

(1919) 04 AHC CK 0016
In the Allahabad High Court

Ramanand Upadhia and Others

APPELLANT

Vs

Dwarka Singh and Bachchu Singh and Others

RESPONDENT

Date of Decision : 15-04-1919

Acts Referred:

Evidence Act, 1872 — Section 114, 90

Citation : (1919) ILR (All) 592

Hon'ble Judges : Walsh, J; Muhammad Rafiq, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Muhammad Rafiq, J.—The two appeals Nos. 419 and 420 are connected and arise out of a suit brought by the plaintiffs respondents for redemption of a mortgage. They stated in their plaint that the mortgage was executed by one Musammat Phulbasi on the 3rd of June, 1876, in favour of Bhairon Singh, the predecessor in interest of the defendants. The mortgage was in lieu of Rs. 300 and was with possession. Musammat Phulbasi died leaving her surviving a son called Ram Sundar. He executed a sale deed in respect of the mortgaged property in favour of the plaintiffs. The latter served a notice on the defendants asking for redemption on the 27th of April, 1915, alleging that the mortgage had been satisfied by the appropriation of the timber on the property. The defendant declined to make over possession of the mortgaged property, and on the 18th of June, 1915, the suit out of which the two appeals have arisen was instituted by them for redemption. In addition to the recovery of the property without payment, the plaintiffs asked for Rs. 215 damages for mesne profits. The defendants resisted the claim on various pleas. They denied the mortgage of the 3rd of June, 1876, as also the allegation that Ram Sundar was the son of Musammat Phulbasi. They stated that the property in suit was their own and in any case they had been in adverse possession for more than 12 years. The original mortgage-deed was not produced in the case. The plaintiffs filed a certified copy of the deed, which was admitted by the court. The court held that as the original mortgage-deed must have been made over to Bhairon Singh, the

mortgagee, and must have come, after his death, in the possession of the defendants, they should have produced it, and as they had failed to produce the original document, the plaintiffs were entitled to give secondary evidence by producing a certified copy of the original deed. The court further held that the presumption u/s 90 of the Evidence Act could be raised in respect of a certified copy filed on behalf of the plaintiffs. The revenue entries from 1864 up to the present day were also filed in the case which show that the owner of the property was the husband of Musammat Phulbasi and after his death her name was entered as owner and subsequently as mortgagor, After her death the name of her son, Ram Sundar, was substituted and he was shown as the mortgagor. The names of Bhairon Singh and the defendants were shown in the revenue papers ever since 1876 as those of mortgagees. Taking the said entries into consideration and the presumption u/s 90 of the Evidence Act the learned Munsif held the mortgage of 1876 proved. The other pleas in defence were also disallowed. The allegation of the plaintiffs with regard to the satisfaction of the mortgage was disbelieved. A decree was passed in favour of the plaintiffs respondents for redemption of the property on the payment of Rs. 300. Under the said decree the plaintiffs were to bear their own costs as also the costs of the defendants. Both parties appealed to the lower court, the plaintiffs with regard to costs and the defendants with regard to the decree for redemption.

2. The lower appellate court dismissed the appeal of the defendants, maintaining the decree for redemption, and accepted the appeal of the plaintiffs partially, making each party to bear his own costs. The defendants preferred two appeals to this Court, namely Nos. 419 and 420. The two appeals came up before me on the 20th of January, 1919, when three objections were urged on behalf of the appellants against the decree of the lower court, namely, first that the mortgage of 1876 is not proved, secondly that the defendants have proved their adverse possession for more than 12 years prior to the institution of the suit, and thirdly that no tender having been made by the plaintiffs, their claim is not maintainable. In my judgment of the 20th of January, 1919, I have given reasons for the rejection of the 2nd, and 3rd objections. The first objection relating to the proof of the mortgage of 1876, raised a point of law about which I found a conflict of authority in this Court and therefore I referred the case to a larger Bench. The only point now before us is whether the mortgage which the plaintiffs seek to redeem has been proved according to law. The contention for the defendants appellants is that the plaintiffs have only filed a certified copy of the mortgage of the 3rd of June, 1876, and no presumption u/s 90 can be raised in respect of it. The language of the section clearly shows that the section applies only to the case of an original document and not to a certified copy. On the other hand, the argument for the plaintiffs respondents is that the use by the Legislature of the words, "when any document is produced," does not limit the operation of the section to cases in which the document is actually produced in court. Secondary evidence of an ancient document is, therefore, admissible without proof of the execution of the original when a case is made out u/s 65 of

the Evidence Act. In support of his argument the learned Counsel for the respondents relies upon the following cases: Khetter Chunder Mookerjee v. Khetter Paul Sreeterutno I.L.R.(1880) Cal. 886, Ishri Prasad Singh v. Lalli Jas Kunwar I.L.R.(1900) All 294, and Ponnambalath Paraparavan v. Karoth Sankaran Nair (1907) 12 Ind Cas 453.

