CALCUTTA HIGH COURT

Mahim Chandra Dey

Vs

Ramdayal Dutta

(E Greaves, C.J. B Ghose, J.)

10.06.1925

JUDGMENT

B.B. Ghose, J.

1. This appeal arises out of a suit brought on a mortgage-bond. Both the Courts below found that the mortgage debt was discharged by the defendants depositing Rs. 600 and odd with the landlord with the consent of the plaintiffs. The mortgage-debt on that date came up to Rs. 673-7. Upon the finding that the mortgage-debt was discharged as aforesaid both the Courts below dismissed the plaintiff's suit. The plaintiff appeals and the sole contention on his behalf is that oral evidence is not admissible to prove the discharge of the debt, inasmuch as it imports an agreement to relinquish Rs. 73 odd of the mortgage-debt. In support of this contention reliance has been placed upon two eases. The first of these, is the case of *G.P. Mallapa v. Matura Nagu Chetty*[1] The head-note of the case runs thus "A subsequent oral agreement to take less than is due under a registered mortgage-bond is an agreement modifying the terms of a written contract, and if, it has to be proved, oral evidence is inadmissible under Section 92, proviso 4 of the Indian Evidence Act". In that case, however, it was held that the defendant was exonerated from the liability of proving the agreement, because it was admitted by the plaintiff. Under Section 58 of the Evidence Act, such plea was taken into consideration and given effect to. The case only lays down the rule enacted under Section 92 of the Evidence Act and can hardly be said to be an authority for the proposition advanced on behalf of the appellant. The next case relied on is that of *Jagannath Kashiram v. Shankar Ganpat Shimpi*[2] That case seems to be in point. There the debtor had alleged that he had paid a sum of money in full discharge of the mortgage-debt, although a larger sum was due on the mortgage-bond. Sir Norman Macleod, C.J., observed at page 58 Page of 44 B.--[Ed.] thus: "But the argument before us has been that there has not been a subsequent oral agreement to rescind or modify the mortgage, but there has been an actual discharge, and that oral evidence was admissible to prove a discharge. In my opinion there is no substance in that argument. The defendant's case must be that the mortgagee agreed to receive Rs. 800 in full satisfaction of the much greater amount which was due on the mortgage, and although he might have said when receiving Rs. 800 I now discharge you from the mortgage'

there was nonetheless an agreement which modified the original agreement of mortgage." With all respect I am unable to accept the reasoning of the learned Chief Justice. A mortgage is discharged either by payment of the full amount of the debt or by release of the debt itself. It has never been doubted that a discharge of the debt by payment may be proved by oral evidence. This point is not contested on behalf of the appellant. The cases in support of this will be found referred to in *Ariyaputhira Padayachi v. Multhukomaraswami Padayachi*[3] Oral evidence of such discharge is not excluded by any provision of Section 92 of the Evidence Act. A release of a debt also may be effected by parol, but if it is in writing it should be registered, if it falls within the provisions of Section 17 of the Registration Act. The release for value is not a transfer of ownership, and though it is true a person who releases a security without consideration may be said to make a gift of it, the transaction does not fail under Ch. VII of the Transfer of Property Act which deals only with gifts of tangible property. There is nothing in the law which requires a writing for a release of the debt by the creditor. What then is there to exclude oral evidence of the discharge of a mortgage-bond when it is pleaded that it was made partly by payment of money and partly by release of the debt? If the creditor says to the debtor "I now discharge you from the debt" or if he says "I make a free gift to you of the money you owe me" I do not think that this can be called an agreement as there is neither any promise to perform anything in future nor is there any consideration for it. Nothing has been left to be done and the transaction is completed at the moment when the release is made. Such a transaction does not fall within proviso (4) to Section 92 of the Evidence Act and I do not think that oral evidence of it is excluded by that proviso. The fear expressed by the learned Chief Justice, that it would be an extremely dangerous precedent if oral evidence were allowed of such a transaction does not also impress me and I think that the danger may be the other way. Such evidence has seldom been excluded in this province. It is common knowledge that when a debtor makes payment of his debt amicably to his mahajan a remission is often made of a part of the interest due on account of the mortgage-bond. If it be held that this release cannot be proved by oral evidence, the mortgagee may sue his debtor for the amount remitted years after the debt was fully discharged: and this he may do, not withstanding that he had returned the mortgage-bond to the debtor on obtaining full satisfaction, for nothing but a proper document would prove the remission. This, however, would be a position which cannot be contemplated. I, therefore, think that oral evidence may be admitted to prove that a mortgage-bond has been discharged partly by payment and partly by release of the debt and there is nothing in Section 92 of the Evidence Act to prevent such evidence being admittted.

2. On this ground, I would dismiss the appeal with costs.

Greaves, J.

3. I agree.

Cases Referred.

148 Ind. Cas. 158 : 42 M. 41 : 8 L.W. 522 : (1918) M.W.N. 719 : 35 M.L.J. 555 : 24 M.L.T. 400
254 Ind. Cas. 689 : 44 B. 55 : 22 Bom. L.R. 39
315 Ind. Cas. 343 : 37 M. 243 : 12 M.L.T. 425 : 33 M.L.J. 339 : (1912) M.W.N. 854