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in a Civil Court. Then *Manno Chowdhury* v. *Munshi Chowdhury*(1) amongst others was referred to by their Lordships in *Beas Singh* v. *Baldeo Pathak*(2), and there they distinguished that case on the ground that an injunction had been sought against the defendants restraining them from proceeding before the Collector in respect to a batwara which was being made. That is exactly the case here.

I am satisfied, therefore, that the Civil Court has ample jurisdiction in a matter like this and the view taken by the learned District Judge cannot be supported.

In the result the appeal is allowed, the decree of the learned District Judge set aside, and it is declared that the estate is not liable to partition and that the defendants be restrained by an injunction from proceeding with it.

The plaintiffs appellants will get their costs throughout which we direct must be paid by the major respondents.

ADAMI, J.—I agree.

S. A. K.

Appeal allowed.

APPELLATE CIVIL.

Before Das and Fazl Ali, JJ.

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Jan., 30.

JAMUNA PRASAD SHAH

v.

FAUJDAR SHAHNI.*

Evidence Act, 1872 (Act I of 1872), sections 16 and 21—mortgage bond, recital in, as to receipt of consideration by mortgagor—whether admissible as against subsequent purchaser—want of consideration, onus on purchaser to prove—discretion of court to receive or reject documents filed late

*Appeal from Appellate Decree no. 1340 of 1928, from a decision of H. R. Meredith, Esq., I.C.S., District Judge of Muzaffarpur, dated the 7th June, 1926, confirming a decision of Babu Harihar Charan, Subordinate Judge of Champaran, dated the 7th April, 1925.

(1) (1918) 3 Pat. L. J. 188. (2) (1928) I. L. R. 7 Pat. 510.

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must be exercised when documents filed—Code of Civil Procedure, 1908 (Act V of 1908), Order XIII, rule 2.

A recital in a mortgage bond as to the receipt of the consideration by the mortgagor is admissible as against a subsequent purchaser of the mortgaged property, and, therefore, in a suit based on the mortgage bond, the onus lies on the defendant-purchaser to prove that no consideration has in fact passed.

Brajeswaree Peshakar v. *Budhanuddi*(1), explained.

Krishna Kishor De v. *Sreemati Nagendrabala Chowdhurani*(2) and *Bisheswar Dayal* v. *Harbans Sahay*(3), dissented from.

Although a court has a discretion to receive or to reject documentary evidence filed after the date of the first hearing, the discretion must be exercised when the documents are filed.

Where, therefore, the plaintiff filed certain documents after the date of the first hearing and the court directed the same to be kept on the record,

Held, that the order must be read as an order "receiving" the documents under Order XIII, rule 2, Code of Civil Procedure, 1908, and that the court had no power to reject them subsequently on the ground that they were filed too late.

Durga Prasad Thakur v. *Baswan Pandey*(4), followed.

Appeal by the plaintiff.

The facts of the case material to this report are stated in the judgment of Das, J.

K. P. Jayaswal (with him *Manohar Lal* and *P. C. Mallick*), for the appellant.

S. K. Mitter (with him *Bhagwan Prosad* and *Satyadeo Sahai*), for the respondent.

DAS, J.—This appeal arises out of a suit instituted by the plaintiff to enforce a mortgage bond alleged to have been executed by the defendants first party on the 26th August, 1912. It appears that the

(1) (1881) I. L. R. 6 Cal. 268.
(2) (1920-21) 25 Cal. W. N. 942.
(3) (1907) 6 Cal. L. J. 659.
(4) (1928) 9 Pat. L. T. 317 (323).

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defendants first party conveyed the disputed property to the defendants second party on the 9th August 1917; and the suit was resisted in the Courts below substantially on behalf of the defendants second party.

The plaintiff alleges that there was Rs. 409 due to him from the defendants first party on different transactions and that the mortgage in suit was executed by the defendants first party to satisfy the debt due by them to the plaintiff as also in consideration for a cash advance of Rs. 341. There is an admission in the mortgage bond as to the receipt of the consideration by the defendants first party. The defendants second party, however, denied the genuineness of the mortgage bond and contended that no consideration passed in respect of the transaction. The Courts below have taken the view that having regard to the attitude taken up by the defendants second party the onus was upon the plaintiff to establish that consideration passed in respect of the transaction of the 26th August, 1912. Both the Courts concurrently found that consideration did not pass and in that view dismissed the plaintiff's suit.

