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The third point is this. Assuming that the right to buy back this land had become vested in the lady, who was the mother of the original seller, she parted with her right to a third person. This third person divided or purported to divide the right into two portions, and he sold each of these portions to a different person. It seems to me very difficult to conclude that by assigning or selling a portion of this right he was in fact assigning or selling anything whatever. The purchaser of half the right seems to me to have bought nothing. In this particular suit we have the two purchasers of the halves of the right joining together as plaintiffs. Whether by so doing they could overcome the difficulty which I have suggested is a point which arises in the case, but it is a point which we need not determine, because the case is decided against the plaintiffs on other grounds.

I agree that the suit should be dismissed as suggested by my learned brother.

Decree reversed.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Heaton.

1918. January 17.

LAKHICHAND CHATRABHUJ MARWADI (ORIGINAL PLAINTIFF), APPELLANT v. LALCHAND GANPAT PATIL AND OTHERS (ORIGINAL DEFENDANTS) RESPONDENTS.*

Indian Evidence Act (I of 1872), section 58—Fact admitted need not be proved—Defendant's admission of signature to a bond—Proof of the bond—Inference from facts which are not evidence—Inference not according to law—Error of law—Interference by High Court on second appeal.

The plaintiff having sued on a mortgage, the sons of the mortgagor, some of whom were minors, denied all knowledge of the mortgage. One of the sons

* Second appeal No. 938 of 1916.

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(defendants) who had attained majority, when examined as a witness, admitted that the signature to the mortgage deed was his father's. At an adjourned date of hearing, the plaintiff was absent on account of illness and his witnesses also were not present. The Court declined to grant any further adjournment, and dismissed the suit holding that the mortgage deed was not proved. The Court also inferred from the mere fact that the plaintiff delayed bringing his suit until almost the last day allowed him by the law of limitation that he must have been receiving interest all that time at the rate stipulated for in the deed, and on that calculation it reached the conclusion that the debt had been fully satisfied. The plaintiff having appealed,

Held, that as far as the defendant who had admitted the signature was concerned, his admission would, under section 58 of the Indian Evidence Act, 1872, relieve the plaintiff of any further responsibility of proving the document.

Held, further, that the inference in question was one not drawn from any evidence, and the drawing of it was an error of law, which could be rectified in second appeal.

SECOND appeal from the decision of C. C. Dutt, Assistant Judge at Dhulia, confirming the decree passed by N. G. Chapekar, Subordinate Judge at Dhulia.

Suit on a mortgage.

The plaintiff sued on a mortgage passed in 1902 by Ganpat, the father of the defendants. Three of the defendants had attained majority: the rest were minors. The defendants pleaded that they had no knowledge of the mortgage. Defendant No. 1 (one of the sons who had attained majority) was examined as a witness in the case, where he admitted that the signature to the deed of mortgage was his father's. At an adjourned date of hearing the plaintiff was absent on account of illness, and his witnesses to prove the deed were not present. The plaintiff's pleader applied to the Court for a further adjournment; but the Court declined to grant it and dismissed the suit, on the following grounds:—

The rate of interest stipulated was Rs. 24. The interest on Rs. 500 at this rate would come to 120 every year.

I presume that the mortgagor was paying the interest. The document was passed in 1902. It is not unfair to assume that the mortgagee would never

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have remained silent if he had not received anything for a period of twelve years. The mortgagor has died only very recently. Let us then presume that the mortgagor was paying annually Rs. 120.

In less than five years the whole debt becomes discharged, and nothing remains due. In justification of the inference I have drawn, I rely upon *Bihari* v. *Ram Chandra*, (1911) I. L. R. 33 All. 483. I further desire to draw attention to the remarks of the Judges at page 374 in the case of *Balkaran Upadhya* v. *Gaya Din Kalwar*, (1914) I. L. R. 36 All. 370.

But the mortgage deed is not proved. The defendants have no knowledge. Defendant No. 1 recognizes the signature on the deed sued upon as that of his father. It is doubtful if this statement can dispense with the necessity of proving the document by citing an attesting witness. If the statement can amount to an admission of the mortgage then only the document need not be regularly and formally proved against the defendants except Nos. 2 and 3. As against the latter there is no evidence whatever.

Mr. Velhankar to-day applied for an adjournment to enable him to produce the writer. But the writer even if examined would not improve matters.

The plaintiff too is absent to-day. It is said he is ill. I do not believe it.

On appeal, the Assistant Judge came to the same conclusion for reasons which were stated as follows:—

Mr. Velhankar's first ground is that the lower Court should have granted him a short adjournment. I do not see why. In his application plaintiff stated that he was ill as well as his witness the writer of the deed. There was neither a medical certificate nor any affidavit to prove that there was any illness. Under the circumstances the lower Court was quite right in not believing the story.

Mr. Velhankar's next point is that even on the evidence, as it is, the mortgage deed is proved against defendant No. 1 and the minor defendants (Nos. 4 to 7) whose guardian he is. I do not agree. Defendant No. 1 recognises his deceased father's signature on the mortgage deed. This is all the evidence there is. Merely on this the mortgage cannot be held proved. Mr. Velhankar's contention that there is no specific denial of the transaction in the written statement has no force as the mortgagor himself is dead and his sons can only say that they are not aware of the mortgage. They can hardly give a straight denial. I think, merely on the recognition by defendant No. 1 of his father's signature on the deed, the deed cannot be held proved against him and the minors.

