(1960) 02 OHC CK 0004

In the Orissa High Court

Case No : S.A. No. 92 of 1958

Pravas Chandra Pati — APPELLANT

Vs

Jagamohan Das and Another — RESPONDENT

Date of Decision : 05-02-1960

Acts Referred:

Evidence Act, 1872 — Section 68
Transfer of Property Act, 1882 — Section 3, 59

Citation : (1960) 26 CLT 359

Hon'ble Judges : Mohapatra, J

Bench : Single Bench

Advocate : N. Mukherji, for the Appellant; S.N. Dasgupta, for the Respondent

Final Decision : Dismissed

Judgement

Mohapatra, J.—This is a Defendant''s second appeal against the reversing judgment of the lower appellate court arising out of a suit for enforcement of a mortgage transaction which purports to have been executed on 17th June 1939 by the Defendant for himself and as guardian of his minor brothers. The minor brothers are dead. The Plaintiffs claim as heirs of the mortgagee. The plea taken by the Defendant was substantially a plea of payment and adjustment.

2. The trial Court dismissed the suit finding that the transaction had not been proved as a mortgage transaction as one of the attesting witnesses admitted to be alive had not been called as required under the provisions of Section 68 of the Indian evidence Act. The lower appellate Court, however, has reversed the finding and allowed a full decree in favour of the Plaintiffs.

3. Mr. Mukherji, appearing on behalf of the Defendant-Appellant, takes up the point that the case is fully covered by the provisions of Section 68 of the Indian Evidence Act and as one of the attesting witnesses alive has not been called, the document cannot be admissible as a mortgage transaction. Manifestly of course, the Plaintiffs'' personal remedy is barred. In my opinion, there is no substance in

the contention of Mr. Mukherji. Section 68 of the Evidence Act makes it mandatory to call one of the attesting witnesses atleast, provided the execution of the document is specifically denied. The lower appellate Court observes that there is no specific denial of the execution of the mortgage bond. On a perusal of the written statement, as a whole, and the statement on oath made by the Defendant in Court, it is dear that the Defendant far from specifically denying the execution had admitted the transaction and its due execution. This is clear from the substantial defence that was taken by the Defendant which is one of adjustment and payment. In such circumstances, it was not essential for the Plaintiffs to call for the attesting witness, but attestation could be proved otherwise.

4. I should avail of this opportunity to clarify the provisions of Section 68 of the Evidence Act and Section 59 of the Transfer of Property Act. Section 59 of the T.P. Act codifies that a mortgage deed in order that it may be enforced as such, must be attested by two witnesses. So when the Plaintiffs come forth to enforce the mortgage transaction, they are not to rest satisfied by proving execution only, but they have got to prove attestation and particularly attestation as defined u/s 3 of the T.P. Act. His attestation can be proved by any other method, provided the case is not hit by the provisions of Section 68 of the Evidence Act, in which case alone it is made compulsory and essential that the Plaintiffs are to call one of the attesting witnesses. I may note here that in this case, the Plaintiffs relied upon the evidence of P.W. 1 to prove attestation. On carefully going through the evidence of P.W. 1, it appears clear, his statement is sufficient to prove attestation as defined in Section 3 of the T.P. Act.

5. Mr. Mukherji has strongly relied upon a Bench decision of the Calcutta High Court reported in Rajani Kanta Barui and Others Vs. Bonbehari Sarkar, . In my opinion this decision does not help the Defendant in this case. In that appeal under Letters Patent, the only question left for consideration was whether or not the document alleged to be the mortgage bond (Ext. 1) had been duly proved to be a mortgage. The Defendant in his written statement had admitted his signature on the said bond, but it was contended that it was not duly attested. It was contended on behalf of the Plaintiff in that case that the mortgagor having admitted the document as a mortgage, proof of attestation was unnecessary. As I have already explained the provisions of the two relevant sections, proof of attestation is essential in order to enforce the transaction as a mortgage transaction. But attestation can be proved by any other method without taking recourse to the provisions of Section 68 of the Evidence Act which comes into operation only when the execution is specifically denied. In that case their Lordships held:

It cannot be contended that the mortgagor having admitted the document as having been executed by him proof of attestation became unnecessary. This decision is in no way inconsistent with my observations in explaining the two relevant sections.

6. In conclusion, therefore, the appeal fails and is dismissed with full costs.

