

(1913) 02 CAL CK 0008

In the Calcutta High Court

Case No : Appeal from Original Decree No. 561 of 1908

Sheo Narain Ray and others

APPELLANT

Vs

Mukshoda Das Mittra and others

RESPONDENT

Date of Decision : 14-02-1913

Acts Referred:

Citation : (1913) 02 CAL CK 0008

Judgement

Coxe, J.—This was a suit on a mortgage said to have been executed by the Defendants Nos. 1 and 2. The suit has been decreed and the Defendants Nos. 3, 4 and 11 appeal. Defendants Nos. 3 and 4 are the sons of Defendant No. 1 and Defendant No. 11 is a subsequent purchaser. They appeal on the same grounds. The first ground taken on their behalf is that the mortgage is not properly proved inasmuch as the document is dated the 3rd June, but the attestations are dated the 16th and 19th. Positive evidence, however, is given by one of the attesting witnesses, a man of respectable position and fully believed by the Subordinate Judge, that the document was executed in the presence of the witnesses and attested by them the same day. The Defendants Nos. 1 and 2 must know if this is true, but the contesting Defendants did not venture to put them in the box. It is pleaded by Defendants Nos. 3 and 4, that Defendants Nos. 1 and 2 are in collusion with the Plaintiffs. These Defendants, however, did not appear at the hearing of the suit and this plea is not taken by the Defendant No 11. No evidence whatever is adduced in support of this assertion. In these circumstances, I fully agree with the learned Subordinate Judge that the execution and attestation of the document are proved.

2. Secondly, it is contended that a certain village or hamle called Samanpura is not included in the mortgage. It appears that Touzi No. 37 is Mehal Dumri Babar which includes Mouzah Dumri Bahar and Mouzah Samanpura. Evidence is given that the Defendants Nos. 1 and 2 represented that the properly consisted of 200 bighas yielding Rs. 2,000 profit. An enquiry was made and it was found that the mehal including Samanpura did consist of 200 bighas yielding Rs. 2,000 profit. The lands of the two villages were not separate Here too the Defendants do not

put the Defendants Nos. 1 and 2 into the box to deny that they intended to mortgage Samanpura. In these circumstances, the fact that the parties used the word "mouzah instead of the word "mehal" in the document does not, seem to me of importance. That the words are interchanged and used inaccurately is clear from the 11th Defendant's sale-deed, which admittedly included Samanpura and yet described the property merely as Mouzah Damri Bahar. I think, therefore, that this contention also fails. It may be observed that the Defendant No. 11 in his application to the Land Registration authorities pleaded that he was "in possession of the 8 annas Takhta of the Mouzah Damri Bahar aforesaid having purchased the same at a public auction and that as such purchaser he was in possession of all lands appertaining to the said estate Dumri Bahar including the lands known under the name of Samanpura and that the rental's for the estate Dumri Bahar includes the lands known as Samanpura without distinction and without any specification." This is a clear admission on the part of the Defendant No. 11 that Samanpura is an integral part of Dumri Bahar. It is not of course valuable as evidence against Defendants Nos. 3 and 4, but it must be remembered that they did not ever appear to contest the suit.

3. Thirdly, it is argued that as Defendant No. 12 and Plaintiff No. 2 are joint, and the Defendant No. 12 is a subsequent purchaser, the suit must fail to the extent of his purchase. Here too no evidence is given by the Defendants though the burden of proof was on them. All that they rely on is a statement of the Plaintiff's witness Purnendu, that the Defendant No. 12 and the Plaintiff No. 2 are in joint mess and seem to him to be joint. There is also a statement in the plaint that Defendant No. 12 is a subsequent purchaser. There is no evidence whatever to show what he has purchased or to prove that he is joint in estate with his brother or that the Plaintiff No. 2 has any interest in the purchase. This contention therefore must also fail.

4. The further and the last point taken is that the suit, so far as it affects the shares of the Defendants Nos. 3 and 4, is barred by limitation. On this point, it appears to me that there is a considerable divergence of judicial opinion and I am not sure that we should not refer the matter to the decision of a Full Bench. As my learned colleague, however, thinks that this course is unnecessary and as I agree with him in his view of the law, I agree that the Appeal should be dismissed with costs.

N.R. Chatterjea, J.

