APPELLATE CIVIL.

Before R. C. Mitter J.

HARI NATH GHOSH

v.

NEPAL CHANDRA RAY CHAUDHURI.*

1936

Aug. 18.

Mortgage—Proof by attesting witness, when necessary—Execution, Meaning of—Indian Evidence Act (I of 1872), ss. 68, 69, 70, 71.

Under the proviso to s. 68 of the Indian Evidence Act, 1872, the execution of a document required by law to be attested may be proved without calling any attesting witness in the case of the execution of the said document not being specifically denied or admitted.

The word "execution" in the proviso to s. 68 of the Act not only means signing by the person but also the attestation of his signature by the witness as required by s. 59 of the Transfer of Property Act.

Arjun Chandra Bhadra v. *Kailas Chandra Das* (1) and *Hira Bibi* v. *Ram Hari Lall* (2) followed.

SECOND APPEAL by the plaintiffs.

The material fact of the case and the arguments in the appeal appear sufficiently in the judgment.

Hemendra Chandra Sen and *Suresh Chandra Sen* for the appellants.

Radha Binode Pal and *Hemendra Narayan Bhattacharjya* for the respondents.

Satyendra Nath Mitra for the Deputy Registrar.

R. C. MITTER J. This appeal is on behalf of the sons of one Bihari Lal Ghosh to enforce a mortgage executed in favour of Bihari Lal Ghosh on

*Appeal from Appellate Decree, No. 774 of 1934, against the decree of Jaminee Kishore Ray, Subordinate Judge of Khulna, dated Nov. 21, 1933, modifying the decree of Neelendra Nath Basu, Second Munsif of Bagerhat, dated May 27, 1931.

(1) (1922) 27 C. W. N. 263.

(2) (1925) I. L. R. 5 Pat. 58; L. R. 52 I. A. 362.

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Ashâr 11, 1324 B.S., by three persons Swarna Mayee, Hari Nath Chakrabarti and Panchanan Ray. Swarna Mayee and Hari Nath were dead before the institution of the suit. The original defendant No. 1 Debendra was admittedly the heir of Swarna Mayee. Defendant No. 2 is the daughter of Hari Nath, but whether she is the legal representative of Hari Nath or not is a question raised between the parties to this suit. Defendant No. 3 is Panchanan himself. Defendants Nos. 4 to 12 have been added as parties defendants to the suit on the allegation that the equity of redemption in some of the properties or in some shares of the properties is vested in them by reason of transfers.

Various pleas were taken by the contesting defendants Nos. 3 and 12—one of the pleas being that the money borrowed on the bond has been paid off. This plea has been disbelieved by both the Courts below and the findings of both the Courts below on this point must stand.

There was a point raised that the suit was bad for non-joinder of parties on the ground that all the persons who are interested in the equity of redemption have not been made parties to the suit. On this point the Courts below have taken divergent views. The Court of first instance came to the conclusion that there was no proof that Hari Nath died survived by sons. The lower appellate Court has come to the conclusion that Hari Nath died leaving two minor sons, who died unmarried, and in that view defendant No. 2, the daughter of Hari Nath, would not represent the equity of redemption, because the last two full owners being the sons of Hari Nath, their sister, defendant No. 2, is not their heir.

Another defence raised was that the bond in suit was not properly attested and it cannot operate as a mortgage bond but a mere money bond. On this point the Courts below have also taken divergent views—

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the Court of first instance holding that the attestation has been duly proved and the lower appellate Court holding otherwise.

