

1895

LAKHMI
CHAND
v.
BALLAM
DAS.

their opinion that no application was ever made to execute the attached decree of the attaching creditor. Not only was the application of the 3rd of July 1888 an application to execute the attached decree, but the application was granted. It was objected by the learned vakil for the respondent that the application of the 3rd of July 1888 was defective, inasmuch as it did not give all the particulars required by s. 235 of the Code of Civil Procedure in regard to the attached decree. In my opinion the particulars which the application gives were sufficient, and in any case the judgment-debtor, by neglecting to show any cause against the execution when opportunity was given him, has, I hold, lost his right to rely on any objection of this nature. For the above reasons I decree the appeal with costs in all Courts, and, setting aside the orders of the lower Courts, remand the case under the provisions of s. 562 of the Code of Civil Procedure with directions to readmit the application under its original number in the register and proceed to dispose of it according to law.

Appeal decreed and cause remanded.

Before Mr. Justice Knox and Mr. Justice Burkitt.

MANOHAR SINGH (PLAINTIFF) v. SUMIRTA KUAR (DEFENDANT).*

Burden of proof—Mortgage deed—Recitals in instrument—Act No. III of 1877 (Indian Registration Act), ss. 59, 60—Evidence.

In a suit brought by a mortgagee upon a mortgage by conditional sale for payment of the mortgage-debt or in default for foreclosure, one of the defendants, not being one of the original mortgagees, but a purchaser at auction-sale under a Rent Court decree, resisted the suit and put the plaintiff to proof on the document under which he claimed. *Held* that the mere production of the deed of mortgage which had been thus questioned and the fact that that deed of mortgage contained an endorsement certificate by the Registrar in the usual manner under s. 59 of Act No. III of 1877, were not sufficient to shift the burden of proof on to the defendants.

Recitals in an instrument may be conclusive and are always evidence against the parties who make them, but they are not evidence against third parties. *Brajeshware Peshakar v. Budhanuddi* (1) referred to.

*Second Appeal No. 915 of 1893, from a decree of J. J. McLean, Esq., District Judge of Cawnpore, dated the 15th May 1893, confirming a decree of Saiyid Akbar Husain, Subordinate Judge of Cawnpore, dated the 4th April 1892.

One Manohar Singh brought a suit upon a deed of conditional sale, claiming either payment of the mortgage-debt or foreclosure of the mortgage, against the heirs of the mortgagor and against one Musammata Sumirta Kuar, who had purchased the property claimed at auction-sale under a decree of a Revenue Court, and, as the plaintiff alleged, with knowledge of his (the plaintiff's) mortgage over the property.

1895

 MANOHAR
SINGH.
?.
MUSAMMAT
SUMIRTA
KUAR.

Of the defendants, heirs of the alleged mortgagor, one did not enter an appearance, and the rest confessed judgment. The defendant auction-purchaser, however, filed a written statement in which she pleaded that the plaintiff's deed was executed by the mortgagor, who was a near relation of his, fictitiously and collusively and without consideration. She also objected to the amount of interest claimed.

On these pleadings the Court of first instance (Subordinate Judge of Cawnpore) found that no consideration had passed under the deed sued upon and that the transaction was collusive, and accordingly dismissed the suit as against Musammata Sumirta Kuar.

On appeal the lower appellate Court (District Judge of Cawnpore) agreed with the findings of the Court of first instance as to collusion and absence of consideration and dismissed the appeal.

The plaintiff appealed to the High Court chiefly on the ground that the lower Courts had wrongly placed the burden of proving payment of consideration on the plaintiff.

Pandit *Moti Lal* and Babu *Durga Charan Banerji* for the appellant.

Mr. *T. Conlan* and Pandit *Sundar Lal* for the respondent.

KNOX and BURKITT, JJ.—The sole point which arises for decision in this second appeal is whether the Courts below have erred in law in throwing the burden of proof of actual payment of the mortgage-money on appellant, who was plaintiff.

