
(1920) 03 MAD CK 0031
In the Madras High Court

Venkata Reddi and Others

APPELLANT

Vs

Muthu Pambulu Naick and Others

RESPONDENT

Date of Decision : 15-03-1920

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 5

Citation : (1920) 43 MLJ 463

Hon'ble Judges : Spencer, J;Sadasiva Aiyar, J

Bench : Full Bench

Judgement

Sadasiva Aiyar, J.—The plaintiffs 1, 4 and 5 are the appellants mentioned in the memorandum of Second Appeal preferred to this Court. As

it appeared that the 3rd plaintiff's name was left out by an oversight of the appellants' learned vakil, we allowed the memorandum of Second

Appeal to be amended by adding the 3rd plaintiff's name also as an appellant.

2. The suit was brought upon a hypothecation bond executed by the 1st defendant in August 1912. Four items of property were hypothecated out

of which item 2 was afterwards sold by the 1st defendant to the 2nd defendant. The 2nd defendant then hypothecated it to the 3rd defendant.

Defendants 2 and 3 remained ex parte both in the court of first instance and in the lower appellate court. The 1st defendant in his written statement

described the plaint bond as "the suit mortgage debt bond." The plaintiffs in their plaint claimed a charge on the properties and sued for sale on the

basis of that charge. If the 1st defendant had intended to plead that the document did not create a charge owing to its alleged invalidity as a

mortgage, he ought to have raised that plea expressly in his written statement. Under Order VIII, Rule 5, C.P.C. "every allegation of fact in the

plaint, if not denied specifically or by necessary implication or stated to be not admitted in the pleadings of the defendant, shall be taken to be

admitted except as against a person who is under a disability." The allegation of fact in the plaint that the mortgage bond gave the plaintiffs a right to

bring the properties to sale as creating a charge on the property not having been denied specifically or by necessary implication must be deemed to

have been admitted by the 1st defendant. The lower appellate court therefore used its discretion wrongly in requiring proof or rather in taking the

validity of the document is a mortgage is not proved on the evidence on record even as against the 1st defendant. Of course under the proviso to

Order VIII, Rule 5, "the court may in its discretion require any facts so admitted to be proved otherwise than by such admission." But that

discretion should usually be exercised by the court of first instance and would be exercised properly in cases where the court of first instance

suspects on prima facie grounds that the admission was made collusively or in order to evade a rule of public policy. However I shall for. the

purposes of the decision of this case even assume that the first defendant did not admit the validity of the document as a mortgage.

3. As regards defendants 2 and 3 they were ex parte (as I have said) in both the courts below and had not appealed against the decree of the court

of first instance directing item 2 also (that property in which alone they were interested) to be sold for the mortgage amount and I think that the

lower appellate court again used its discretion (under Order 41, Rule 33) in a wrong manner in interfering with the District Munsif's decree so far

as it affected the ex parte defendants 2 and 3 on a mere technical ground. However I shall again assume that its discretion in this matter also was

not exercised improperly. Even then it seems to me that the Lower Appellate Court should have given the plaintiffs an opportunity to fill up the

alleged gaps in the evidence which were not at all considered material by the first Court and should in the language of the proviso to Order VIII,

Rule 5 have "required evidence" of the facts which it considered not proved before finding them against the present appellants. But it is unnecessary

to deal with this point also further.

4. The only remaining short question is whether the mortgage deed has been proved to create a valid charge (having regard to Section 59 of the

Transfer of Property Act) on the evidence actually adduced in this case and not disbelieved by the Lower Appellate Court. Section 59 requires

that a mortgage securing a principal amount which is Rs. 100 or upwards should be created by a registered instrument signed by the mortgagor

and attested by at least two witnesses. It has been now settled that an "" attested "" document means a document whose execution by the executant

has been actually seen by the apparent attestor. See Shamu Patter v. Abdul Kadir Ravuthan 28 M.L.J. 321.