3. The reply for the appellants is that those cases were wrongly decided and that the provisions of Section 90 were not carefully considered, Reliance is placed by the appellants on a passage in the judgment of a Bench of this Court in first appeal No. 13 of 1913, decided on the 6th of July, 1914. The passage in question is as follows: "Section 90 of the Evidence Act only applies when the document is produced and the presumptions therein mentioned are presumptions in favour of a document which is actually produced. Even then the court is not bound to presume, although it is entitled to do so if it thinks fit. There is no presumption in favour of a document, the copy of which is produced in evidence." On a reference to the facts of that case it appears that no question of presumption u/s 90 arose, inasmuch as the loss of the original mortgage-deed had been satisfactorily proved. The observations about the application of Section 90 to a certified copy were merely an expression of opinion which need not have been made as far as the decision of that case was concerned. The cases relied upon by the plaintiffs respondents were not brought to the notice of the learned Judges who decided it. I agree with Mr. Justice Wilson, in his observations in the case of Khetter Chunder Mookerjee v. Khetter Paul Sreeterutno I.L.R.(1880) Cal. 886. The language of Section 90 does not limit or confine the application of the section to cases where the original document is actually produced in court. This Court also took the same view in the case of Ishri Prasad Singh v. Lalli Jas Kunwar I.L.R. (1900) All 294, on the construction of the section contended for by the appellants. It would open a door to fraud by enabling a mortgagee to withhold the mortgage deed and thus defeat the claim for redemption. I think that the lower courts were right in applying Section 90 to the certified copy of the mortgage of 1876 filed by the plaintiffs. There is one more point to be considered in connection with the objection of the appellants. The learned Counsel has contended that no notice for the production of the original was served upon his clients, and omission to give such a notice is fatal to the case of the plaintiffs, and that they were not entitled to give secondary evidence unless and until they had served a notice upon the defendants to produce the original. I do not think that there is any force in this contention. According to Section 66 of the Evidence Act, secondary evidence of the contents of the documents referred to in Section 65, Clause (a), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, (or to his attorney or pleader), such notice to produce it as is prescribed by law, except in the six cases mentioned in the section. One of the exceptions is: "when, from the nature of the case, the adverse party must know that he will be required to produce it." In the present case the defendants must have known that the mortgage deed in their possession would be required

in evidence in the case. They failed to produce it. The plaintiffs were, therefore, entitled to give secondary evidence of the deed without giving any notice to the defendants or their pleader, calling upon them to produce the original. I would, therefore, hold that there is no force in the appeal and that the appeal should fail.

Walsh, J.

4. On the question of law referred to this Court by my brother I agree that the presumption permitted by Section 90 of the due execution and attestation of a document which is shown to be 30 years old may be made by the court where that document cannot be produced but a certified copy of it is forthcoming.

5. In this case the defendant, the suit being one for redemption, was an adverse party who must have known that he would be required to produce the original of the mortgage. Notice to produce the document, therefore, was excused by Section 66(a). The loss of the original or its wilful non-production by the defendant, it matters not which, therefore, made a certified copy admissible u/s 65. That certified copy was admissible to prove the original, in other words, to prove what the original, if produced, would have proved. I feel bound to say that the language of the section seems to me to permit by its express terms the presumption which has been applied in this case only to an original which is produced, and I find myself unable to accept the explanation which is given of the word "produce" as not meaning production in court, because in my opinion the section is only dealing with the function of a court and no other sort of production in a section of the Evidence Act could be contemplated, and the argument for the appellant in this case is that the document is not produced. I prefer, while agreeing entirely with the result, to base my opinion upon a well-known rule of equity by which the courts have always acted by analogy to a statute which is not expressly applicable. We have to apply the rule of equity and good conscience where an express provision does not happen to have been made and by analogy in the case of the production of a certified copy, as the document would have proved itself if produced, so I think it proves itself by the proper proof and production of secondary evidence which the law allows to be substituted for the original in certain conditions. If this is not in itself sufficient, I think it is one of those cases which was probably contemplated by the general power of presumption given by Section 114 of the Evidence Act. By that section the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, Section 90 is really only one illustration of that general presumption. The law says, and rightly says, owing to the long period of time which has expired, that when a document 30 years old is produced it is to be presumed that it was properly executed and attested. That is nothing more than having regard to the common course of natural events, human conduct and public and private business. The probability is that it was. It may of course be expressly proved by the other side that it was not, but the party relying upon the document is not to be punished by its inability to prove

the affirmative. It seems to me that in applying the analogy of Section 90, which expressly provides for the production of the original, to the production of a properly established certified copy, the court is merely exercising powers given to it u/s 114. In any case I think there is clear authority on the subject which ought to be followed in this Court. The point was decided by a single Judge in 1880 in the case of Khetter Chunder Mookerjee v. Khetter Paul Sreeterutno I.L.R.(1880) Cal. 886. That decision was followed by a two Judge decision of this Court in 1900, reported in the case of Ishri Prasad Singh v. Lalli Jas Kunwar I.L.R.(1900) All. 894, which we ought to follow. A two-Judge Madras Bench took the same view in 1907 in the case of Ponnambalath Parapravan v. Karoth Sankaran Nair (1907) 12 Ind Cas 453. The only suggestion of an authority to the contrary are some obiter dicta by the first court in 1914. A perusal of the record of that case shows clearly that these dicta, which occur at the end of the judgment, were unnecessary for the decision. As my brother has pointed out, the case was disposed of at an earlier stage by a decision that the loss of the document was not established. The case has not been reported. The judgment shows clearly that the authorities to which we have referred were not mentioned or considered by the Court. I think it very unlikely if the Court's attention had been drawn to these authorities, that they would have expressed the opinion which they did, at any rate, without considerable argument. It is a point, as has been said, not free from difficulty and one which could not be disposed of by a few cursory observations. I think the dictum relied upon is not an authority at all.

6. The order of the Court is that the appeal is dismissed with costs.