The first question which we have to determine in this appeal is whether there was any onus upon the plaintiff to establish the passing of consideration. Now, as I have said, the defendants first party admitted in the mortgage bond that they had received the consideration money from the plaintiff. The defendants second party took a conveyance of the disputed properties from the defendants first party on the 9th August, 1917. It is conceded by Mr. Mitter who appears on behalf of the respondents that so far as the defendants first party are concerned they are bound by their own admission and that, if they contested the plaintiff's suit the onus would be on them to establish that consideration did not pass in respect of the mortgage; but he contends that the defendants second party are in a different position and are in fact strangers to the transaction of the 26th August

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1912; and that, as they deny the genuineness of the transaction, the plaintiff has to establish the reality of it as against them; and in support of his argument Mr. Mitter has relied on *Brajeswaree Peshakar* v. *Budhanuddi*(1), *Krishna Kishor De* v. *Sreemati Nagendrabala Chowdhurani*(2), and *Bisheswar Dayal* v. *Harbans Sahay*(3). Having regard to the authorities some of which at any rate support the argument of Mr. Mitter, it is necessary to deal with the point with care.

As I have said, it is not suggested that the recital in the mortgage bond as to the receipt of the consideration money is not admissible as against defendants first party. Now on what principle can it be urged that it is not equally admissible as against defendants second party who have taken a conveyance of the property from the defendants first party. Section 18 of the Evidence Act provides as follows:

> "Statements made by persons from whom the parties to the suit have derived their interest in the subject-matter of the suit are admissions, if they are made during the continuance of the interest of the persons making the statements."

Now it is quite true that the admission of the defendants first party in the written statement is not admissible as against defendants second party, because it was made after they parted with their interest in the subject-matter of the suit in favour of the defendants second party; but so far as their admissions in the mortgage bond of the 26th August, 1912 are concerned, they obviously stand on a different footing. I think this is clear from section 18 of the Evidence Act, and the relevancy of such admission is clearly provided for in section 21 of the Evidence Act which provides that admissions are relevant, and may be proved as against the person who makes them, or his representative in interest. The defendants second party are clearly the representatives in interest of the defendants first party. If

(1) (1881) I. L. R. 6 Cal. 268. (2) (1920-21) 25 Cal. W. N. 942.
(3) (1907) 6 Cal. L. J. 659.

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there were no authorities on the subject, I should have no hesitation whatever in coming to the conclusion that the statements made by the defendants first party in the mortgage bond of the 26th August, 1912, are admissible as against the defendants second party.

But, as I have said, Mr. Mitter relies on three decisions of the Calcutta High Court. So far as the first decision is concerned, I do not think that it completely supports the argument; and so far as the later decisions are concerned, speaking with the utmost respect, I consider that they have proceeded on the misunderstanding of what was actually decided by Garth, C. J., in the first-mentioned decision. The material question which had to be considered in that case was, whether the unqualified admission of the mortgagor as to the receipt of consideration money was admissible as against the subsequent purchaser for value. The lower appellate court, without reference to the question of onus of proof and on an examination of all the evidence had decided that the mortgage bond which was the subject-matter of the suit was not a bonafide document and that no consideration passed in respect of the same. The case came up before Jackson and McDonell, JJ. and the two learned Judges differed in opinion, Jackson, J., being of the opinion that the recital in the mortgage bond was admissible in evidence as against the contesting defendants, McDonell, J., being of a different opinion. The case was then heard by Garth, C. J. In dealing with the argument which we are now considering that learned Chief Justice said as follows: "In this case, the only way in which, as far as I can see, the recital in the bond could possibly be made evidence against the defendant no. 2, was this: He no doubt claimed under the defendant no. 1, and he claimed the very property which was professedly mortgaged by his vendor, consequently the recital was a statement made with reference to that property by the person under whom he claimed, and therefore it was admissible in evidence as against him."

I stop here for a moment to point out with the utmost respect that the proposition for which the plaintiff contends in this case was put with very great clearness and precision. Is there anything in the subsequent part of the decision to suggest that the Learned Chief Justice rejected the proposition as an unsubstantial one? I think not; for the learned Chief Justice continued as follows: "But then, in a case of this kind, the weight to be attributed to the recital would depend entirely upon the other evidence of the bonafides of the bond. If the plaintiff's evidence did not satisfy the Court that the transaction itself was honest and bonafide, the fact that the parties to the fraud had stated in the bond that the consideration was truly paid would, as it seems to me be entitled to little or to no weight."

