

APPELLATE CIVIL.

Before U Aung Tha Gyaw, J.

P.R.V.S.P. CHETTYAR FIRM (APPELLANT)

v.

U KYI MIN AND FIVE OTHERS (RESPONDENTS).*

H.C.
1948

July 8.

Evidence Act, s. 63 (5), s. 63 (c)—Lost document—Necessity for proof of execution and attestation.

Held: When execution was denied it is incumbent to have satisfactory proof of execution including attestation and registration of the document, even though the document was lost as a result of robbery at the time of evacuation. S. 68 of the Evidence Act is clear on the point and the loss or destruction of the document does not dispense with the mode of proof.

R.M.A.R.M. Chettyar Firm v. U Htaw, 11 Ran. 26; *Karimullah v. Gudar*, 82 I.C. 396; *Jadunath Mita v. Isar Jha and others*, 178 I.C. 198, referred to.

A decree could not be passed on the basis of entries in the account books alone, and they do not establish that the transaction did take place as alleged. There must be evidence to corroborate the entries such as the evidence of the document or persons present at the transaction.

Ramgobind Prasad v. Gulab Chand Sahu, I.L.R. 20 Pat. 273, followed.

Even if the entries in the account books are relevant under s. 32 (2) of the Evidence Act the Court is not bound to believe the same without corroboration.

Rampyarabai v. Balaji Shridhar, I.L.R. 28 Bom. 294, referred to.

Bhattacharyya for the appellant.

Kyaw Zan U for the respondents.

U AUNG THA GYAW, J.—The appellant P.R.V.S.P. Chettyar Firm of Zigon claimed a mortgage decree against the respondents in respect of a sum of Rs. 4,179-4 alleged to be due on a registered mortgage bond executed by the 1st respondent and his deceased wife, Daw Nyein on the 10th April 1941. The

* Civil Second Appeal No. 40 of 1948 against the decree of the District Court of Tharrawaddy in Civil 1st Appeal No. 16 of 1947, dated the 31st January 1948.

respondents denied the execution of the bond and the existence of the debt claimed by the appellant. The registered mortgage bond was said to have been lost in the possession of Chokalingam Chettyar, an agent of the appellant firm in 1942, when he lost his life somewhere in Arakan in about March 1942 while he was fleeing from the Japanese invaders. Secondary evidence of the contents of the said document was offered for the appellant in proof of its claim. On the evidence produced before him, the learned Assistant Judge came to the conclusion that the respondent U Kyi Min, and his deceased wife, Daw Nyein, did execute a registered mortgage bond in favour of the appellant firm and that this registered mortgage bond was lost from the possession of the firm's Agent, Chokalingam Chettyar, in about March 1942 and accordingly granted the appellant a preliminary mortgage decree for the amount claimed with the usual costs. The respondents' appealed to the District Court which set aside the judgment and decree of the lower Court and dismissed the appellant's suit with costs on the ground that although the appellant firm had succeeded in proving the loss of the original registered mortgage bond, to entitle the firm to use secondary evidence of its contents, they had failed to prove due execution and attestation of the document to be entitled to the decree asked for.

The appellant has now put forward the plea that in the circumstances arising out of the War in Burma, the claim in suit should be allowed on the strength of the entries found in the firm's books of accounts produced as evidence in the case. It is also contended that due execution and attestation of the registered mortgage bond in suit need not be proved in the case of lost documents and that if any such proof is required in this particular case, the evidence given by the appellant

H.C.
1948P.R.V S.P.
CHETTYAR
FIRMU KYI MIN
AND FIVE
OTHERS.U AUNG THA
GYAW, J.

H. C.
1948

P. R. V. S. P.
CHETTYAR
FIRM

v.
U KYI MIN
AND FIVE
OTHERS.

U AUNG THA
GYAW, J.

in that regard should have been found sufficient to entitle him to the decree asked for.

Regarding the loss and destruction of the mortgage bond in suit both the lower Courts came to a concurrent finding in the appellant's favour. There is sufficient evidence on the record in proof of the fact that documents belonging to the appellant firm were lost in about March 1942 in the possession of Chokalingam Chettyar, its agent, when he was robbed and murdered on his way to India. Under section 63 (5) of the Evidence Act secondary evidence of a document in suit must mean and include oral accounts of the contents of the document given by some person who has himself seen it. The lower Appellate Court appears to have examined the appellant's evidence on this point with some care and it rightly came to the conclusion that the evidence so adduced in the appellant's behalf does not satisfy the requirements of law contained in section 63 (5) read with section 63 (c) of the Evidence Act. Arumu, the present agent of the plaintiff firm, was said to have been present at the time the said mortgage bond was executed by the respondents in the firm's office in Zigôn ; but it does not appear from his evidence that he had acquainted himself with the contents of the document in question. The extracts from the account books can hardly be regarded as any evidence of the fact when the witness did not say definitely in his evidence that these entries were made by him. The next witness relied upon by the appellant is U Kyaw Hoe (P.W. 1), the alleged writer of the mortgage bond. This witness, however, cannot possibly remember the fact that he had himself written the mortgage bond in suit for the appellant firm six years ago. In this state of the evidence it was hardly possible for the lower Appellate Court to arrive at any finding in the appellant's favour. The lower

Appellate Court next relies on the case of *R.M.A.R.M. Chettyar Firm v. U Htaw* (1) in respect of its view that in the face of the respondents' denial of execution, it was incumbent upon the appellant to adduce satisfactory proof of the fact that the mortgage bond in suit was registered, signed by the mortgagors, and attested by at least two witnesses. