APPELLATE CIVIL.

Before Mr. Justice Bisheshwar Nath Srivastava.

1929
September, 18.

BRIJ KISHORE AND ANOTHER (PLAINTIFFS-APPELLANTS) *v.* BENI PERSHAD AND OTHERS (DEFENDANTS-RESPONDENTS).*

Civil Procedure Code (Act V of 1908), Order VI, rule 17—Amendment of plaint—Courts discretion to allow amendment of pleadings—Redemption suit—Defendant denying mortgage in suit and setting up other mortgages—Amendment of plaint claiming redemption of mortgages set up by defendant in the alternative, if permissible—Evidence Act (I of 1872), section 90—Copy of document 30 years old—Presumption of genuineness of documents under section 90 Evidence Act, if applies to copies also.

Where in a suit for redemption the defendant denied the existence of the mortgage set up by the plaintiff and pleaded that he was in possession under some other mortgages and the plaintiff applied for amendment of the plaint by adding an alternative relief for redemption of the mortgages set up by the defendant in case the mortgage set up by him as not proved, *held*, that the Court was justified in allowing the amendment as order VI, rule 17 of the Code of Civil Procedure gives wide discretion to the Court in the matter of the amendment of pleadings. *Sheo Prasad* v. *Lalit Kuar* (1), and *Salik Ram* v. *Ramanand* (2), referred to.

The presumption under section 90 of the Evidence Act with regard to document 30 years old arises in the case of copies as well as originals. If the copy is proved to be a true copy presumption may be made in favour of the genuineness of the original. *P. Subramanya Somayajulu* v. *Y. Seethayya* (3), relied on.

Mr. *Ishuri Prasad*, for the appellants.

Mr. *Haider Husain*, for the respondents.

SRIVASTAVA, J. :— This appeal arises out of a suit for redemption of a mortgage. The plaintiffs' case, as

*Second Civil Appeal No. 184 of 1929, against the decree of Saiyid Khurshed Husain, Subordinate Judge of Hardoi, dated the 3rd of April, 1929, reversing the decree of Thakur Surendra Vikram Singh Munsif, North Hardoi, dated the 22nd of December, 1928.

(1) (1896) I. L. R., 18 All., 403. (2) (1899) 3 O. C., 173.
(3) (1922) I. L. R., 46 Mad., 92.

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originally put forward in the plaint, was that their predecessor-in-interest Pahlwan Singh had, on the 10th of June, 1869, made a mortgage with possession in favour of Moti the predecessor-in-interest of the defendants, for Rs. 99 and they claimed to be entitled to a decree for redemption of the said mortgage. The defendants denied the existence of the mortgage set up by the plaintiffs. They pleaded that they were in possession of the property in suit under two other deeds of mortgage, one for Rs. 32, dated the 6th of September, 1863 (exhibit A1) and the other for Rs. 36-14-0 dated the 21st of October, 1866 (exhibit A2). Both these deeds were executed by Jodhan Singh the predecessor of Pahlwan Singh. The explanation offered by plaintiffs with regard to the two mortgages, exhibits A1 and A2 was that the mortgage deed in suit dated the 10th of June, 1869, was executed in lieu of them and that these earlier deeds had merged in the latter deed. However, in order to be on the safe side they also applied for an amendment of their plaint and asked for permission to add an alternative relief for redemption of the two mortgages set up by the defendants in case the existence of the mortgage deed set up by the plaintiffs was not established. This application for amendment was at first opposed by the defendants but subsequently the opposition was withdrawn and the amendement was made accordingly. The defendants were given an opportunity to meet the alternative case introduced into the pleadings by means of the amendment and they sought to meet it by pleading that the plaintiffs' claim for redemption of the two mortgages, exhibits A1 and A2 was barred by limitation. The plaintiffs answered the plea of limitation by setting up an acknowledgment said to have been made by Moti on the 14th of May, 1869.

The parties went to trial on these pleadings and the learned Munsif found that the plaintiffs had failed to

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prove the existence of the mortgage dated the 10th of June, 1869. He, however, found the alleged acknowledgement by Moti of the two mortgages dated the 6th of September, 1863 and the 21st of October, 1866, established and as a consequence of this finding he gave the plaintiffs a decree for possession by redemption of the two mortgages aforesaid. On appeal the learned Subordinate Judge has reversed the decision of the Munsif and dismissed the plaintiffs' suit. He bases his decision on two grounds, namely, (1) that the Munsif was wrong in allowing amendment and decreeing the claim on the basis of the two mortgages set up by the defendants and (2) that no valid acknowledgment was proved and therefore the claim for redemption in respect of the two mortgage deeds was barred by limitation.

