

(1965) 01 PAT CK 0010

In the Patna High Court

Case No : Letters Patent Appeal No. 129 of 1959

Ram Narayan Pandey and Others

APPELLANT

Vs

Kedar Nath Tewari and Others

RESPONDENT

Date of Decision : 30-01-1965

Acts Referred:

Evidence Act, 1872 — Section 91, 92

Citation : AIR 1965 Patna 463

Hon'ble Judges : R.L. Narasimham, C.J;G.N. Prasad, J

Bench : Division Bench

Advocate : D.N. Verma, Kedar Nath Verma and M.N. Verma, for the Appellant;
Lal Narain Sinha and L.M. Sharma, for the Respondent

Final Decision : Dismissed

Judgement

G.N. Prasad, J.—This is an appeal by the defendants first party against the decision of a learned Single Judge of this Court modifying the decree passed by the trial court in a suit instituted by the plaintiffs (respondents 1 to 3) on foot of a mortgage bond for Rs. 4,000/-executed by defendant No. 1 in their favour on the 21st June 1948, with stipulation to pay interest at the rate of 70 maunds of paddy by kutcha weight per year. After giving credit for the value of paddy paid by the defendants in satisfaction of the interest for the first year, the plaintiffs laid their claim at Rs. 5,803/-

2. Among the plaintiffs, only Kedar Nath Tewary (Plaintiff No. 2) held a registration certificate (Ext. 6) dated the 4th March 1947 under the Bihar Money Lenders Act, 1938, entitling him to carry on money-lending business up to a limit of Rs. 5,000"-, and it was alleged in paragraph 6 of the plaint that the amount claimed in the suit belonged exclusively to plaintiff No. 2, but the names of the other, two plaintiffs were

"also advisedly entered in the mortgage bond in the category of creditors. Hence in order to avoid objection plaintiffs Nos. 1 and 8 also become plaintiffs".

3. Various pleas in defence were put forward in their written statement by the contesting defendants 1 and 2; but it is necessary to mention only one of them, namely, that Section 4 of the Bihar Money Lenders (Regulation of Transactions) Act, 1939, is a bar to the maintainability of the suit, inasmuch as all the three plaintiffs have equal rights in the mortgage bond which is the basis of the suit, and that the plaintiffs have wrongly alleged in paragraph 6 of the plaint that the loan was advanced by plaintiff No. 2 only

4. The trial court gave effect to this plea and passed a decree in favour of plaintiff No. 2, holding that he alone was entitled to maintain the suit and to a decree for one-third of the amount due under the bond in suit.

5. In appeal by the plaintiff's. The learned Single Judge referred to the case of the plaintiffs set out in paragraph 6 of the plaint, which was supported in their evidence by plaintiff No. 2 (P. W. 2) as well as by plaintiff No. 3 (P. W. 5). and observing that there was no rebutting evidence on the side of the defendants, the learned Judge came to the conclusion that the case of the plaintiffs must be accepted that the money belonged to plaintiff No. 2 alone and that plaintiffs 1 and 3 were mere name lenders. And since plaintiff No. 2 held the registration certificate Ext. 6 he was entitled to a decree for the amount outstanding which the learned Judge found to be Rs. 5,687/- up to the date of the institution of the suit. The decree passed by the trial court having been modified as aforesaid, the defendants first party have preferred this appeal under Clause 10 of the Letters Patent.

6. The short point raised by Mr. D. N. Verma appearing in support of the appeal is that the learned Single Judge was in error in relying upon oral evidence in support of the plaintiffs' case set out in paragraph 6 of the plaint because all such evidence was inadmissible in view of Section 92 of the Evidence Act which, so far as it is relevant, provides:

"When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms".

In this context the learned counsel drew our attention to the bond in suit which is on the record as Ext. 4 and pointed out that all the three plaintiffs were described therein as the Mahajans or money-lenders in whose favour the mortgage was created. The argument is that in face of this recital in the document (Ext. 4), no evidence can be admissible to the effect that only plaintiff No. 2 was the mortgagee and that the other two plaintiffs were not interested in the transaction because that would amount to varying or subtracting from the terms of the written contract embodied in the document.

7. In my opinion, the language of section 92 lends no support to the argument of

the learned counsel. Both Section 92 and section 91 that precedes it, speak of the "terms" of a contract, and what they say is that if the terms have been incorporated in the form of a document, then in all cases like the present where the law requires the contract to be reduced to writing, the terms of the contract must be proved by the document itself or by secondary evidence thereof in appropriate cases, and that no oral evidence shall be admitted for the purpose of contradicting, varying, adding to, or subtracting from the terms of the contract. But the question as to who are the parties to the contract is not a term of the contract. The contracting parties are the authors of the terms of the contract and not the terms of the contract themselves. Section 92 itself recognises the distinction between the "terms" of a contract and the contracting parties when it speaks of "the terms of any such contractetc" in its opening sentence and of its "terms" towards the close, and also makes pointed reference to "the parties to the instrument" while providing for exclusion of oral evidence for the purpose of contradicting, varying etc. from the "terms" of the contract.

