APPELLATE CIVIL.

Before Woodroffe, D. Chatterjee and Newbould JJ.

SATISH CHANDRA MITRA

v.

JOGENDRANATH MAHALANABIS.*

1916

May 26.

Evidence—Mortgage—Deed, form of proof of—Evidence Act (I of 1872), ss. 68 to 71.

In a suit on a mortgage bond, the admission of execution by the sole mortgagor does not dispense with the necessity of complying with the provisions of section 68 of the Evidence Act in order to prove the execution of the document as against other parties in the suit who do not admit such execution. Such a document must be proved as against them in accordance with the provisions of sections 68, 69 and 71 of the Evidence Act.

Jogendra Nath Mukhopadhya v. *Nitai Churn Bandopadhya* (1) distinguished.

SECOND APPEAL by Satish Chandra Mitra, the plaintiff.

The appeal arose out of a mortgage suit. Defendant No. 1 was the mortgagor. The other defendants were subsequent purchasers. Defendant No. 1 admitted the mortgage, but pleaded satisfaction. The remaining defendants denied the *bonâ fides* of the mortgage and impeached it as fraudulent and collusive and executed without consideration. On the day of the trial, defendant No. 1 did not appear and the prayer of defendants Nos. 3 to 5 for time was rejected. Defendant No. 6 also failed to appear. The

* Appeal from Order, No. 56 of 1915, against the order of D. P. Bagchi, Subordinate Judge of Faridpur, dated Jan. 14, 1915, reversing the order of Man Mohan Neogi, Munsif of Faridpur, dated March 18, 1914.

(1) (1903) 7 C. W. N. 384.

1916

SATISH CHANDRA MITRA v. JOGENDRA-NATH MAHALA-NABIS.

suit was eventually decreed *ex parte* against the non-appearing defendants and dismissed as against the appearing defendant. The decree made in the case was a mortgage-decree. The Munsif passed the decree upon the admission of the mortgagor defendant in his written statement and upon the oath of the Sub-Registrar and the person through whom the money was advanced. None of the attesting witnesses were called and examined to prove the execution of the mortgage, though the plaintiff had applied for time to do so.

On appeal by defendants Nos. 3 to 5, the Subordinate Judge held that the mortgage-deed should not have been used in evidence, as no attesting witness had been called, as provided for in section 68 of the Evidence Act, for the purpose of proving its execution. On this view the judgment and decree of the Court below were reversed and the appeal allowed.

The plaintiff appealed to the High Court. At the hearing of the appeal there was a difference of opinion between D. Chatterjee and Newbould JJ. and the case was referred to Woodroffe J. The differing judgments were as follows :—

D. CHATTERJEE J. This was a suit upon a mortgage bond. The defendant No. 1 was the executant of the mortgage and the other defendants derived title to the mortgaged property subsequently by execution and certificate sales. The defendant No. 1, executant of the document, admitted the mortgage-deed and the first Court gave a decree on the basis of the mortgage.

It appears that defendants Nos. 3 to 5 made an attempt to have the case postponed for the purpose of getting an order of transfer of the case to the Court of the Subordinate Judge for trial with another suit in the same matter. Before the order of the District Judge on the application for transfer was received the case was disposed of by the learned Munsif. Upon appeal, the learned Subordinate Judge remanded the case, holding that the document, that is the mortgage deed, had not been proved by the examination of any of the attesting witnesses as required by section 68 of the Evidence Act.

On appeal it is contended before us that the order of the learned Judge below is wrong, in that section 70 of the Evidence Act provides 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, and that therefore it was not necessary to prove the attestation of the document.

It is contended by the learned vakeel for the respondents, however, that an admission of the execution by the executant has the effect of proving the document as against the party making the admission and not as against them; and as they stated in the written statement that the document was not executed in accordance with law, the document ought to have been proved, so far as they are concerned, in accordance with the general provisions of section 68.

Section 68 provides that 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. Section 69 provides for cases where no attesting witness can be found. Section 70 says that if a person who has executed a document admits the execution, then that will be taken as sufficient proof of its execution as against him, *i.e.*, the person making the admission. Section 70 therefore seems to be an exception to the general rule contained in section 68. This exception must be read by the light of the words used in it, and so reading the section the meaning seems to be that an examination of an attesting witness will not be necessary for the purpose of proving the execution, if the executant admits that he has executed the document; but this proof must be considered as confined in its operation only to the person making the admission. If that be so, the defendants Nos 3, 4 and 5 who do not admit the execution of the document, cannot be said to be bound by the sufficiency of the proof of the execution supplied by the admission of the executant. This contention of the learned vakeel for the respondent seems to be supported by principle also. The defendant No. 1, I take it, executed the mortgage and thereafter he made sales in favour of the respondents, or the respondents derived title to his right, title and interest existing after the execution of the mortgage. If it were to be held that the respondents were bound by the admission made by the executant subsequent to their acquisition of title, it would be sinning against the law of admissions; because in that case the executant of the document would be making a derogation from his own grant by making an admission to the detriment of persons deriving title from or through him before the admission.