5. The next point for consideration is "" how is a document which purported to be attested by two witnesses to be proved in order that it may be

accepted by the Court to be a valid mortgage document, such a document being required by law to be attested by two witnesses ?"" For this

purpose, we have to look into the Evidence Act where Sections 68 and 69 contain provision as to the mode of proof of ""a document which is

required by law to be attested,"" a mortgage document for Rs. 100 or upwards being such a document. Section 68 says "" 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."" I think the implication from the language

of the section is that, if one attesting witness has been called (if there be an attesting witness alive, etc.,) then the document can be accepted by the

Court (of course if it believes his evidence) as evidencing a mortgage-transaction as the necessary evidence insisted upon by Section 68, Evidence

Act of a document required by law to be attested has been given. In pther words the document can on that evidence, be treated by the Court as

having created the charge on Immovable property which it purports to create. Section 68 requires only that one attesting witness (if alive) should

be called for the purpose of proving execution subject of course to the condition that that witness is subject to the process of the Court and

capable of giving evidence. The Lower Appellate Court however held that either two attesting witnesses should be called when two are alive and

that even assuming that one only need be called, he should, at least, be made to prove that another (or the other) attesting witness besides himself

also saw the execution. Hence it held that the plaint document was not properly proved as a mortgage document as one only of the attesting

witnesses was called and he merely proved its execution by the 1st defendant and the attestation by himself (that witness) and he was not asked

about any other attester having seen the execution (I might add here that the Lower Appellate Court in its very technical handling of the case even

refused to allow an application for review filed by the plaintiffs).

6. Mr. Sesha Aiyangar for the respondent, 3rd defendant (the 1st defendant who contested the suit in the two Lower Courts remaining ex parte

here and the 3rd defendant who was ex parte in the Courts below now taking advantage of the Lower Appellate Court's decision to appear

before us in order to support it) contends that though Section 59 of the Transfer of Property Act does not deal with the quantum or mode of proof,

we must assume that it not only requires that a mortgage document (for 100 rupees or more) should be attested by two witnesses but that the

mortgagee suing on it should call two witnesses, if alive, to prove the document or should make the one witness (called) to prove its attestation by

another also. No doubt there are English and American statutes which contain such strict provisions about the mode of proof also (by calling, at

least two witnesses) of documents required to be attested by two or more witnesses. I do not see, however, why we should make Section 59

stricter than it is and add the words to the section (after the words ""two witnesses"" such as "" two of whom at least shall, if alive, be called to prove

the instrument or one of whom at least, shall be called to prove that the instrument was not only attested by himself but attested by another

attester."" The fact that the Evidence Act is 10 years older than the Transfer of Property Act has no relevancy in the consideration of this question. I

might add that Section 69 of the Evidence Act says that, if no such attesting witness can be found, proof that the attestation of one attesting witness

at least is in the hand-writing of that witness and that the signature of the person executing the document is in the hand-writing of that person is

proof which might be accepted as sufficient by the Court. If Section 59 of the Transfer of Property Act is interpreted, as we are invited to interpret

it, as adding another requisite (even in the circumstances contemplated by Section 69 of the Evidence Act, that is, even where no attesting witness

is alive or could be found) namely direct proof that two attesting witnesses saw the execution, it would be practically impossible in most such cases

to adduce evidence of third persons about attestation by two witnesses and many old mortgage transactions could never be proved at all as such.

Documents, say about 28 years old, where it is not at all unlikely that the two attestors and the mortgagee have died (life not being too long in this

country) cannot be proved at all to be valid documents unless some third persons who did not attest but merely happened to be present at the

execution and attestation (a very unlikely contingency) happened to be alive, remembered what happened long ago of a transaction at which they

were casually present and could therefore be called to prove the attestation by two attestors. If the argument is pushed to its logical limit, then even

Section 90 of the Evidence Act which says that documents purporting to be 30 years old can be presumed to have been validly executed and

attested must be deemed to have been overruled by the provisions of Section 59 of the later Transfer of Property Act. No doubt, where the

provisions of Section 68, Evidence Act have been complied with by calling the attesting held that whereas Section 59 of Act IV of 1882 did

require that there should be two attesting witnesses at least for the validity of the document of the nature mentioned in that section, the requirements

of the Evidence Act as to proof of such a document could be sufficiently met by compliance with the directions in Sections 68 and 69 of the

Evidence Act. I think also that Section 114 of the Evidence Act (relied on in some other connection by the learned Judges who decided

Jogendranath Mu-khopadhya v. Nitai Churn Bundopadhya 7 Cal. W.N. 384 supplies the clue to the intention of the legislature in enacting Sections

68 and 69 of the Evidence Act which consider proof up to a certain point as legally sufficient. As I said already, such prima facie evidence of

validity (believed by the Court to be true) could be rebutted by other evidence (of course, when believed by the Court).