1895

MANOHAR
SINGH.

v.

SUMIRTA
KUAR.

There is no doubt that if the burden of proof was rightly laid, the findings of fact arrived at by the lower appellate Court are sufficient for the determination of the appeal and cannot be disputed. The respondent was in possession of the property in dispute, having purchased the same under a sale following a decree of a Rent Court dated the 16th of January 1888, the date of the sale being the 20th of August 1891. The appellant sought to recover possession of the same property on a registered deed of mortgage by conditional sale over the same property purporting to have been executed in his favor on the 19th of August 1886. The respondent virtually put the appellant to proof of the document under which he claimed, and what is contended before us is that, upon the mere production by the appellant of the deed of mortgage which had been thus questioned, and on the fact that that deed of mortgage contained an endorsement certificate by the Registrar in the usual manner under the Indian Registration Act, s. 59 the burden of proof had then and there shifted on to the shoulders of the respondent. Precisely the same question was considered in *Brejeshwore Peshakar v. Budhanuddi* (1). We fully concur in the law laid down by the Chief Justice at pages 277 and 278, where he says that in his opinion in that case "the effect of the recital as well as the decision of the Privy Council in *Chowdry Deby Persad v. Chowdry Dowlut Singh* has been misunderstood. A recital in a deed or other instrument is no doubt in some cases conclusive, and in all cases evidence, *as against the parties who make it*, and it is of more or less weight or more or less conclusive against them according to circumstances. It is a statement deliberately made by those parties, which, like any other statement, is always evidence against the persons who make it. But it is no more evidence as against third persons than any other statement would be." To the same effect is s. 60 of Act No. III of 1877 which does not provide that a certificate signed by a Registering Officer shall be considered conclusive proof, but simply provides that it may be admissible for the purpose of proving that the facts mentioned in the endorsement referred to in s. 59 have

(1) I. L. R., 6, Calc., 268.

occurred as therein mentioned. It requires more than this, especially where, as in the present case, the surrounding circumstances were suspicious and not explained.

We dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Aikman.

SETH SHAPURJI NANA BHAI (DECREE-HOLDER) v. SHANKAR DAT DUBE
(OBJECTOR).*

Execution of decree—Civil Procedure Code, s. 234—Application to execute decree against alleged representative of deceased judgment-debtor.

In the case of an application under s. 234 of the Code of Civil Procedure to execute a decree against a person alleged to be the representative of a deceased judgment-debtor it is for the Court which passed the decree to decide whether the person against whom execution is sought is or is not such representative, but it is for the Court executing the decree to decide to what extent such person is liable as such representative. *Srihary Mundul v. Murari Chowdhry* (1).

THE facts of this case sufficiently appear from the judgment of Aikman J.

Munshi *Ram Prasad* and Maulvi *Ghulam Mujtaba* for the appellant.

Pandit *Sundar Lal* and Babu *Kalindi Prasad* for the respondent.

AIKMAN, J.—The appellant in this case got a money decree from the Court of the Subordinate Judge of Aligarh against one Rája Hari Har Dat Dube, a resident of the district of Jaunpur. The judgment-debtor died after the passing of the decree and before execution had been taken out. After his death the decree-holder applied to the Court which passed the decree to send it for execution to the Court of the Subordinate Judge of Jaunpur. In his application he inserted the name of the respondent Raja Shankar Dat Dube, brother, and Musammat Sahodra, widow, of the deceased judgment-

* Second Appeal No. 694 of 1894, from an order of L. G. Evans, Esq., District Judge of Aligarh, dated the 4th April 1894, confirming an order of Babu Mohan Lal, Subordinate Judge of Aligarh, dated the 23rd July 1892.

(1) I. L. R., 13 Calc., 257.

1895

MANOHAR
SINGH
v.
SUMIRTA
KUMAR.

1895
March 6.