In this view of the case, I think that the lower Appellate Court was

1916

SATISH CHANDRA MITRA v. JOGENDRA-NATH MAHALA-NABIS.

CHATTERJEE J.

right in sending the case back for the formal proof of the document as against defendants Nos. 3, 4 and 5 who did not admit the execution of the document. I would, therefore, dismiss this appeal with costs.

As there has been a difference of opinion in this case, it will be placed before the Hon'ble the Chief Justice so that it may be referred to a third Judge. The point on which the Court has differed is whether in a suit on a mortgage bond the admission of execution by the sole mortgagor is sufficient to render it unnecessary for the mortgagee to comply with the provisions of section 68 of the Evidence Act in order to prove the execution of the document as against subsequent transferees of the mortgaged property who do not admit the execution, or must the execution be formally proved against them.

NEWBOULD J. In this case I regret that I am unable to agree with my learned brother. We are, I think, agreed that section 70 of the Evidence Act must be read by way of proviso to section 68. From this it appears to me to follow that an admission by the sole executant of an attested document of its execution by himself dispenses with the necessity to call an attesting witness under section 68 for the purpose of proving its execution. There is a marked difference in the language used in the two sections 68 and 70. Section 68 speaks of the document being "used as evidence," section 70 of its being "proved." Under section 70, and even apart from it, the admission of a party to an attested document cannot prove it against a person who is not a party to it. But I see no reason why such admission should not render the document admissible in evidence against him. The admission does not prove the document against him; but it is sufficient to prevent his taking the technical plea that the provisions of section 68 have not been complied with.

I am aware that a contrary view was expressed by a Divisional Bench of this Court in *Jogendra Nath Mukhopadhya* v. *Nitai Churn Bandopadhya*(1). But this is only an *obiter dictum* as the document there in question was held to have been proved to be only attested on other grounds. The correctness of the view taken by the learned Judges who decided this case has been doubted by Ameer Ali and Woodroffe's "Law on Evidence," 5th edition, page 506, where it is stated "if the admission of the executant has not the effect of dispensing with proof of attestation, there was no necessity for the section at all, as recourse may be had to the general provisions of the Act relating to admissions, if the admission of execution is to be used only in the sense of an admission of signing only."

It, therefore, seems to me that section 68 must be read subject to the provisions of subsequent sections; and where an executant admits execution

(1) (1903) 7 C. W. N. 384.

of an attested document, the document can be used as evidence against other parties to the suit and proved in the ordinary way without it being necessary to call or prove the handwriting of an attesting witness.

I would, therefore, decree the appeal and set aside the order of the learned Subordinate Judge, remanding the case for a fresh trial, and direct him to dispose of the appeal on the evidence on the record.

Babu Bipinbihari Ghose (Jr.) (with him *Babu Surendra Kumar Bose*), for the appellant. Section 68 of the Evidence Act deals with a particular method of proving documents that are required by law to be attested. The succeeding sections are provisos where the rule laid down in section 68 is modified. The words "as against him" in section 70 contemplates a case where there are more mortgagors than one. By the words "party to a document" are meant the mortgagee and mortgagor, and no others: *Abdul Karim* v. *Salimun* (1).

The puisne mortgagees or those who have got the equity of redemption are not prejudiced, as it is open to them to impeach the transaction in any way they like.

"Proof" does not mean *conclusive* proof.

Dr. Sarat Chandra Basak (with him *Babu Ashitaranian Ghose*), for the respondents, was asked only about the proper form of the decree that should be passed in the case.

Cur. adv. vult.

WOODROFFE J. In the case of a document required by law to be attested the admission of a party to it of its execution by himself is, under section 70 of the Evidence Act, sufficient proof of its execution as against him. If, therefore, the question had arisen solely between the plaintiff and the mortgagor in this case, it would not have been necessary to have called

(1) (1899) I. L. R., 27 Calc. 190.

1916

SATISH CHANDRA MITRA v. JOGENDRA-NATH MAHALA-NABIS.