7. In the present case, the evidence of P.W. 4 believed by the Courts sufficiently satisfied the requirements of Section 68 of the Evidence Act (the

document being on its face, attested by at least two attestors and thus satisfying the requirements of Section 59 of the Transfer of Property Act).

Following therefore Shib Dayal v. Sheo Ghulam ILR (1916) All. 241 I would hold that the document has been proved to be a valid mortgage.

8. In the result the decree of the Lower Appellate Court will be modified and the usual mortgage decree shall be passed in favour of the plaintiffs

for the sum mentioned in the Lower Appellate Court's decree with interest as provided for therein, items 1, 3 and 4 being directed to be sold first

and item 2 last. The plaintiffs shall have their costs of the second appeal from defendants 1 and 3 and their costs incurred in the courts below will

be paid by the 1st defendant. The costs shall also be a charge upon the mortgaged property. Time for redemption is six months from this date.

Spencer, J.

9. In this case the validity of the suit document, a mortgage deed, was not the subject of any issue in the court of first instance, the only matter on

which the plaintiffs and the 1st defendant joined issue being the question of discharge, upon which defence the District Munsif dismissed the suit.

10. On appeal the Subordinate Judge after reversing the first Court's finding on the question of discharge, gave the plaintiffs a personal decree

against the 1st defendant alone and refused to give them a decree for sale of the mortgaged property on the ground that the attestation to the deed

had not been properly proved. From the Subordinate Judge's order on the Review petition his reasons for not granting a decree on the mortgage

appear more fully than in his judgment. He says therein that though the 1st defendant admitted execution he did not ask for an issue to be framed as

to the validity of the mortgage deed but as against the other defendants who remained ex parte it was incumbent on the plaintiffs to prove the

document in the manner prescribed by Section 68 of the Evidence Act and he had not done so.

11. In my opinion the requirements of Section 68 of the Evidence Act were sufficiently complied with when P.W. 4 an attesting witness, was

examined. If there had then been any idea of suggesting that this witness did not know what was meant by "attesting" he should have been asked

some questions in the cross-examination to further explain his statement in the chief examination, "I attested it." The document, Ex. A shows that

two other witnesses signed it. But it is not known definitely whether they are alive and available for examination.

12. The features of this case resemble that decided in *Shib Dayal v. Sheo Ghulam* ILR (1916) All 241. It was there stated "with regard to the

proof of the mortgage, the plaintiff produced one of the attesting witnesses who proved that he saw the mortgagor sign the mortgage and that he

signed his name as an attesting witness. On the face of it the mortgage appears to have been attested by a number of other witnesses, but they

were not called, nor did the witness who was called say that there was any other attesting witness present. He was not asked the question by either

side. The question is whether under these circumstances, there being no other evidence, the mortgage can be said to be proved." Their lordships of

the Allahabad High Court held that there had been a sufficient compliance with the law as stated in Section 68 of the Evidence Act when one

attesting witness was examined, as required by that section and the evidence for the plaintiff was not at all rebutted. *Ram Dei v. Munna Lal* ILR

(1916) All 109 was a similar case. As to the amount of proof required, Section 68 of the Evidence Act does not require that more than one

attesting witness should be called to say that he attested it before the document can be used as evidence. I do not believe that it could have been

the intention of the framers of the Transfer of Property Act which became law in 1882 to lay down anything in Section 59 contrary to the

provisions of the Evidence Act of 1872 on the subject of proof. If an appellate Court in the exercise of its discretion under the provisos to Section

58 of the Evidence Act and to Order VIII, Rule 5 of the CPC requires clearer proof of attestation, it is the duty of the Court itself to call for such

proof, and not to decide that the document has not been proved as a mortgage merely because the plaintiff did not examine all attesting witnesses.

See *Arumugham Chetiy v. Muthu Koundan* (1919) M.W.N. 409 and *Muniappa Chetty v. Vellachamy* (1918) M.W.N. 853.

13. Mr. Sesha Aiyangar for the respondent, relied on two other decisions which can clearly be distinguished. In *Param Hans v. Randhir Singh* ILR

(1916) All. 461 the second witness did not sign or make a mark and so the document was held to be not validly executed as there was nothing in

the evidence to show that he authorised the scribe to write his name. In *Vadla Nagiah v. Divakara Mudaliar* (1917) 6 L.W. 147 there was no

admission or proof of the attestation nor did any presumption arise from, the common course of business that the mortgage had been validly

attested. Both these cases are therefore distinguishable from the present.

14. I concur in the decree proposed to be passed by my learned brother.