

(1967) 04 OHC CK 0006
In the Orissa High Court
Case No : Second Appeal No. 252 of 1964

Sita Dakuani and Others

APPELLANT

Vs

Rama Chandra Nahak and Others

RESPONDENT

Date of Decision : 28-04-1967

Acts Referred:

Evidence Act, 1872 — Section 58, 67, 68, 69, 70
Succession Act, 1925 — Section 63
Transfer of Property Act, 1882 — Section 3, 59

Citation : (1967) 33 CLT 811

Hon'ble Judges : Das, J

Bench : Single Bench

Advocate : Y.S.N. Murty and K.C. Acharya, for the Appellant; R.C. Misra and A.K. Padhi, for the Respondent

Final Decision : Allowed

Judgement

Das, J.—Defendants are the Appellants. Defendant No. 1 is the father of Defendant No. 2. The appeal arises out of a reversing judgment of the Additional Subordinate Judge, Berhampur.

2. It is the case of the Plaintiffs that the Defendants being in need of money for their domestic expenses borrowed a sum of Rs. 600/- by a registered deed of mortgage by conditional sale on 3-8-1952 (ext. 1). It was agreed that the Defendants would release the properties on payment of the aforesaid sum of Rs. 600/- within two years and in case they failed to pay the amount Ananta Naik, father of Plaintiffs 1 to 5 and the husband of Plaintiff No. 6 will become the full owner of the properties and would enjoy the same absolutely.

3. The Defendants did not pay the amount within the stipulated period. So the Plaintiffs called upon the Defendants to pay up the same with interest or to put the land in their possession. The Defendants did not do either of these things. Hence the Plaintiffs filed the present suit for a decree directing the Defendants to deliver the suit-properties to them or in the alternative to pass a decree for the

realisation of the said amount with interest at 12 per cent per annum and also for a decree for foreclosure and sale of the suit-lands, covered under ext. 1.

4. The Defendants admitted the execution of the document, ext. 1, but denied the passing of consideration. According to them, it was a mere benami transaction made with a view to avoid the creditors of the Defendants.

5. The learned trial Court negated the contention of the defence and held that the document, ext. 1, was for consideration and it was not a benami transaction as alleged by the Defendants. He, however, held that ext. 1 has not been proved to be a mortgage bond. It was only a money-bond and as soon, the suit should have been filed within six years from the date of expiry of the stipulated period of two years, which expired on 3-3-1955. As the suit was filed on 13-5-1961, that is, beyond six years from that date, he held the suit to be barred by limitation and accordingly he dismissed the Plaintiffs' suit.

6. The main ground of his not treating the document as a mortgage-bond was that the same had not been proved to have been duly attested within the meaning of Section 3 of the Transfer of Property Act. As proof of the attestation was essential to enforce a transaction as a mortgage-transaction, he treated ext. 1 as a simple money-bond and accordingly held the suit to be time barred.

7. The learned appellate Court, however, reversed the finding of the trial Court and decreed the Plaintiffs' suit and directed the Defendants to pay the principal and the interest within six months failing which the Plaintiffs were directed to take steps to make the decree final by foreclosure. The Defendants had admitted the execution of the document and had not challenged the validity of attestation in their written statement. In this view of the matter, he held that the case was covered by the proviso to Section 68 of the Evidence Act and the Plaintiffs are absolved from proving the execution and due attestation of the document by calling any attesting witnesses. He further held that the transaction was a mortgage, as the proof of attestation by p.w.2 was not challenged.

8. The only contention raised in this appeal by Mr. Murty, learned Counsel for the Appellant is one of limitation on the footing that the ext. 1 is not a mortgage-bond as the same has not been duly proved to have been attested, an essential requirement to make it a mortgage transaction.

9. It is not disputed that ext. 1 is found to be a mortgage-bond, the suit is within time and the Plaintiffs are entitled to a mortgage decree though a personal decree is barred. Section 59 of the Transfer of Property Act, lays down that where the principal money secured is one hundred rupees or upwards, a mortgage other than a mortgage by deposit of title deeds can be affected only by a registered instrument signed by the mortgagor and attested by at least two witnesses. Thus, a document like ext. 1 in order to take effect as a mortgage-bond, must be signed by the mortgagor and attested by at least two witnesses.

10. In this connection the definition of the word "attested" as appearing in

Section 3 of the Transfer of Property Act may be seen. It says that:

"attested" in relation to an instrument, means and must be deemed always to have meant, attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary.

