

(1915) 07 AHC CK 0026
In the Allahabad High Court

Raj Mangal Misir and Others	Vs	APPELLANT
Mathura Dubain and Another		RESPONDENT

Date of Decision : 01-07-1915

Acts Referred:

Evidence Act, 1872 — Section 33, 70
Registration Act, 1908 — Section 60(2)

Citation : (1916) ILR (All) 1

Hon'ble Judges : Henry Richards, C.J.;Piggott, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Henry Richards, C.J. and Piggott, J.—This appeal arises out of a suit on foot of a mortgage, dated the 3rd of February, 1888. The original amount secured was Rs. 251. The amount claimed for principal and interest is Rs. 1,384. There is no allegation of any payment upon foot of principal or interest from the time of the execution of the deed, and the suit was not instituted until the 10th of August, 1909, that is to say, in or about twenty-one years after the alleged execution of the mortgage. Defendant No. 1 is the widow of the alleged original mortgagor, one Bandhu Dube. Defendant No. 2 is alleged to be a subsequent transferee at an auction sale held on foot of another mortgage alleged to be puisne to the mortgage in suit. An ex parte decree was obtained on the 30th of November, 1909. This ex parte decree was set aside on the 21st of January, 1913, on the application of Musammatt Mathura, the defendant No. 1, who satisfied the court that she had not been served with the process. When the court was granting the decree ex parte, a witness of the name of Baldeo was produced, who stated that he was the sole surviving attesting witness to the mortgage and that he had seen the bond executed by Bandhu. He identified the signature of Bandhu and his own. The ex parte decree having been set aside, as already stated, the plaintiff was called upon to prove his case as in a contested suit. Meanwhile Baldeo had died. A witness was produced, who attempted to prove that the signature of Baldeo was in the hand-writing of the latter. He was unable to say

that he had ever seen Baldeo write or that he had ever received documents purporting to have been written by Baldeo in answer to documents written by him or that documents written by Baldeo had in the ordinary course of business been habitually submitted to him. In other words, he was unable to say that he was "acquainted" with the hand-writing of Baldeo. Under these circumstances the court of first instance held that the plaintiff's had failed to prove the mortgage sued upon and dismissed the suit. The lower appellate court confirmed the decree of the court of first instance.

2. In second appeal to this Court it has been contended that the evidence of Baldeo given at the time the ex parte decree was granted should have been admitted as evidence of the due execution of the document. Section 33 of the Evidence Act provides, amongst other things, that the evidence given by a witness in a judicial proceeding is relevant for the purpose of proving in a subsequent judicial proceeding, or at a later stage of the same judicial proceeding the truth of the facts which it states when the witness is dead. It is under this section that the appellants contend that the evidence of Baldeo should have been admitted by the courts below here is, however, a proviso to the section that before the evidence of a deceased witness can be admitted, it must be shown that the adverse party in the first proceedings had the opportunity of cross-examination. So far as Musammat Mathura is concerned it is clear that she had no such opportunity, it having been found by the court that she was never served with the process prior to the granting of the ex parte decree. It is contended that as defendant No. 2 did not apply to have the ex parte decree set aside, it must be taken that he had an opportunity of cross-examining the witness. The affidavit of the process-server made in the absence of defendant No. 2, when the suit was first instituted, is relied on. In our opinion this is not sufficient. If it was intended to use the statement of Baldeo as evidence against defendant No. 2, it would at least have been necessary to prove, by the oral evidence of the witness who had served him with the process, the fact of service. It was not sufficient to refer to the ordinary affidavit of service made by the process-server. It is unnecessary to decide whether if the process-server had been produced, his evidence would have been sufficient to entitle the plaintiffs to put in the evidence of Baldeo, but it seems to us clear that without the evidence of the process server the evidence of Baldeo was not admissible against either of the defendants, There was no evidence of the execution or due attestation of the document sued upon.

3. It was next contended that the certificate of the Registrar endorsed upon the bond proves an admission by Bandhu that he executed the document, and reliance is placed upon Section 70 of the Evidence Act. This section provides that the admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested. It seems to us that the admission" referred to in this section is an admission in the course of the very proceedings, for example, made in the pleadings or by a party himself in his examination. The contention is

that the certificate contains an admission by Bandhu and that under the provisions of Section 60, Clause (2), of the Indian Registration Act, 1908, the certificate of the Registrar is sufficient proof that Bandhu made the admission. In our opinion this contention goes much too far. The certificate endorsed by the registering officer upon a document which requires registration is evidence that all the provisions of the Registration Act have been duly performed.

4. It may be said that the plaintiffs have been somewhat unfortunate. They have themselves to blame in the first place because they waited so long before instituting their present suit. But for the period of grace allowed by the recent Limitation Act the suit would have been barred by time. If the finding of the court below was correct that the defendants or at least one of them was not duly served this also was the fault of the plaintiffs.

5. The appeal fails and is dismissed with costs.