Even if the bond be held proved, I agree with the learned Subordinate Judge that the debt is satisfied.

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The mortgage deed in suit was passed in 1902, i.e., over twelve years before date of suit. The lower Court presumed that the mortgagee sat silent so long merely because he was getting the interest as stipulated in the bond in suit, viz., 120 rupees a year. I think the lower Court's presumption is justified by the cases of *Bihari* v. *Ram Chandra*, (1911) I. L. R. 33 All. 483 and *Balkaran Upadhya* v. *Gaya Din Kalwar*, (1914) I. L. R. 36 All. 370 (remarks at p. 374).

The plaintiff appealed to the High Court.

D. C. Virkar, for the appellant :—Section 58 of the Indian Evidence Act, 1872, relieved the plaintiff from the necessity of proving the deed as soon as defendant No. 1 admitted the signature on the same. The present suit was brought almost on the last day allowed by the law of limitation : but this circumstance does not justify the inference, which the lower Court has drawn, that the plaintiff must be presumed to have received interest all the time. The cases of *Bihari* v. *Ram Chandra*[1] and *Balkaran Upadhya* v. *Gaya Din Kalwar*[2] do not apply.

H. B. Gumaste, for the respondent :—The questions whether the deed is proved, and whether it is satisfied are questions of fact which cannot be gone into in second appeal. The Allahabad cases are decisive of the question raised in this appeal.

Virkar, in reply.

BEAMAN, J. :—This is a very unsatisfactory case. The plaintiff sued on a mortgage. There were seven defendants, of whom four were minors, all members of a joint Hindu family. The eldest defendant professes to know his father's handwriting. The father was the mortgagor. This defendant, being examined and shown the mortgage deed, said that the signature was his father's. As far as he was concerned, this admission, in our opinion, would, under section 58 of the Indian Evidence Act, relieve the plaintiff of any further responsibility of proving the document. But the decision

[1] (1911) 33 All. 483. [2] (1914) 36 All. 370.

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is not so clear as regards the remaining six defendants. The plaintiff in fact did intend to produce the attesting witnesses, and there was, as far as we can see, no culpable delay on his part, but on the day fixed for the hearing he said that he was ill and his witnesses were not present. Both the Courts declined to grant him any further time, and, therefore, they held that he had failed to prove the mortgage deed. That finding, in our opinion, must be wrong against defendant No. 1 at any rate. It is to be remembered that these defendants plead that they know nothing of the mortgage transaction. They do not deny that it may have taken place, nor do they anywhere allege payment. Nevertheless both the Courts have inferred from the mere fact that the plaintiff delayed bringing his suit until almost the last day allowed him by the law of limitation that he must have been receiving interest all that time at the rate stipulated for in the deed, and on that calculation they have reached the conclusion that the debt has been fully satisfied. Both the Courts refer to two decisions of the Allahabad High Court, *Bihari* v. *Ram Chandra*[1] and *Balkaran Upadhya* v. *Gaya Din Kalwar*[2]. But without commenting upon those cases it is clear that an inference of the kind we have just mentioned is not one which can be supported by any authority. It is in effect an inference not drawn from any evidence. It could not have been drawn from any evidence because payment was not alleged and no enquiry was made upon the point. Drawing inferences of this kind from matters not in evidence before the Court is well-settled to be an error of law. We feel no difficulty, therefore, in neglecting these concurrent findings of the two Courts below which otherwise would no doubt conclude the case. The result is that at present in our opinion there has been no trial at all.

[1] (1911) 33 All. 483. [2] (1914) 36 All. 370.

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We feel, therefore, that we must reverse the decrees of the Courts below and remand the case for a proper trial upon the merits. Costs will abide the final result.

HEATON, J. :—I concur.

Decree reversed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Heaton.

1918. *January* 21.

BAPUJI NARAYAN CHITNIS AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS *v.* BHAGWANT BALWANT CHITNIS AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS*.

Ejectment suit—Onus of proof—Proof of title.

Where in a suit in ejectment, the plaintiff fails to prove title, but succeeds in proving that he was in possession of the lands in dispute for a brief period within twelve years of suit, the onus of proving title is not thereby shifted to the defendant.

SECOND appeal from the decision of G. K. Kale, Assistant Judge, A. P., at Satara, confirming the decree passed by H. N. Mehta, Joint Subordinate Judge at ampur.

Ejectment suit.

The plaintiffs sued to recover possession of certain lands from the defendants. From 1881 down to 1898, the defendants had been in possession of the lands; but the plaintiffs went into possession in 1898 and retained it till 1907, when they were ousted by the defendants. The present suit was instituted in 1911.

In the suit, the plaintiffs failed to establish their title to the lands; but they maintained that as they had been in possession of the lands within 12 years of suit, the burden of proving title to the lands was thereby thrown on the defendants.

*Second Appeal No. 1068 of 1916.