The plaintiffs appellants have come here in second appeal. They impugn the findings of the lower appellate court on both the points mentioned above. As regards the question of amendment I am constrained to say that the view taken by the lower appellate court is astonishing. It is true, as pointed out by the lower appellate court on the authority of *Sheo Prasad* v. *Lalit Kuar* (1) and *Salik Ram* v. *Ramanand* (2), that in a suit for redemption the plaintiff can get a decree only on foot of the mortgage set up by him and if he fails to prove such mortgage he cannot be given a decree for redemption on any other mortgages which might be found to subsist between the parties. But this, in my opinion, affords all the more reason why the plaintiff in such a case should be allowed to amend his plaint if he wishes to do so. Order VI, rule 17 of the Code of Civil Procedure gives wide discretion to the Court in the matter of amendment of pleadings. As pointed out before, the objection raised against the amendment on behalf of the defendants was subsequently withdrawn by them. Under the circumstances I find myself wholly unable to

(1) (1896) I. L. R., 18 All., 403. (2) (1899) 3 O. C., 173.

follow the process of reasoning by which the learned Subordinate Judge came to the conclusion that the trial court was not justified in allowing the amendment. All that Mr. *Hyder Husein*, the learned counsel for the defendants respondents could say in support of the judgment of the lower appellate court was that the amendment was improper as it had the effect of introducing a new cause of action. However, he had to concede that he could not object to such amendment if the relief for redemption of the mortgages was claimed in the alternative. Paragraph 2(*b*) which was added as a result of the amendment clearly shows that the plaintiffs in the first place asked for redemption of the mortgage dated the 10th of June, 1869, and in case the existence of the said mortgage was not proved, then in the alternative, they asked for redemption of the two earlier mortgages set up by the defendants I must therefore accept the contention of the appellants and hold that the learned Subordinate Judge is wrong in questioning the amendment which was made in the trial court.

Next as regards acknowledgment. It is admitted that the present suit was instituted more than sixty years after the execution of the two mortgages, exhibits A1 and A2. The plaintiffs seek to bring their claim within limitation by relying upon an acknowledgment made by the mortgagee Moti on the 14th of May, 1869. The acknowledgment is said to be contained in the plaint of a suit to contest a notice of ejectment which was instituted by Moti in the revenue court. Exhibit 4 is the copy of the said plaint. It appears that one Durga issued a notice of ejectment against Moti alleging him to be a mere tenant. Moti instituted a suit to contest the notice setting up his rights as a mortgagee under the two mortgages in question. Moti was ultimately successful in his suit and the notice of ejectment issued against him was cancelled. The judgment and

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decree passed in the said suit are the defendants' own exhibits A3 and A4 of this case. The plaintiffs produced exhibit 4 which is a certified copy of the aforesaid plaint on the 26th of September, 1928, which was the date fixed for the framing of issues. The trial court on that very day presumed it to be genuine under section 90 of the Indian Evidence Act. The learned Subordinate Judge has held that the genuineness of exhibit 4 could not be presumed because no presumption under section 90 of the Indian Evidence Act can be made in favour of a copy when the original has not been produced before the court. The learned counsel for the defendants respondents laid great stress upon the fact that it was a matter in the discretion of the lower courts whether the genuineness of exhibit 4 should be presumed or not and the lower appellate court having in the exercise of its discretion refused to presume its genuineness, the discretion of the lower appellate court cannot be questioned in second appeal. It might be remarked in passing that obviously the principle emphasised by the learned counsel for the respondents has been violated by the learned Subordinate Judge. It might also be pointed out that the genuineness of the document having been presumed by the trial court on the very date when the document was produced in evidence, there was hardly any occasion for the plaintiffs to summon the original of the document before the court. Under the circumstances, if the view of the lower appellate court, that it was essential for the court to have the original before it in order to enable it to make a presumption under section 90, is correct, the proper course for that court to have adopted would have been to give an opportunity to the plaintiffs to summon the original before the court, rather than to throw out the claim on that ground. However, apart from all these circumstances I am satisfied in the present case that there has been no exercise of discretion by the lower appellate court. The learned Subordinate Judge took

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a certain view of law and held in accordance therewith that no presumption could be raised under section 90 because the original had not been produced before the court. The whole question, therefore, which requires consideration is whether the view of law taken by the learned Subordinate Judge is correct or not. The lower appellate court has never approached the case from the standpoint that if the terms of section 90 permitted the court to presume the genuineness of copy whether the present case was a fit one or not for the raising of such presumption. For these reasons I think that I am free to consider the validity of the view taken by the learned Subordinate Judge in light of the law on the point. The words used in section 90 of the Evidence Act are "when any document . . . is produced." These words as they stand do not confine the application of the section to cases in which the original document is actually before the court. It is admitted by the learned counsel for the defendants respondents that the certified copy of the plaint filed in court was admissible as secondary evidence of the original which formed part of a public record. In my opinion therefore there was nothing in section 90 to prevent the court from making a presumption of the genuineness of the original. If authority were needed I may refer to the full Bench decision of the Madras High Court reported in *P. Subramanya Somayajulu* v. *Y. Seethayya* (1). It will suffice for me to quote the relevant portion of the head note which is as follows:—

> "The presumption under section 90 of Evidence Act with regard to documents 30 years old arises in the case of copies as well as originals. If the copy is proved to be a true copy a presumption may be made in favour of the genuineness of the original."

(1) (1922) I. L. R., 46 Mad., 92.

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I am therefore of opinion that the second ground relied upon by the learned Subordinate Judge is also untenable. Before leaving this part of the case it might be mentioned that the learned counsel for the defendants respondents contended that the lower appellate court was justified in refusing to presume the genuineness of exhibit 4 because there was evidence before it which went to show that Moti was illiterate. This is answered by what I have said before that in my opinion the learned Subordinate Judge has not applied his mind at all as to whether it was a fit case for the exercise of discretion or not. Reference to the illiteracy of Moti was made only in support of the view that it was the duty of the trial court to insist on the production of the original before it.

For the above reasons I allow the appeal, set aside the decision of the lower appellate court and restore that of the trial court. The plaintiffs appellants will get their costs in this Court as well as in the lower appellate court.

Appeal allowed.