit was that the mortgagor was not entitled to redeem without at the same time paying the amount of five other bonds. Whether these bonds amounted to mortgages or not is a question which is in dispute between the parties. The trial Court held that none of the five bonds pleaded by the mortgagees was proved. The lower Appellate Court held that only one of them, the bond of 28th. October, 1898, was proved, but it rejected the mortgagees' claim to receive the amount of this bond on the ground that a suit on it would have been barred by limitation. The present appeal, relates to the bond of 28th October, 1898, above referred to and to another bond dated 29th October, 1898, but it is only the former with, which we are really concerned. The lower Appellate Court has rejected the bond of 29th October as not proved, and though it was suggested that this finding was based on a misreading of the evidence, it turns out on the evidence being read to us that this plea is erroneous and that the evidence has not been in any way misread or misinterpreted. The finding of fact regarding the bond of 29th October is fatal to the appeal so far as this bond is concerned.

2. With regard to the bond of 28th October, 1898, the first question to be considered is whether it is a simple bond or must be construed as a mortgage by way of additional charge. The learned Munsif ejected it on the ground that it was not proved in accordance with Section 68 of the Evidence Act, inasmuch as one of the attesting witnesses was alive and had not been called and it was not proved that he was incapable of giving evidence. A witness was called to depose

to this man being ill and incapable of moving, but the learned Munsif rejected his evidence as false and remarks in the course of his judgment that this very witness was actually present in Court in another case on the day preceding that on which the evidence was given. The learned Judge of the Court below has accepted this finding of the Munsif and has clearly stated in his judgment that if the bond were required bylaw to be attested he would agree with the Munsif that it had not been proved. He holds, however, that the bond does not amount to a mortgage, and, therefore, the provisions of Section 68 of the Evidence Act were inapplicable.

3. The bond was for a sum of Rs. 44 re-payable with interest at Rs. 2 per month. It was first of all stipulated that it should be re-paid on Magh Section 15, Fasli 1305. The date appears to be a mistake, for, according to the calendar, it corresponds to February 6th, 1898, about 8 months prior to the execution of the bond. If the bond was not re-paid on the stipulated date it was provided that the executant should not be entitled to re-pay it except along with the original usufructuary mortgage of the 11th, October, 1898, but the amount would be paid at the same time as that mortgage. It was then said that if the mortgagor made any objection to pay, the Mahajan would be able to recover the money from his person and property, and finally the document is said to have been executed by way of mashrutulrahn.

4. Except in so far as there was a covenant for re-payment on Magh Section 15, Fasli 1305, we find it impossible to distinguish that document from the one considered by a Full Bench of this Court in Har Prasad Vs. Ram Chandar and Others, There also there was no express stipulation hypothecating the property, but there was a reference to an earlier mortgage and a statement that the bond in suit would be paid off along with that mortgage and that without paying the additional sum due under the bond that mortgage could not be redeemed. Finally, as in the present case, the document was described as mashrutulrahn which term the Full Bench defines as meaning "a mortgage, or more correctly speaking, an additional mortgage."

5. We think that the intention of the document clearly was that if it was not paid off on Magh Section 15, 1305, it was to be charged on the property along with, and in addition to, the mortgage-money payable under the deed of 11th October, 1898, and to be consolidated with that mortgage. Reference has been made both by the Court below and in argument to the case of Kesar Kunwar v. Kashi Ram 30 Ind. Cas. 777 : 37 A. 634 : 13 A.L.J. 889. So far as that case is inconsistent with the Full Bench ruling in Har Prasad Vs. Ram Chandar and Others, it must be deemed to have been superseded by the Full Bench decision, We find, therefore, that the document in suit does amount to a mortgage by way of additional charge and that it is not legally proved in accordance with the requirements of Section 68 of the Evidence Act. On this ground we dismiss the appeal with costs including fees on the higher scale.