

1952
 SAKHARAM
 JIVAJI
 v.
 PANDURANG
 RAGHU-
 NATH

*Gajendra-
 gadkar J.*

I, therefore, hold that the plaintiffs, who were in possession of the lands as permanent tenants prior to the execution of the mortgages in suit, have no interest in the property mortgaged or in the right to redeem the same. Therefore, in my opinion, the lower appellate Court was right in dismissing their claim for redemption on this preliminary ground.

The present suit is defective for another reason also. Even if the plaintiffs had the right to sue for redemption under s. 91 of the Transfer of Property Act the mortgagor or his heirs and legal representatives would be necessary parties to the suit under O. XXXIV, r. 1. It is true that the mortgagor's line has become extinct; but that would mean the mortgagor's estate has escheated to the Crown; and as such, the present suit would be incompetent without the State being on the record. This point has not been taken in the Courts below; but it is a point of law which clearly arises on the plaint as it is filed. But as I have already held, the plaintiffs are not entitled to sue in redemption under s. 91. Therefore, the appeal fails and must be dismissed with costs.

Appeal dismissed.

M. W. P.

APPELLATE CIVIL

Before Mr. Justice Dixit.

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 Oct. 14

MAHAMAD SAHEB NABISAHEB ISMAIL MAGDUM (ORIGINAL PLAINTIFF), APPELLANT *v.* KAMAL *alias* BAPU SHIRAJSAHEB AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Indian Evidence Act (I of 1872), ss. 65, 68, 90—Presumption as to ancient document—Document required by law to be attested—Whether presumption regarding due attestation can be raised on certified copy—Indian Registration Act (XVI of 1908) ss. 58, 59, 60—Effect of.

In 1895 the predecessors-in-title of the plaintiff executed a deed of mortgage in favour of the predecessors-in-title of the defendants. In 1946 the plaintiff filed a suit for accounts under s. 15D of the Dekkhan Agriculturists' Relief Act, 1879, and prayed for redemption. The original deed was not forthcoming but as it was registered, a certified copy was produced by the plaintiff. On the question whether the presumption under s. 90 of the Indian Evidence Act, 1872, as to due execution and attestation of a document would apply to the certified copy of a document,

* Second Appeal Nos. 1004 and 1005 of 1949.

Held, that even assuming that the presumption under s. 90 could be raised as to its due execution in the case of a certified copy of a document which is registered and which bears the Sub-Registrar's endorsement as to proper execution, such a presumption could not be raised in relation to its attestation.

Vithoba Savlaram v. Shrihari,⁽¹⁾ and *Basant Singh v. Brijraj Saran Singh*,⁽²⁾ relied upon.

Pandappa Mahalingappa v. Shivalingappa,⁽³⁾ distinguished.

Second Appeal from the decision of V. R. Paralkar, Assistant Judge, Belgaum reversing the decision of N. S. Metrani, Civil Judge, J. D., at Athni.

The facts are set out in the judgment.

G. R. Madbhavi, for the appellants.

T. S. Jahagirdar, for respondents Nos. 1, 2, 8 to 10, 13 and 15.

DIXIT J. These two appeals raise a pure question of law which is whether the presumption raised by s. 90 of the Indian Evidence Act as to due execution and attestation of a document will apply to a certified copy of a document required to be executed and attested. The facts of the two cases in which this question arises are simple.

The property in suit No. 90 of 1946 out of which S. A. No. 1004 of 1946 arises consists of Survey Nos. 61/1, 80/24, 484/3, 478/3 and 616/9 situate at Kudchi in the Belgaum District.

The property in suit No. 91 of 1946 out of which S. A. No. 1006 of 1949 arises consists of survey Nos. 61/2, 80/25, 484/3 and 615/9. The suit property in the two suits originally belonged to the family of the plaintiffs.

On June 12, 1895, the predecessor-in-title of the plaintiffs executed in favour of the predecessors-in-title of the defendants a simple mortgage in order to secure a sum of Rs. 250-5-0. The mortgage deed is Ex. 59 in the case. On the same day viz. on June 12, 1895, the predecessors-in-title of the plaintiffs executed in favour of the predecessors-in-title of the defendants a simple mortgage in order to secure the same sum of rupees viz. Rs. 250-5-0. The mortgage deed is Ex. 57 in the case.

