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APPELLATE
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32 C. 719=1
C. L. J.
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where Article 116 was applied to a suit brought against the representatives of a deceased agent for the recovery of certain sums alleged to have been received and misappropriated by the agent; the suit was not for an account strictly so called, but rather for the recovery of specific sums of money and was treated as one for compensation for breach of a contract [728] in writing and registered. A similar view was taken in the case of *Mati Lal Bose v. Amin Chand Chattopadhyaya*, (1) although the learned Judges, who decided it, made some observations as to the applicability of Article 89, which were not necessary for the purposes of the decision, and which are, perhaps, not quite in harmony with the cases I have already mentioned.

The result therefore is that the view taken by the learned Subordinate Judge is correct, and this appeal must be dismissed with costs.

Appeal dismissed.

32 C. 729 (=9 C. W. N. 697.)

[729] APPELLATE CIVIL.

*Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and
Mr. Justice Mitra.*

PRAN NATH SARKAR v. JADU NATH SAHA.*

[12th April, 1905.]

Mortgage—Attestation, absence of—Charge—Transfer of Property Act (IV of 1882), ss. 58, 59, 100.

Where a transaction evidenced by a document was a mortgage as defined by s. 58 of the Transfer of Property Act, but the document was not attested by two witnesses as required by s. 59 of the Act:

Held, that it did not operate as a charge under s. 100 of the Act.

Rani Kumari Bibi v. Sri Nath Roy (2) and the observations of Banerjee in *Tofaluddi Peada v. Mahar Ali Shah* (3) approved.

[Fol. 83 Cal. 985=4 C. L. J. 219; Ref. 85 Cal. 837=12 C. W. N. 849=7 C. L. J. 492; 14 Bom. L. R. 115; 15 I. C. 665=16 C. W. N. 1075.]

SECOND APPEAL by the plaintiff Pran Nath Sarkar.

Plaintiff brought this suit to enforce a registered mortgage bond executed in his favour by the father of the defendant, Jadu Nath Saha. The defendant alleged that there was no consideration for the mortgage bond, and that it was executed by his father as a *benami* transaction. The date of payment stated in the bond was in the month of Baisakh 1299 (April-May, 1892); the suit was instituted in the year 1901.

The Munsif, who tried the suit, framed two issues for trial:

(i) Whether the mortgage bond set up by the plaintiff is a *benami* transaction.

(ii) Whether the requirements of s. 59 of the Transfer of Property Act, were complied with.

He decided the first issue in favour of the plaintiff, but, deciding the second issue against him, dismissed the suit. On appeal [730] by the plaintiff, the Subordinate Judge held that the mortgage bond

* Appeal from Appellate Decree No. 1273 of 1903, against the decree of Kali Kumar Bose, Subordinate Judge of 24-Pergunnahs, dated the 16th March 1903, affirming the decree of Kali Pada Mukherjee, Munsif of Sealdah, dated the 28th of February 1902.

(1) (1901) 1 C. L. J. 211.
(2) (1892) 1 C. W. N. 81.

(3) (1898) I. L. R. 26 Cal. 78.

was not attested by at least two witnesses as required by s. 59 of the Transfer of Property Act ; he therefore dismissed the appeal.

The plaintiff appealed to the High Court.

Babu Mahendra Nath Roy (Babu Krishna Prashad Survadhicary with him), for the appellant. Having regard to s. 70 of the Evidence Act, when the bond is admitted, non-attestation would not invalidate it. But if it is not a valid mortgage, may it not be a charge. *Rani Kumari Bibi v. Sri Nath Roy* (1) is against me. The document makes the property security for the money, but the transaction did not amount to a mortgage for want of attestation. It therefore amounts to a charge. In the third edition of Brown and Shephard's Transfer of Property Act the learned Commentators expressed this view, p. 197. If attestation is not matter of proof merely, but an element necessary to constitute a mortgage, the transaction in this case would not amount to a mortgage, and in that case it would be a charge—s. 100, Transfer of Property Act : if the transaction amounted to a mortgage notwithstanding the absence of attestation, then attestation becomes only a matter of proof. By act of parties in this case land was made security for a debt, but on account of non-attestation the transaction did not amount to a mortgage. The case therefore comes within s. 100. *Rani Kumari Bibi v. Sri Nath Roy* (1) was wrongly decided ; the observations of Banerjee, J. in *Tofabuddi Peala v. Mahar Ali Shaha* (2) at p. 81 are also against me.

[MACLEAN, C. J. Why is this not a mortgage within the meaning of section 58 ?]