11. It was urged by Mr. Murty, learned Counsel for the Appellants, that p.w.2 who is the only attesting witnesses examined in the case has said nothing about his seeing the executant signing in his presence, nor he having signed in the presence of the executant. All that he has said is that he was an attestor to the document and he is silent about attestation by any other witness. As such, it was contended that ext. 1 has not been proved to have been only attested, to be effective as a mortgage-transaction.

12. It was however urged by Mr. Misra for the Respondent that the Defendants have not specifically denied the execution of the mortgage-bond, nor have they challenged the validity of the attestation of the document. On the other hand they have admitted the execution of the document and as such, it was not necessary to call any attesting witness not even p.w.2 to prove the execution of ext. 1. For this, he relied upon the proviso to Section 68 of the Evidence Act which lays down the mode of proof of the execution of a document which is required by law to be attested. Section 58 runs thus:

If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the Court and capable of giving evidence;

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act of 1908, unless its execution by the person by whom it purports to have been executed is specifically denied.

13. It is not disputed that the execution of the document has not been specifically denied and the validity of the attestation of the document has not been challenged in the written statement, nor in the evidence. The question is if despite that it is incumbent on the part of the Plaintiffs to prove the due attestation of the document and if the proviso to Section 68 can be taken to have dispensed with the same.

14. At this stage it may be noticed that specific provisions regarding proof of

execution of documents which are required by law to be attested, and those which are not so required have been laid down in section- 68 to 71. If an attesting witness is alive, and is subject to the process of the Court and is capable of giving evidence, he may be called to prove the attestation as is laid down u/s 68. If, however, no such attesting witness is available, it must be proved that attestation of one attesting witness at least is in his handwriting and the signature of the person as provided u/s 69 of the Evidence Act. Resort can be made to Section 69 not as a general rule, but only when the absence of the attesting witnesses can be sufficiently accounted for. If the attesting witness denies the signature or does not recollect the execution of the document its execution may be proved by other evidence. /Section 67 deals with proof of document other than the documents required by law to be attested. There the execution of the signing of the document can be proved by proof of the signature of the person. Thus, the mode of proof of a document which is required by law to be attested, within the definition of Section 3 of the Transfer of Property Act at hereinafter quoted, is different from the mode of proof of other kind of documents which are not so required to be attested.

15. It cannot be disputed that in the case of a mortgage bond the attestation of the signature of the executant by at least two witnesses is one of the essential requirements as required u/s 59 of the Transfer of Property Act. There cannot be any doubt that the evidence of p. w 2 falls short of proof of due attestation as he has said nothing about the other attesting witnesses. No doubt, on the body of the document, two persons including p w. 2 appear to be attesting witnesses to the document, but one could not presume from such signature that the document was attested by the other signatory also See *Girija Dutt v. Gangotri Dutta* AIR 1955 S.C. 146.

16. Mr. Misra, learned Counsel for the Respondents, contended that the Defendants having admitted the execution of ext. 1, though advanced a plea of hen ami transaction, the presumption as to due attestation can be called in aid and the evidence of the mortgagee alone that the deed was" executed by the mortgagor would be sufficient in law to establish due attestation. According to him even if the evidence of p.w.2 is taken to be insufficient to prove due attestation, that is immaterial. He relied upon a decision of the Nagpur High Court reported in *Dasarath Prasad v. Lale Singh* AIR 1951 Nag. 343. There a specific issue was raised whether Defendant No. 1 executed a mortgaged deed with proper attestation and for consideration and the only evidence of execution and attestation was that of the Plaintiff who said that he advanced certain amount to the Defendants who executed the mortgage-deed. The witness was not cross-examined regarding the details of this execution, nor was he asked a single question about attestation. The first Court decreed the claim but the lower appellate Court held that the evidence was not sufficient to prove due attestation, and be accordingly dismissed the claim.

The question that arose in second appeal was whether the evidence of p.w.1 that

the Defendant executed the mortgage-deed was sufficient in the circumstances of that case to prove execution as also attestation. There the evidence of p.w.1 regarding attestation was believed by the appellate Court. In other words, though no attesting witnesses were examined, p.w.1, the Plaintiff himself proved the due attestation of the document and that was believed by the appellate Court. The learned Judge observed:

It is important to state that the learned Judge (meaning the first appellate Court) did not disbelieve the evidence to prove attestation. He, however, observed that there should not be any doubt on the fact that when a deed is required by law to be attested in a particular way, the attestation must be proved in that way. But each case will depend upon its own facts and given a proper condition, attestation can be" presumed when there is no specific attack on due execution. He relied upon some of the previous decisions of their own High Court. The case is clearly distinguishable. In the present case there is no proof of due attestation either in the evidence of the Plaintiff or the attesting witness, p.w.2.