It is necessary to examine the third point first. The bond which has been produced in this case on the face of it purports to be a mortgage bond and the signatures of some persons appear there as attesting witnesses. In the written statement there is an express denial that the bond was not properly attested. Whether the signature by the three persons —Swarna Mayee, Hari Nath and Panchanan— have been admitted by the defendants the different paragraphs of the written statement are rather ambiguous; some paragraph would imply that the signatures of the three persons appearing on the said bond were admitted by the defendants to be genuine signatures and in other parts of the written statement, especially para. 4, there is a statement that the mortgage bond had not been executed by the mortgagors—the Bengali word used being *sampâdan*. The case proceeded in the Courts below on the footing—which must be the footing on which I must decide this case,—that the defendants admitted the fact of the signing the bond by Swarna Mayee, Hari Nath and Panchanan, but they expressly denied due attestation of the same.

For the purposes of proving the mortgage bond the plaintiffs, however, did not examine any of the attesting witnesses to the bond. The defendants examined one of the attesting witnesses for the purpose of proving positively that the bond was not duly attested. The said attesting witnesses examined on behalf of the defendants stated in Court that the signature of Panchanan was not duly attested. The plaintiffs, however, proved the execution, *i.e.*, the signatures of the mortgagors and the fact of proper attestation by examining persons other than any of the attesting witnesses. The Court below disbelieved the evidence given by the attesting witness examined on behalf of the defendants

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and believed the evidence of these persons who had been examined in support of the plaintiff's case. The Court of first instance took the view that, having regard to the proviso to s. 68 of the Evidence Act, which was added in the year 1926, the plaintiffs were not under the obligation to examine an attesting witness to prove the bond in suit. The lower appellate Court has taken a different view of the said proviso and has held the bond in suit is not a mortgage bond as its attestation by the examination by the plaintiffs of an attesting witness has not been proved. It is necessary in the first instance to examine the scope of the proviso to s. 68 of the Evidence Act.

As I have stated in the earlier part of this judgment, it must be taken that the contesting defendants Nos. 3 and 12 admitted the genuineness of the signatures of Swarna Mayee, Hari Nath and Panchanan on the bond in suit, but they have expressly denied the attestation. The question, under these circumstances, is whether the proviso is attracted to the case. Reading the different sections of the Indian Evidence Act beginning with s. 68 and ending with s. 71, I mean the sections after the amendment of 1926, the following cases are contemplated:—

Where the execution of a document required by law to be attested is admitted by a person the document need not be formally proved by a party as against him. This is s. 70.

Where the execution of such a document is expressly denied the document must be proved by the examination of at least one of the attesting witnesses unless all the attesting witnesses are dead or are not available; and

Where the execution of such a document is neither admitted by a party nor its execution specifically denied, the law requires the proof of the document but in a less formal manner. (This is the case which

is contemplated in the proviso to s. 68.) The document has to be proved in such a case but not necessarily by the examination of an attesting witness. This is my view of the proviso which has been added in 1926 to s. 68 of the Evidence Act. The question, therefore, that arises is what is the meaning of the word "execution" occurring in s. 70 and in the proviso to s. 68. According to well-known principles of construction the said word must be given the same meaning. The interpretation of the word "execution" as occurring in s. 70 has been the subject-matter of decisions of this Court. A very useful one is the decision of Mr. Justice Richardson in the case of *Arjun Chandra Bhadra* v. *Kailas Chandra Das* (1). There a suit had been brought on a mortgage. The defendant, namely, the alleged mortgagor, admitted his signature upon the mortgage bond but he said at the same time that it was not duly attested and so could not have the effect of a mortgage bond. The question that was raised was whether the case came within the provisions of s. 70 of the Evidence Act. In dealing with this question Mr. Justice Richardson explained the significance of the word "execution" in relation to documents which the law requires to be attested. At the bottom of p. 376 and the top of p. 377 of the report he says thus:—

> These provisions in the Evidence Act deal with the method of proof. But the force of the word "execution" has still to be considered and in my opinion no admission of execution is effectual under s. 70 unless it amounts to an acknowledgment of the formal validity of the instrument. What the defendant said in the present case amounts not so much to an admission of execution as a denial of execution.

In Wharton's Law Lexicon the execution of deeds is defined as "the signing, sealing and delivering of "them by the parties as their own acts and deeds in "the presence of witnesses," and a similar explanation is given in regard to the execution of wills.