On July 8, 1946, the plaintiffs filed the aforesaid suits for accounts under s. 15D of the Dekkhan Agriculturists' Relief Act and they prayed for redemption. In support of their

⁽¹⁾ (1944) 47 Bom. L. R. 116.

⁽²⁾ (1935) 37 Bom. L. R. 805.

⁽³⁾ (1943) 47 Bom. L. R. 962.

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claim, the plaintiffs in the two suits were unable to file the original mortgage deeds, but, instead, they produced only certified copies thereof.

Various contentions were taken by the defendants, one of which need be stated in the course of this judgment and that contention was that it was not true that the original mortgage deeds were with the defendants and that the predecessor-in-title of the defendants were the mortgagees, nor had they taken any mortgage deeds from the predecessors-in-title of the plaintiffs.

It appears that the parties to these deeds are all dead. The writer, the attesting witnesses and the identifying witnesses are all dead. The plaintiffs had no personal knowledge regarding the two transactions. Since the defendants denied that the original documents were with them, the trial Court allowed certified copies to be produced under the provisions of ss. 65 and 66 of the Indian Evidence Act and it was conceded on behalf of the defendants that the certified copies were admissible in evidence. However, since the defendants denied the execution of the documents by the mortgagors, the mortgage deeds had to be proved. That means that the execution of the mortgage deeds had to be proved and the due attestation of the mortgage deeds had also to be proved.

Under these circumstances the question before the lower Courts was whether the presumption arising under s. 90 of the Indian Evidence Act could be raised in favour of the plaintiffs.

The trial court took the view that such a presumption could be raised under s. 90 of the Indian Evidence Act and so, that court gave the plaintiffs in both the suits the decrees as set out in the orders.

From the decrees made in the two suits the defendants appealed in the District Court, Belgaum, and the learned Assistant Judge reversed the decree of the trial Court and dismissed the plaintiffs' suits. From the appellate decrees the original plaintiffs have come up in second appeal.

Since the two appeals raise a common question of law, it will be convenient to dispose of the two appeals by a common judgment. Mr. Madbhavi who appears for the plaintiffs in each appeal contends that the lower appellate Court was

wrong in holding in each case that the presumption under s. 90 could not be raised in this case. In order to appreciate this contention it is necessary to reproduce a part of s. 90. So far as material, it runs as follows:—

“Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person’s handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.”

Now, the presumption raised by s. 90 applies to the original document. But it is contended that the presumption can be raised even in respect of a certified copy. That the presumption under s. 90 can be raised in favour of the original document only is established by authority. That authority is to be found in a judgment of this court reported in the case of *Vithoba Savlaram v. Shrihari*⁽¹⁾. It is enough, I think, to quote the head-note in that case:

“The statutory presumption permitted by s. 90 of the Indian Evidence Act, 1872, can be raised only with regard to the original document if produced to the Court. It does not apply to a certified copy when the original document is not before the Court.”

The judgment was delivered by Mr. Justice Chagla, as he then was, and he relied, in support of his view upon a decision of their Lordships of the Privy Council reported in the case of *Basant Singh v. Brijraj Saran Singh*⁽²⁾. If this case lays down the correct principle, Mr. Madbhavi has really no case in appeal. But Mr. Madbhavi contends that there is another decision in his favour which is reported in the case of *Pandappa Mahalingappa v. Shivlingappa*⁽³⁾. Mr. Madbhavi relies upon a part of the head-note in that case which runs as follows:

“The statutory presumption under s. 90 of the Indian Evidence Act, 1872, cannot be made in respect of a document merely on production of its copy under s. 65 of the Act. But where such copy produced bears the Sub-Registrar’s endorsement as to the proper execution of the original document, such a presumption can be safely made.”