17. At this stage we may refer to a decision of this Court reported in *Pravash v. Jagamohan* 26 C.L.T. 359 where the applicability of Section 68 of the Evidence Act and Section 59 of the Transfer of Property Act came up for consideration, In that case a suit was filed for enforcement of a mortgage transaction purporting to have been executed by the Defendant. The Defendant admitted the execution of the mortgage deed, but took the plea of payment and adjustment. The trial Court dismissed the suit saying that the transaction has not been proved to be a mortgage-transaction as one of the attesting witnesses admitted to be alive, had not been called for as required u/s 68 of the Evidence Act. In view of the absence of a specific denial of execution and the evidence on record, the appellate Court, however, reversed that finding and decreed the Plaintiff's suit. The plea taken by the Defendant Appellant in second appeal was that in view of the mandatory provisions of Section 68 of the Evidence Act, it was incumbent upon the Plaintiff to prove due attestation in accordance with law and that not having been done, the document is not admissible as a mortgage-transaction. It was observed by Mohapatra, J. that Section 58 of the Transfer of Property Act enjoins upon the mortgagee to enforce a mortgage transaction not only by proof of execution, but also by proof of attestation, as defined u/s 3 of the Transfer of Property Act. This attestation can be proved by any other method, provided the case is not hit by Section 68 of the Evidence Act in which case alone it is made compulsory and essential that the Plaintiffs have to call on of the attesting witnesses. There, however, on examination of the evidence of p.w.1 he was satisfied that it is sufficient to prove the attestation as defined u/s 3 of the Transfer of Property Act. The lower appellate Court no doubt had placed reliance on this decision but has missed the point that in that case it was held on evidence that due attestation has been proved. That is, it has been proved to have been attested by two persons as required u/s 3 of the Transfer of Property Act.

18. In the case reported in *Sakinabai Vs. Sakinabai Bohra and Another*, relied

upon by the appellate Court it was held that when the attestation of a document is not specifically denied and when the witness is not cross-examined regarding the details of the attestation, it was sufficient for him to say that it was attested by the other witness is and himself and that is enough to prove attestation. But that is not the case here as seen from the evidence.

19. In a case reported in Ballans v. Mallana AIR 1960 Mys. 234, it was held that the net effect of Section 68 of the Evidence Act is that if the execution of a document of gift is specifically denied, then the attesting witnesses must be called to prove it. If, however, such execution is not specifically denied, then it will not be necessary to call the attesting witnesses to prove the same. But the document all the same will have to be proved. The effect of the proviso is that due execution and attestation of the gift-deed will have to be proved and it may be proved by calling a person other than the attesting witness. In other words, the proviso to Section 68 should not be construed as meaning that document in such a case would be proved by itself.

20. In a case reported in Vishnu Ramkrishna Wani Vs. Nathu Vithal Wani, , the question was whether a will had been proved to have been duly executed. It was held that the execution of the will does not merely mean the signing of it by the testatrix or to put her thumb impression on the will, but it means all the formalities required and laid down by Section 63 of the Succession Act, to have been complied with. That was a case where the attesting witness was not in a position to prove the attestation of the will by the second witness. It was held that the evidence falls short of the requirements of Section 68 of the Evidence Act. In other words the document was held to be ineffective as it was not proved to have been attested by two witnesses, as required by law.

21. Thus, the legal position is that despite the admission of the execution of the deed by the Defendant it was incumbent to prove the due attestation of the mortgage if the Plaintiff wants to take advantage of the transaction as a mortgage unless of course attestation is admitted. All that proviso to Section 68 lays down is that in such a case the document may not be proved by any attesting witness but all the same due attestation must be proved.

22. It was urged that in view of Section 70 of the Evidence Act, the admission of the 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. In the case reported in AIR 1925 203 (Privy Council) , it was held that such admission of a party apply only to a document duly attested and not to one which have not been proved to be so.

23. In the present case as We have already seen p.w.2 and even p. w 1 has made no reference at all about any other witness attesting the document. In view of that position it cannot be said that ext. I was duly attested within the meaning of Section 3 of the Transfer of Property Act and as such it cannot be enforced as a mortgage-bond as it falls short of the requirements of Section 59

of the Transfer of property Act. The order of the appellate Court is accordingly set aside and the Plaintiff's suit must be dismissed.

The appeal is accordingly allowed, but in the circumstances of the case parties to bear their own costs throughout.