

(1927) 11 AHC CK 0034
In the Allahabad High Court

Salaik Chand and Others

APPELLANT

Vs

Mt. Tamiz Bano and Others

RESPONDENT

Date of Decision : 01-11-1927

Acts Referred:

Evidence Act, 1872 — Section 67

Citation : AIR 1928 All 303

Hon'ble Judges : Sulaiman, J; Ashworth, J

Bench : Full Bench

Final Decision : Dismissed

Judgement

Sulaiman, J.—This is a plaintiffs' appeal arising out of a suit for sale on the basis of a mortgage-deed alleged to have been executed by Abdul Quyum, the predecessor of the defendants, on the 24th September 1913, and registered. The particulars of the mortgage were given in full in the plaint. The written statement of Mt. Tamiz Bano, one of the defendants, first of all merely stated that the allegations in the various paragraphs of the plaint with certain exceptions "were not admitted." It then went on to say in para. 9 that the execution, completion and the consideration of the document sued upon was not admitted by the contesting defendant. I may note here that the translation of this paragraph as printed is not accurate. The defendant meant not to admit either the execution, completion or the consideration. The Court below framed the first issue as follows:

Is the hypothecation bond genuine and for consideration?

2. The parties led evidence on the question of execution as well as consideration, and the plaintiff produced an attesting witness Sheo Prasad and himself went into the witness-box in trying to prove due execution. The Court below found this issue against the plaintiffs and held that the requirements of the law as laid down in Section 67, Evidence Act, were not complied with and "execution for consideration" was not proved. Hence this appeal. In my opinion, the contention

urged before us, which does not find place in the memorandum of appeal, that the execution of the bond had not been specifically denied, cannot be accepted particularly in view of the fact that the parties understood in the Court below that the execution of the bond was in dispute and issue was framed and evidence was led on it. The defendant Tamiz Bano did specifically say that she did not admit it. Even if there was some ambiguity, it was open to the Court under the proviso to Order 8. Rule 5, Civil P.C., to call upon the plaintiffs to prove it.

3. The main point for consideration is whether the Court below was right in finding that the execution of the document in dispute had not been fully proved.

4. As regards the evidence of the plaintiff, Salaik Chand, the Court below was pointed out that on his own showing he was a boy of fourteen years of age when the document was executed and that in his evidence he purported to recognize the thumb-impression of the witness, Sheo Prasad, which showed that he was not a reliable witness. The Court below was not impressed by his evidence and did not think that his statement that he could identify the signature of Abdul Qayum could be accepted.

5. We must accept the estimate of the evidence of this witness as made by the Court below. The second witness was Sheo Prasad, who admittedly is an illiterate person and is unable to read the document or identify the signature of Abdul Qayum. His statement, however, was that Abdul Qayum had executed a bond for Rs. 3,000 in favour of Ram Chandra Suhai 11 years ago and that the bond was attested by him and he had made his thumb-impression on it. The contents of the bond were read over to him and he stated that they were similar to the contents of the bond which had been executed by Abdul Qayum, though he had to admit that he did not remember the wording of it. He purported to identify his own thumb-impression on the document. The Court below was not satisfied that Sheo Prasad, who was an illiterate person, could identify the thumb impression appearing on this document as that of his own. Being illiterate he can not specifically prove the signature purporting to be that of Abdul Qayum. No doubt the document was registered and there may be ground for supposing that it was not a forged document, but it had to be proved u/s 67, Evidence Act, that the document alleged to have been signed by Abdul Qayum was in his handwriting. It is the fault of the plaintiffs themselves that they brought this suit long after the other attesting witnesses and the scribe were dead. This may be a misfortune for them, but we have to see whether they have complied with the requirements of the law. Under the circumstances, it must be held that there is not sufficient legal evidence on this record to establish that the signature which purports to be that of Abdul Qayum is that of Abdul Qayum himself. I would, therefore, uphold the decree of the Court below and dismiss the appeal.

Ashworth, J.

6. I concur in the dismissal of the appeal. There is, in my opinion, no force in the plea which Mr. Agarwala took up in argument, although not contained in the

memorandum of appeal that the lower Court improperly framed an issue as to execution of the mortgage-deed. That contention appears to me to be based on a mistranslation of para. 9 of the written statement as it appears in the record of proceedings. That paragraph denied three things: execution, completion and consideration for the deed. The translation suggests that it was merely consideration which was denied. Order 8, Rule 5, Civil. P.C., must be interpreted to mean that a defendant may either deny or not admit an allegation of the plaint, but if he wishes to do this, he must state that he denies or does not admit each separate allegation and must state the allegation. He cannot make a general denial or refuse generally to admit several allegations. The rule cannot be interpreted to mean that a refusal to admit a specific allegation can be taken to be an admission of that allegation. It was argued by the appellants' counsel in this case that it was open to the Court below and is open to this Court to come to a conclusion that the document in question was duly executed by holding that execution was proved in the sense that the word proved is defined in Section 3, Evidence Act. In other words, it was contended, that we might hold this document to have been executed because we considered that execution was so probable that a prudent man ought, Under the circumstances of the particular case, to act upon the supposition that there had been execution.

7. I concur with my learned brother that the execution of a document cannot be deemed proved as required by the Evidence Act merely because it is proved in the sense of the definition of "proved." That definition of the word proved must be read along with Section 67 of the Act. That section requires that there must be specific evidence that the signature purporting to be that of the executant is in the handwriting of the executant. Until this is proved, the Court cannot proceed to consider whether execution is proved. In other words, S 67 makes proof of execution of a document something more difficult than proof of matter other than the execution of a document. In this case it was unfortunate for the plaintiffs that both their witnesses who were produced to prove the signature of the executant were under a disability. One of them was illiterate and could only make his thumb-impression. The lower Court was right in believing that, this man could not recognize a signature alleged to have been made in his presence 11 years before. As to the plaintiff, he stated that he was only 12 years old when he saw Abdul Qayum sign the document He had never seen his signature before. He does not say that he had ever seen it since. He pretended (obviously wrongly) that he could identify the thumb-impression. These facts being taken into consideration, the lower Court was quite justified in distrusting his evidence. It may be that proof of the signature of Abdul Qayum by the plaintiff was a matter of great difficulty, but the plaintiff or his predecessor-in-interest, namely, his father, cannot be said to be free from responsibility for that difficulty. They should have sued on the bond sooner. It is commonsense for a person holding a bond not to wait for bringing a suit on the bond until the evidence of the signature of the person liable under it has become difficult. Every one must be presumed to know the law and consequently the plaintiff or his father should

have been aware of the provision of Section 67 which requires strict proof of signature.

8. For the above reasons, I concur in the dismissal of this appeal.