If it is a mortgage in spite of the fact that it is not attested, attestation would only be matter of proof, which in the present case would be dispensed with as execution is admitted. I rely on the principle of equity that effect should be given to a deed so far as possible. Ashburner's Principles of Equity, p. 356 ; *Sonatun Shaha v. Dino Nath Shaha* (3) where an unregistered and unattested mortgage bond was given effect to as a simple money bond.

[731] Babu Charu Chandra Dey for the respondent. Section 70 of the Evidence Act dispenses with proof of execution, it does not dispense with proof of attestation : *Jogendra Nath Mukhopadhyaya v. Nitai Churn Bundo-padya* (4). As to whether it is a charge or not all the cases are in my favour—*Ghose's Law of Mortgage*, p. 199.

Babu Mahendra Nath Roy, in reply.

MACLEAN, C. J. This is a suit upon a mortgage bond. The question is whether the provisions of section 59 of the Transfer of Property Act have been sufficiently complied with so as to make the mortgage an effectual one. It is contended for the defendant, who executed the mortgage that, inasmuch as the document was not attested by two witnesses, it is not an effectual mortgage. The question whether it was so attested or not is a question of fact. The finding of the Subordinate Judge is that one of the so-called witnesses, Kedar Nath Chuckerverti, signed the mortgage bond before it was signed by the executant, and apparently not in his presence, and that the mortgage bond was written out at the house of the plaintiff, where the defendant did not go to execute it, and further, that the defendant, Jadunath Saha, who was the other attesting witness, signed the document as an attesting witness at the house of the plaintiff before it was signed by the mortgagor. Upon these findings it would be difficult to hold

(1) (1896) 1 C. W. N. 81.

(2) (1898) I. L. R. 26 Cal. 78.

(3) (1898) I. L. R. 26 Cal. 222.

(4) (1908) 7 C. W. N. 384.

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APRIL 12. that the mortgage was duly attested within the meaning of section 59 of the Transfer of Property Act.

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We have been referred to the case of *Ramji Hari Bahi v. Bai Parvati* (1). The facts in that case were quite different from those in the present, and therefore, it is unnecessary to say whether or not we agree with it. There it was apparently held that, by analogy to section 50 of the Indian Succession Act, the language of which, however, is quite different from that of section 59 of the Transfer of Property Act, the mortgage was sufficiently attested if, after it had been executed by the mortgagor, the mortgagor admitted his signature in the presence of the attesting witnesses who then signed as witnesses. We have not that state of facts in [732] the present case; nor need we consider the cases of *Girindra Nath Mukerjee v. Bejoy Gopal Mukerjee* (2) and *Abdul Karim v. Salimun* (3) which do not appear to be in point.

But then it is said that, even if it be not a good mortgage, it operates as a good charge under section 100 of the Act.

Section 100 of the Act says:—"Where immovable property of one person is by Act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property." What we have to consider then is whether the present transaction amounted to a mortgage. The expression "amount to a mortgage" in section 100 means such a mortgage as is defined by section 58 of the Act, and, although we have not had the advantage of seeing the mortgage bond, it has not been suggested that it was not a transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced by way of loan, so as to bring it within the definition of a mortgage in that section. If we were to assent to the argument of the appellant that, though coming within the definition of section 58, it does not amount to a mortgage by reason of the fact that the requirements of section 59 have not been complied with, we might as well strike the latter section out of the Act, for, if the transaction is bad as a mortgage, because the document was not registered and attested as required by section 59, but still good as a charge under section 100, the owner of that charge can afford to disregard section 59 altogether, for he would be amply protected under section 100. We do not think the Legislature could have intended this, nor does its language warrant such a conclusion. The above view gains support from the case of *Rani Kumari Bibi v. Srinath Roy* (4) and from the observations of Mr. Justice Banerjee in the case of *Tofaluddi Peada v. Mahar Ali Shaha* (5). The appeal must be dismissed with costs.

MITRA, J. I am of the same opinion. I would only add that I have perused the mortgage bond, which is in the vernacular. [733] It is a simple mortgage within the provisions of section 58 of the Transfer of Property Act. Section 100 of that Act, therefore, cannot apply.

Appeal dismissed.

(1) (1902) I. L. R. 27 Bom. 91.
(2) (1898) I. L. R. 26 Cal. 246.
(3) (1899) I. L. R. 27 Cal. 190.

(4) (1896) 1 C. W. N. 81.
(5) (1898) I. L. R. 26 Cal. 78 at p. 81.