5. As regards the first three points, I have nothing to add to the judgment of my learned colleague.

6. The fourth and last point taken is that the suit, so far as it affects the shares of the Defendants 3 and 4 is barred by limitation, the suit having been instituted more than six years after the due date mentioned in the mortgage deed. The decision of this question depends upon whether the mortgage executed by the father can be enforced against the sons as a mortgage, in which case the 12

years" rule of limitation provided by Art. 132 of the Limitation Act would apply.

7. It appears that no evidence was adduced by the Defendants to prove that the debt was contracted for immoral purposes and the issue raised upon that point was given up. The Court below found it to be proved that with the exception of Rs. 750, the rest of the money borrowed was expended in re-payment of antecedent debts and that the 750 rupees was required for family purposes, and held that the Plaintiffs were entitled to a mortgage decree for the entire property mortgaged including the shares of Defendants 3 and 4. In the cases of *Suraj Bansi Koer v. Shea Prashad Singh* J. L. R. 5 Cal, 148 (1879). and *Bhagwat Proshad Singh v. Girija Keor* I. L. R. 15 Cal. 717 (1888)., their Lordships of the Privy Council quote with approval a dictum of Chief Justice Westropp that "subject to certain limited exceptions (as for instance, debts contracted for immoral or illegal purposes) the whole of the family undivided estate would be, when in the hands of sons and grandsons, liable to the debts of the father and grandfather." If that is so, it would seem to follow that a suit to obtain payment of these debts contracted by a father upon a mortgage of the ancestral property by a sale of the said property in the hands of the sons and grandsons would be a suit to enforce payment of money charged on immoveable property governed by Art. 132 of the Limitation Act. It is true in the case of *Luchmun v. Gitidhar* I.I, P 5 Cal, 855 (1880). the Full Bench held that the mortgage itself upon which the money was raised could not be enforced, but that the debt so contracted by the father being itself an antecedent debt within the rulings of the Privy Council and the son being a party to the suit, the mortgagee notwithstanding the form of the proceeding would be entitled to a decree directing the debt to be raised out of the whole ancestral estate inclusive of the mortgaged property. So far as the share of the father is concerned it is now the accepted view that the mortgage is capable of enforcement to the extent of his share. In the case of *Maheshur Dutt v. Kishun Singh* I. L. R. 34 Cal. 184: s. c. 11 C. W. N. 294 (1907), the learned Judges were of opinion that the law as laid down by the Full Bench of this Court cited above cannot be held to be any longer binding on us in view of the later decisions of the Privy Council in *Nanomi Babuasin v. Modhun Mohun* I. L. R. 13 Cal. 21 (1885).) and *Bhagwat v. Girij* I. L. R. 15 Cal. 717 (1888) that the principle laid down in these decisions of the Privy Council as applicable to cases of complete alienation must be held equally to apply to cases of partial alienation, such as mortgages, and that a mortgage bond executed by the father on receipt of a loan which the sons failed to prove to have been taken for immoral purposes was binding on the sons, and that the limitation applicable to a suit on the bond in respect of the sons as well as in respect of the father was that provided by Art. 132 of the Limitation Act. The learned Judges declined to follow the case of *Surja Frosad v. Golab Chand* I. L. R. 27 Cal 762 (1900) in which a contrary view was taken on the ground that that case did not follow the principles laid down by the Privy Council. No doubt the case of *Maheshur Dutt v. Kishun Singh*, L. R. 34 Cal. 184 : s. c. 11 C. W. N. 294 (1907) was dissented from in the case of *Kishun Prosad v. Tipan Prosad* I. L. R. 34 Cal. 735 : s. c. 11

C. W. N. 613 (1907) but in the latter case the question of limitation did not arise, the suit having been instituted within six years from the due date and the learned Judges in that case expressly reserved their opinion upon the question of limitation applicable to a suit of this description. The question whether a mortgage executed by the father can be enforced against the son as a mortgage was considered in a very recent case (see the unreported case of Biswa Nath v. Fugodip Narain decided on the 16th August 1912). In that case the suit was instituted 6 years after the due date, but it was held with reference to the provisions of sec. 85 of the Transfer of Property Act and to the case of Suraj Prosad v. Golab Chand I. L. R. 28 Cal. 517 : s. c. 5 C. W. N. 640 (1901).