The document which was being considered in *Vithoba Savlaram’s*⁽¹⁾ case was dated 1891, while the document which was being considered in *Pandappa Mahalingappa’s*⁽³⁾ case was dated 1878. It is obvious that while the latter document was executed prior to the enactment of the Transfer of Property Act,

⁽¹⁾ (1944) 47 Bom. L. R. 116.

⁽²⁾ (1935) 37 Bom. L. R. 305.

⁽³⁾ (1943) 47 Bom. L. R. 962.

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the former was subsequent to the enactment of the Transfer of Property Act. Section 59 of the Transfer of Property Act provides that where the principal money secured is one hundred rupees or upwards, a mortgage other than a mortgage by deposit of title-deeds can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses". Section 68 of the Indian Evidence Act provides that "if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence." It is clear, therefore, that the execution of the two mortgage deeds by the mortgagors has to be proved and also the attestation of the two mortgage deeds has also to be proved. For that purpose, it is necessary to prove the two mortgage deeds by the evidence of the mortgagors. The mortgagors are all dead. The attesting witnesses are also dead. But s. 68 provides that if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. It is admitted that the attesting witnesses are dead. The position, therefore, is that neither the original mortgagors could prove the execution of the documents nor one of the attesting witnesses could prove the execution of the documents by the mortgagors and since the originals were not produced but only the certified copies, the plaintiffs claimed that they could rely upon the presumption raised by s. 90.

The question for decision, therefore, is whether the presumption under s. 90 can be raised in each case. In view of the decision in *Vithoba Savleram's* case⁽¹⁾ the presumption under s. 90 cannot be raised in the case of a certified copy because the presumption can be raised only in respect of the original document. But then Mr. Madbhavi relies upon *Pandappa Mahalingappa's* case and he says that the presumption can be raised even in the case of certified copy, if there is a Sub-Registrar's endorsement upon a document. Mr. Justice Lokur has taken the view that the statutory presumption under s. 90 can be raised in a case where a certified copy bears the Sub-Registrar's endorsement as to the proper execution of the original document, and I will assume that that is the correct principle. Even so, that principle can be applied in the case of a certified copy only in respect of the execution by the mortgagor in view of the endorsement made by the Sub-Registrar as a

⁽¹⁾ (1944) 47 Bom. L. R. 116.

⁽²⁾ (1943) 47 Bom. L. R. 962.

result of the effect of ss. 58, 59 and 60 of the Indian Registration Act. I will assume, therefore, in favour of Mr. Madbhavi that the presumption raised by s. 90 can be raised in favour of the certified copies with respect to the execution of the two mortgage deeds by the mortgagors. But I am unable to accept the argument of Mr. Madbhavi that the presumption under s. 90 can be raised with respect to the due attestation of the documents because ss. 58, 59 and 60 of the Indian Registration Act have no reference whatever to the attestation of a document. When a document is presented for registration, the Sub-Registrar has to inquire whether the executant admits execution of the document and if the executant admitted the execution of the document, the Sub-Registrar has to make an endorsement in conformity with the provisions contained in ss. 58, 59 and 60 of the Indian Registration Act. But the Sub-Registrar is not required to make any endorsement in respect of the attestation of a document by an attesting witness. If that is so, then ss. 58, 59 and 60 have no application to the attestation of a document.

If, therefore, the presumption under s. 90 can, at the most, be raised in favour of the certified copy with respect to the due execution of the document, having regard to the provisions contained in ss. 58, 59 and 60, I am unable to hold that any such presumption under s. 90 can be raised in favour of the certified copy in relation to the attestation of the document. In view of this conclusion, it seems to me that the lower appellate Court was right in holding that the due execution of the mortgage deeds was not proved.

If the due execution of the documents is not proved, then it is obvious that the plaintiff in each case cannot maintain the present suit which is based upon the mortgage deeds in question.

For the above reasons, therefore, I think, the view taken by the lower appellate Court in each case is correct. The result is that S. A. No. 1004 of 1949 fails and it will be dismissed with costs, and for the same reasons, S. A. No. 1005 of 1949 also fails and that too will be dismissed with costs.

Appeal dismissed.

K. B. S.