WOODROFFE J.

any attesting witnesses or other evidence. The admission by the party to the document would have dispensed with the necessity of all further proof. In the present case, however, there are other defendants than the mortgagor. The learned pleader who appears on behalf of the plaintiff admits that the admission of the mortgagor is not evidence against his co-defendants, and that it will therefore be necessary for him to prove by evidence affecting those co-defendants that the mortgage was executed and operative. He, however, contends that the effect of the admission by the executant is to dispense him from proof in a particular form, namely, by calling an attesting witness. He contends that the effect of sections 68 to 72 of the Evidence Act is that where there are several defendants against whom a mortgage is sought to be proved and one of the defendants being the executant of the document admits execution, that admission whilst not dispensing with the necessity of proof of the mortgage as against the defendants other than the executant, does dispense with the necessity of calling an attesting witness. I am, however, unable to agree with this contention. The effect of section 70 is, in my opinion, that the proof by calling attesting witnesses is dispensed with where the party executant admits execution only as against him, and that where there are other defendants than the party making such admission the document is not admissible in evidence as against them until it has been proved by attesting witnesses in the manner prescribed by the Act. It is the common practice that a document is admitted against a particular party only or for a particular purpose and not as against other parties or for other purposes. In the case before me it is, in my opinion, necessary not only to prove the document as against the defendants other

than the admitting executant, but to prove it in the way required by sections 68 and 69, namely, the production of an attesting witness. The admission of the executing party has no effect at all, except as regards the party himself. As regards others, the position is just the same as if there had been no such admission; that is, the case must be proved against them in the way required by those sections. The decision in the case of *Jogendra Nath Mukhopadhya* v. *Nitai Churn Bundopadhya* (1) does not touch the matter before us, for there the question was not as to the effect of an admission by an executant upon the question of the proof required against parties other than the executant: nor does the passage cited from the text-book quoted in Mr. Justice Newbould's judgment refer to the matter now in issue, but to the point which appears to have been raised by the decision in *Jogendra Nath's Case* (1). That decision is open to this construction that even when the executant admits execution, his admission is proof of execution or signing only and does not dispense with proof of attestation. If this be the meaning of that judgment, I am unable to agree with it, as I think that the admission of the executant has the effect of dispensing with the proof of attestation as against him. For if the admission of execution is to be understood only in the sense of an admission of signing, then there was no necessity for section 70 at all, regard being had to the general provisions of the Evidence Act relating to admissions. This is also indicated by the last words of section 70, "though it be a document required by law to be attested." I therefore agree with the conclusion of Mr. Justice Chatterjee that in a suit on a mortgage bond the admission of execution by the sole mortgagor does not

(1) (1903) 7 C. W. N. 384.

1916

SATISH CHANDRA MITRA v. JOGENDRA-NATH MAHALA-NABIS.

dispense with the necessity of complying with the provisions of section 68 of the Evidence Act in order to prove the execution of the document as against other parties in the suit who do not admit such execution. I think that a document must be proved as against them in accordance with the provisions of sections 68, 69 and 71 of the Evidence Act.

I therefore dismiss this appeal with costs.

S. M. *Appeal dismissed.*

APPELLATE CIVIL.

Before Sanderson C.J. and Mookerjee J.

1916

June 8.

MIDNAPUR ZEMINDARY COMPANY, LD.

v.

SECRETARY OF STATE FOR INDIA.*

Court-fee—Suit for declaration that entry in record of rights a nullity, whether one for consequential relief—Specific Relief Act (I of 1877) Ch. VI, s. 42—Bengal Tenancy Act (VIII of 1885) s. 111A—Amendment or rejection of plaint—Civil Procedure Code (Act V of 1908) O. VII, r. 11.—Court Fees Act (VII of 1870) Sch. II, Art. 17, cl. (iii)., s. 7, (iv) cl. (c).

Where a court-fee of rupees ten was paid in a suit purporting to be under section 111A of the Bengal Tenancy Act, but the plaintiffs prayed for a declaration (*a*) that they were occupancy ryots, and (*b*) also that the entry in the record-of-rights showing them as tenure-holders was a nullity; and the plaintiffs on being required to supply the deficit court-fee on the second relief claimed failed to do so within the time fixed by the Court :—

Held, (i) that the second prayer being for a consequential relief was not such a declaration as was contemplated by the proviso to section 111A; (ii) that the learned Judge had no alternative but to reject the plaint; and (iii) that the plaintiffs could not be allowed to amend the plaint by striking

* Appeal from Original Decree, No. 91 of 1915, against the decree of Chandra Bhusan Banerjee, Subordinate Judge of Murshidabad, dated Feb. 3, 1915.