In the Oxford Dictionary the meaning attributed to the verb "execute" in the present connection is, "to go through the formalities necessary to the

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"validity of (a legal act, *e.g.*, a bequest, agreement "mortgage, *etc.*). Hence to complete or give validity "to (the instrument by which such act is effected) by "performing what the law requires to be done, as "by signing, sealing, *etc.*"

Sealing is not generally speaking necessary in India but the execution of a document must still mean something more than the mere signing by the party. It must certainly include delivery, and I think it also includes signing in the presence of witnesses where witnesses are necessary.

This view receives some support from the decision of the Judicial Committee in the case of *Hira Bibi* v. *Ram Hari Lall* (1). In my judgment, the word "execution" as used in the proviso to s. 68 in the case of a mortgage bond which the law requires to be attested by witnesses means and includes all the series of acts which would give validity to the instrument *qua* mortgage, *i.e.*, the word "execution" used in that section not only means signing by the borrower but the attestation of his signature by the witnesses as required by s. 59 of the Transfer of Property Act. In this case, when defendants Nos. 3 and 12 expressly stated that the document was not attested in accordance with law it must be taken that they expressly denied the execution of the mortgage bond and that denial required the plaintiffs to prove the mortgage bond in the more formal way, *i.e.*, by examining one of the attesting witnesses. In this view of the law it seems to me that the lower appellate Court has taken the correct view that there is no proof of attestation in this case. But I must take into consideration the fact that though the attesting witnesses were available to the plaintiffs they did not examine anyone of them by taking a mistaken view of the proviso to s. 68. It is this circumstance which induces me to give the

(1) (1925) I. L. R. 5 Pat. 58 ; L. R. 52 I. A. 362.

plaintiffs an opportunity to prove the alleged mortgage bond formally by examining one or more attesting witnesses to the bond. To enable them to do so I remand the case to the Court of first instance. If the plaintiffs examine one or more of the attesting witnesses and the Court comes to the conclusion the bond in suit has been duly attested the Court of first instance will take up the question as to whether the suit is bad for non-joinder of parties or not.

For the purposes of considering this point it must be taken that defendant No. 2 is not the legal representative of Hari Nath as is the finding of the lower appellate Court. But the point that must be considered is whether the share in the equity of redemption of Hari Nath in the properties said to have been included in the mortgage security is vested in the other persons who had been made defendants to the suit, namely, defendants Nos. 4 to 12. If they represent the share of the equity of redemption of Hari Nath in all the properties included in the said security the Court would answer the point of non-joinder of parties in favour of the plaintiffs. But if they do not, the Court would hold that the suit is bad as a mortgage suit for non-joinder of parties.

During the pendency of the appeal in the lower appellate Court the heirs of Debendra, defendant No. 1, died and defendant No. 12, who was the appellant in the lower appellate Court, did not substitute the heirs of Debendra. It was not necessary for him to do so because of the position that he took in the appeal that the bond was not a mortgage bond,—not being properly attested.

Now the plaintiffs who were the respondents before the lower appellate Court were under no obligation to substitute the heirs of Debendra. Now that the suit is sent to the Court of first instance I give the plaintiffs an opportunity to add the heirs of Debendra as parties defendants to the suit. As

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soon as the necessary application is made in the Court of first instance by the plaintiffs that application is to be granted, but the plaintiffs must take prompt action in this respect.

The points, therefore, on which I remand the case to the Court of first instance are those I have indicated above, namely, the question about attestation after giving the plaintiffs an opportunity to examine one or more of the attesting witnesses, and secondly the question of non-joinder of parties. All other questions between the parties must be taken as settled by the findings of the lower appellate Court. Each party would bear their respective costs of this Court. The costs of the lower Courts as also the costs to be incurred after remand would follow the result of the suit.

Case remanded.

A. K. D.