(2001) 03 PAT CK 0072

In the Patna High Court

Case No : A.F.A.D. No. 450 of 1986

Smt. Pawan Rekha Devi — APPELLANT

Vs

Kesho Yadav — RESPONDENT

Date of Decision : 22-03-2001

Acts Referred:
Evidence Act, 1872 — Section 68, 70

Citation : (2001) 2 BLJR 1034

Hon'ble Judges : S.N. Pathak, J

Bench : Single Bench

Final Decision : Allowed

Judgement

S.N. Pathak, J.—This appeal is directed against the judgment of the first appellate Court passed by Sri Narayan Gupta, Additional District Judge-VI, Munger in Title Appeal No. 24 of 1982. The plaintiff of Title Mortgage Suit No. 51 of 1979 is the appellant here.

2. The relevant facts, in brief, are that the appellant had filed the aforesaid title suit seeking foreclosure of the mortgage-deed dated 6th February, 1974. The case of the plaintiff-appellant was that the defendant of the suit (respondent) had taken a loan of Rs. 5,000/- and a mortgage with conditional sale was executed on 6th February, 1974. It was stipulated in the mortgage-deed that in default of payment of mortgage money by 30 Baishakh 1385 Fasli, the defendant respondent failed to pay back the loan amount by the stipulated date, and, hence, the suit was filed for foreclosure. The case of the defendant-respondent was that there were business transactions between the plaintiff and the defendant and an amount of Rs. 500/- was due for which a simple mortgage was executed. However, the further pleading of the defendant-respondent was that of course, a mortgage-deed with conditional sale was got executed by the plaintiff fraudulently and the money due was only Rs. 500/- and not Rs. 5,000/-.

3. On contest of the suit by both the parties, the trial Court decreed the suit.

However, the first appellate Court in the judgment dated 3rd June, 1986 reversed the judgment of the trial Court and, hence, this second appeal.

4. On perusal of the first appellate Court''s judgment, it transpires that the appellate Court held on the basis of evidence that of course, an amount of Rs. 5,000/- was taken by the defendant-respondent and not Rs. 500/-. The appellate Court further held that a mortgage-deed with conditional sale was executed and not simple mortgage, as pleaded by the defendant-respondent. The appellate Court, however, held on the basis of the evidence that it was not proved that the mortgage-deed was attested by two witnesses, as required under the law and, hence, the appellate Court further held that the plaintiff-appellant was not entitled for a decree for foreclosure.

5. This second appeal was admitted on the following questions:

(a) whether Exhibit-4 was admitted in evidence, without objection by the defendant?

(b) whether the lower appellate Court erred in law in holding that Exhibit-4 was not proved in accordance with the law relating to evidence? and,

(c) whether in view of the findings on the merits of the case, the Court below should have dismissed the suit?

6. I find that the trial Court decreed the suit, as prayed for by the plaintiff-appellant. The appellate Court dismissed the suit on the sole ground that one of the attesting witnesses, who was examined in Court as P.W. 9, failed to depose that other attesting witness, namely, Bhujangi Thakur had also signed in his presence and on this ground, the appellate Court held that the mortgage-deed concerned was not properly proved and admitted into evidence. Hence, in the opinion of the lower Court, there was no valid document of mortgage. On this basis, the first appellate Court dismissed the suit, I am of the opinion that under the T.P. Act for validity of mortgage, at least, there should be two attesting witnesses. So attestation of a mortgage-deed by two witnesses gives the mortgage-deed validity under the mode of transfer, as prescribed under the T.P. 1 Act. So far as the mode of proving the mortgage-deed concerned is concerned, the law law is laid down under the Evidence Act. Section 68 of the Evidence Act has clearly laid down that a mortgage shall be required to be proved by at least one attesting witness, if the attesting witness concerned is alive and subjected to the process of the Court. So the document of mortgage has to be brought in evidence by proof of execution of the same by at least one attesting witness, if alive. Section 68 of the Evidence Act has specifically stated that such a document shall not be admitted into evidence unless at least one attesting witness is called for the purpose of proving its execution. Apparently, therefore, it is the execution of the document that has to be proved by the attesting witness. The attesting witness is not required to prove the signature of other attesting witness on the same document. So even if P.W. 9 omitted to state in his evidence that other witness, namely, Bhujang Thakur had also signed in his presence, that does not

mean that the other attesting witness did not sign on the alleged mortgage-deed. The signature of Bhujang Thakur does appear on the mortgage-deed (Ext. 4), as the lower appellate Court has also noticed it and there was no evidence that this signature was forged by any body other than Bhujang Thakur. The appellate Court''s opinion was that since this signature was not proved by the attesting witness P.W. 9 or by any other witness. The signature of Bhujang Thakur was not to be presumed. I am of the opinion that it was not the signature of attesting witness that had to be proved rather it is the execution of the document that had to be proved by at least one attesting witness, as required u/s 68 of the Evidence Act. Besides that, Section 70 of the Evidence Act has laid down;

That the admission of a 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.

So under this Section, when execution of the mortgage-deed was admitted by defendant-respondent, its execution was not to be proved by even one attesting witness; but in the instant case, one of the attesting witness was examined and he proved the execution by the main defendant. The fraud which the defendant alleged in securing a mortgage-deed with additional sale in stead of simple mortgage has not been proved by the defendant and the onus in this connection lay heavily on him. Fraud heard by a party has to be proved like a criminal case and the principle of evidence is that he who asserts a particular fact has himself to prove it. There is no gainsaying the repetition of the law laid down u/s 68 of the Evidence Act that it is the execution of the document required by law to be attested which is to be proved and not its attestation, as the appellate Court has mentioned in his judgment.

7. In the result, I am of the opinion that the first appellate Court''s judgment and his findings are based on erroneous interpretation of law relating to proof of a document of mortgage. So this appeal is allowed and the judgment of the first appellate Court is set aside. The judgment of the trial Court is affirmed.

8. In the circumstances of the case, there shall be no order as to costs of this appeal.