As I read the judgment, the learned Chief Justice did not decide the case on a question as to the onus of proof. I read his judgment as indicating that the onus of proof was on the defendants; but in the circumstances of that particular case the weight to be attributed to the recital was very slight. I do not for a moment suggest that the present case cannot be decided in the way in which Sir Richard Garth decided that case. The onus of proof in a case of this kind must primarily be on the defendants; but if the plaintiff goes to the witness box, the defendants may show by the cross-examination of the plaintiff and from other circumstances that the case of the plaintiff is inherently suspicious. Now how much evidence in a particular case would be required to turn the scale is a matter entirely for the Courts of facts. That is a matter with which we are not concerned in this case. Sir Richard Garth was satisfied that the lower appellate Court in that case had dealt with the whole case without reference to the onus of proof and he had no difficulty, in those circumstances, to come to the conclusion that the decision of the lower appellate court was binding on the High Court in Second Appeal.

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But as I read the judgment in this case of the learned Judge in the lower appellate court, the whole case has been decided on the view that the plaintiff failed to establish that consideration passed in respect of the transaction which is the subject-matter of the suit. The learned District Judge considered that the learned Subordinate Judge was right in placing the onus upon the plaintiff. Having expressed this opinion, he proceeded to say as follows: "The oral evidence must be considered *in regard to this matter of onus*; and, having carefully considered the entire evidence *in the light of that consideration*, I am not prepared to differ from the learned Subordinate Judge."

It seems to me therefore that the whole decision of the learned Judge in the Court of appeal below rests upon his view as to the onus of proof.

I now come to the subsequent decision upon which Mr. Mitter relies, *Krishna Kishore De* v. *Sreemati Nagendrabala Chowdhurani*(1) which of course is entitled to the highest respect. In deciding that case, the learned Judges said as follows: "If an action to enforce a mortgage security is contested by the mortgagor and execution is admitted by or proved against him, the onus lies upon him to prove that the recital as to the payment of consideration for the deed which he executed is untrue * * * * When, however, the claim is contested by a stranger who denies that the bond was executed and also asserts that there was no consideration for the mortgage, the onus is upon the mortgagee to prove his case."

Stopping here for a moment, I may point out that no exception can be taken to the statement of law as propounded in the passage which I have just quoted. The question however is, whether a subsequent purchaser for value can be regarded as a stranger. In

(1) (1920-21) 25 Cal. W. N. 942.

my opinion section 18 of the Evidence Act read with section 21 makes it perfectly clear that the subsequent purchaser is not a stranger but a privy. The learned Judge then proceeds to say as follows: "This position may be fortified by reference to a long line of decisions" and amongst the decisions to which the learned Judge refers is the decision of Garth, C. J., to which I have already referred. I may mention that the decision of Garth, C. J., is not an authority for the proposition that a recital in the mortgage bond as to the receipt of consideration money by the mortgagor is not admissible in evidence against a subsequent purchaser for value.

The last of the cases relied upon by Mr. Mitter substantially adopts the view taken in *Krishna Kishor De* v. *Sreemati Nagendrabala Chowdhurani*(1). As I have said, these decisions are entitled to the greatest weight; but they are not binding on this Court. Having regard to what Sir Richard Garth himself stated in the earliest of these cases and having regard to section 18 and section 21 of the Evidence Act, I am clearly of opinion that a recital in a mortgage bond as to the receipt of the consideration by the mortgagor is admissible as against a subsequent purchaser. It was therefore admissible as against defendants second party and the Courts below should have considered the whole case from the point of view that the initial onus was upon the defendants second party.

There is, however, no mystery in the term 'onus'. The onus may be upon the defendants; and yet the defendants may by cross-examination of the plaintiffs extract such admissions that the Court may well come to the conclusion that the transaction upon which the plaintiff relies is inherently improbable. It is not possible to lay down any general rule on this point, nor is it desirable that we should do so; but, if I were satisfied that the Courts below dealt with the

(1) (1920-21) 25 Cal. W. N. 942.

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case fairly without reference to the question of onus of proof, I should have hesitated before interfering with the decision in this case.