8. That the terms of the contract are something distinct from the parties thereto is apparent also from the Indian Contract Act, section 2 of which speaks of proposal and promise and then provides in Clause (c) that the person making the proposal is called the promisor, and the person accepting the proposal is called the promisee, and Clause (e) clarifies the matter further by providing that every promise and every set of promises, for using the consideration for each other, is an agreement. The same conclusion follows from Section 58 of the Transfer of Property Act which contains separate definitions of mortgage, mortgagor, mortgagee, mortgage-money and mortgage deed. In other words, the mortgagor and the mortgagee are parties to the contract of mortgage, the terms of which are set out in the mortgage deed, but they are not the terms thereof. I am, therefore, clearly of the opinion that the reference to the terms of the contract in Sections 91 and 92 of the Evidence Act does not extend to the parties to the contract and that what is excluded by Section 92 is oral evidence designed to contradict, vary, add to or subtract from the terms agreed upon by the parties, and not as to who are the real contracting parties.

9. The view which I take is supported by a Bench decision of the Madras High Court reported in Venkatasubbiah Chetty v. Govinda-rajulu Naidu ILR 31 Mad 45. There, the bond which was the basis of the suit, was signed by only one of the partners of a firm who set up the defence that the money was borrowed for the partnership business and sought to lead evidence for the purpose of proving that he had signed the bond not only on his own behalf but also as the agent of his partner, but the trial Court stopped the defendant from adducing any such evidence holding that the terms of the bond cannot be altered by oral evidence of what occurred prior to the execution of the bond. On appeal, the Division Bench did not accept this proposition and after referring to certain English decisions made the following observation at p. 47:

"In our opinion there is nothing in Section 91 or Section 92 of the Indian

Evidence Act which is inconsistent with these decisions, since a question as to who the contracting Parties are is not in our opinion one of the "terms of a contract" within the meaning of these sections. We may further remark that none of the illustrations to the sections deal with this question. It would seem therefore it was not the intention of the Legislature to depart from what would appear to be the settled rule under the English law"

Reference was made to the following passage in Roseoe's "Nisi Prius Evidence":

"In an action on a written contract between plaintiff and B, oral evidence is admissible, on behalf of the plaintiff, to show that the contract was in fact, though not in form, made by B, as agent of the defendant; for the evidence tends not to discharge B, but to charge the dormant principal: Willson v. Hart (1817) 7 Tau 295, and it is admissible although B named his principal at the time he entered into the contract (Calder v. Dobell (1871) 6 CP 486)

10. On behalf of the respondents "Mr. Lalnarain Sinha relied upon section 82 of the Indian Trusts Act. 1882 and urged that if the contention of Mr. D. N. Verma were to prevail, then that would have the effect of nullifying the principle of the law relating to resulting trusts, which are well-established in Indian law as pointed out in various decisions of the Privy Council, such as AIR 1922 56 (Privy Council) , and AIR 1928 172 (Privy Council) . In both those derisions, their Lordships of the Judicial Committee referred to the ""widespread and persistent practice" prevalent in our country

"for owners of property to make grants and transfers of it benami for no obvious reason of apparent purpose, without the slightest intention of vesting in the donee any beneficial interest in the property granted or transferred, as well as the usages which these natives have adopted and which have been protected by statute"" ,

and pointed out that

"no exception has ever been engrafted on the general law of India negating the presumption of the resulting trust in favour or the person, providing the purchase-money, such as has. by the Courts of Chancery in the exercise of their equitable jurisdiction, been engrafted on the corresponding law in England in those cases, where a husband or father pays the money and the purchase is taken in the name of a wife or child. In such a case there is under the general law in India, no presumption of an intended advancement as there is in England".

In my opinion, there is considerable-force in the contention of Mr. Sinha.

11. Mr. D. N. Verma has. however, relied upon linn Sadasuk Janki Das v. Sir Kishen Pershad. AIR 1918 PC 146, Mst. Sahdeya Kuar and Others Vs. Rash Behari Singh, , and Meghraj Tibrawala v. Panchu Sahu, AIR 1952 Pal 39. in support of his contention that oral evidence is inadmissible for the purpose of proving that a person appearing in a document as the lender of a loan is not the real lender but only a name-lender. But the cases relied upon by Mr. Verma are

all of negotiable instruments which stand on a clearly different footing, having regard to Section 8 of the Negotiable Instruments Act, 1881, which defines the "holder of a promissory note, bill of exchange or cheque" to mean "any person entitled in his own name to the possession thereof and to receive or recover the amount, due thereon from the parties thereto". The scheme of the Negotiable Instruments Act is that it is only the holder or the holder in due course who is competent to give a valid discharge for the money for which the promissory note, bill of exchange or cheque has been executed or drawn up. and it is on account of the special characteristic of negotiability attaching to a negotiable instrument that no oral evidence is admissible for the purpose of proving that the creditor is somebody other than the holder or the holder in due course. That is why, it was pointed out by Lord Buckmaster in the case of *Firm Sadasuk Janki Das*, AIR 1918 PC 146. that:

"It is of the utmost importance that the name of a person or firm to be charged upon a negotiable document should be clearly stated on the face or on the back of the document, so that the responsibility is made plain and can be instantly recognised as the document passes from hand to hand".