But now arises a point which is of some importance. It is recited in the mortgage bond that Rs. 341 was received in cash by the defendants first party. It was admitted on behalf of the plaintiff that the money was not paid before registration but was paid after registration, that is to say, after execution of the document. Now this illustrates what I mean by saying that the plaintiff by his own admission in the witness box may help the defendant in the matter of the onus. It is obvious therefore that the plaintiff cannot succeed so far as the sum of Rs. 341 is concerned; and this portion of the claim must fail unless the books of account which the plaintiff will have liberty to produce before the Courts below should help him in any way. As regards the sum of Rs. 409 it is obvious that the Courts below must consider the whole case in the light of the observations in this judgment.

But one point remains: it appears that the account books tendered by the plaintiff were rejected by the Court of first instance. Now the facts are these. The suit was filed on the 21st July, 1924. The plaintiff was directed to file his books of account on or before the 16th November, 1924. I may point out that the issues were settled on the 12th January, 1925; but the plaintiff was as a matter of fact directed to file the books of account before the settlement of issues. He failed to file his books on the date fixed, but he actually made an application on the 3rd February, 1925, that is to say, within a few days of the settlement of issues for liberty to file the books. The learned Subordinate Judge passed an order directing that the books be kept on the record. The trial commenced on the 30th March, 1925, and when the plaintiff tendered the books of account, they were rejected by the learned Subordinate Judge on the

ground that they were filed too late. In my opinion, the course adopted by the learned Subordinate Judge was not a proper one. It may be pointed out that he himself allowed the defendants to file certain documents on the 12th February, 1925, and I can see no reason why he should have accorded this preferential treatment to the defendants. But in truth the question is decided by reference to the relevant provisions in the Code of Civil Procedure. I have dealt with the point at very great length in various cases, some of which are reported and I respectfully draw the attention of the learned Subordinate Judge to a decision of this Court in *Durga Prosad Thakur* v. *Baswan Pandey*(1). My view is this. The Court has a discretion to receive documentary evidence if filed after the date of the first hearing of the suit, although it has equally a discretion to reject those documents. But the Court must exercise the discretion when the party files those documents. It was open to the learned Subordinate Judge on the 3rd February, 1925, to refuse to receive the documents; but on the contrary he passed an order directing that they should be kept in the record. That order must be read as an order "receiving" the documents under Order XIII, rule 2, of the Code. It was of course open to the Court afterwards to reject them on the ground that they were not relevant documents or to refuse to act upon them on the ground that they were not genuine. But the discretion to be exercised by the Court under Order XII, rule 2, of the Code is exercised and properly exercised when the documentary evidence is sought to be filed by a party. In my opinion in the circumstances of the case there is no reason why the plaintiff should not be allowed to tender the documentary evidence, especially as the learned Subordinate Judge had no hesitation whatever in receiving the documentary evidence filed by the defendants nine days after those filed by the plaintiff.

(1) (1928) 9 Pat. L. T. 317 (323).

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I would allow the appeal, set aside the judgments and the decrees passed by the Courts below and remand the case to the lower appellate Court with direction that it should remand the case to the Court of first instance. The plaintiff will have liberty now of tendering the documentary evidence which was filed by him on the 3rd February, 1925. It is understood that he will not be at liberty to tender in evidence any other documentary evidence. It will be open to the learned Subordinate Judge to consider the books of account; but how he will regard them it is not for us to say in this Court. It will also be open to the defendants second party to tender such evidence in rebuttal of the documentary evidence which may be tendered by the plaintiff as the defendants second party may be advised. Costs will abide the result and will be disposed of by the lower appellate Court.

FAZL ALI, J.—I agree.

Case remanded.

S. A. K.

APPELLATE CIVIL.

Before Adami and Chatterji, JJ.

1929.

JAGANNATH MARWARI

v.

KALIDAS.*

Jan., 31.
Feb., 1, 5.

Limitation Act, 1908 (*Act IX of* 1908), *section* 24 *and Schedule* 1, *articles* 36, 115 *and* 120—*suit for damages for malfeasance or misfeasance—liability ex-delicto or ex-contractu—proper article applicable—section* 24, *scope of—terminus a quo.*

*Appeal from Appellate Decree no. 309 of 1926, from a decision of J. A. Saunders, Esq., I.C.S., District Judge of Manbhum, dated the 17th December, 1925, reversing a decision of Babu Brajendra Prasad, Subordinate Judge of Dhanbad, dated the 30th July, 1924.