In all the three cases relied upon by Mr. Verma, the question of the applicability of Section 92 of the Evidence Act did not arise for consideration and, therefore, they are of no assistance to us for the purpose of determining the scope of that section. Merely on the ground that the question of benami is foreign to a negotiable instrument, it cannot be held that such a question cannot be raised in a case of mortgage like the present one,

12. Mr. Verma then relied upon *Ebrahimbhoy Pabaney Mills Co. Ltd. Vs. Hassan Mamooji*, which is the decision of a learned Single Judge of the Bombay High Court. The importance of this decision lies in the fact that the decision in *Venkatasubbiah Chhetty's* case. ILR 31 Mad 45 was referred to therein, and as to the passage which I have extracted above therefrom, it was observed that:

""Perhaps this statement of law is rather too wide".

At the same time it was recognised that

"the identity of the contracting parties is not a term of the contract when given as evidence to establish a benefit or to enforce a liability not inconsistent with the contract".

It is true that it was further observed by the learned Single Judge of the Bombay High Court that:

"But such evidence is not admissible for the purpose of exonerating a contracting party from liability, for that would be substituting a different agreement from that induced by the writing", and in this context reference was made to the decision of the Privy Council in, 46 Ind. App. 33: (AIR 1918 PC 146): but 46 Ind. App. 33: (AIR 1918 PC 146), was again a case of negotiable instrument and that indicates that the case which the learned Single Judge of the Bombay High Court

was dealing with was also such a case. The Bombay decision is. therefore, of net assistance to us.

13. Finally. Mr. Verma relied upon the decision of the Rangoon High Court reported in *Ma Aye Tin v. Daw Thant*, AIR 1941 Rang. 99. There, the dispute was in respect of certain property which had been purchased in the joint names of the plaintiff's deceased husband and the defendant who was his adoptive mother. In support of her claim, the plaintiff relied upon the ordinary presumption of law, according to which the property belonged to both the owners in equal shares. But the defendant sought to lead evidence for the purpose of proving that she alone had paid the whole consideration for the purchase and the name of the plaintiff's husband was mentioned in the documents so that he should be able to present them for registration. Upon these facts, it was held that evidence of the latter category was inadmissible u/s 92 of the Evidence Act.

But this decision was given without analysing different portions of the section to which I have made pointed reference above. Besides, as a broad proposition, the Rangoon decision seems to me to militate against the well-established principle of resulting trust. The decision also appears to me to be obiter since it has further been pointed out therein that even if the evidence called by the defendant were to be accepted, it was too vague to rebut the presumption of the property being the joint property of the defendant and her adopted son, and further the defendant was the guardian appointed by the Court of the plaintiff's husband who happened to be a minor at the time, when the properties in dispute were acquired. I am, therefore, unable to apply the Rangoon decision to the facts of the present case, I am clearly of the opinion that there is no substance in the contention raised by Mr. D. N. Verma that the evidence relied upon by the learned Single Judge for the purpose of accepting the plaintiff's case as set out in paragraph 6 of the plaint is inadmissible or that the decision of the learned Single Judge is vitiated on that account.

14. Mr. Verma then contended that the oral evidence given by P. Ws. 2 and 5 should not have been preferred to the recitals in the bond in suit describing all the three plaintiffs as the money-lenders in relation to the loan. But as has been rightly pointed out by the learned Single Judge, the evidence of P. Ws. 3 and 5 relied upon by him was one sided since no evidence to the contrary was led on behalf of the defendants. They merely relied upon the recitals in Ext. 4, but recitals of this kind are not binding as admissions, as pointed out by this Court in *Jabit Singh v. Sheopujan Singh*. 1956 BLJR 254. Nor it can be suggested that recitals as to profession or residence of a party to contract is a term of the contract to which the provision of Section 92 of the Evidence Act can be extended.

15. The learned Single Judge has found upon the evidence that the entire money was advanced to defendant No. 1. who was the Karta of his joint family, by plaintiff No. 2 alone and since the claim of plaintiff No. 2 was not affected by the provisions of Section 4 of the Bihar Money Lenders (Regulation of Transactions)

Act, 1939. he was entitled to a decree for the full amount of the outstanding loan. In my opinion, the decision of the learned Single Judge is correct I and there is no merit in this appeal. The appeal is accordingly dismissed with costs payable to the plaintiff respondent No.

Narasimham, C.J.

16. I agree.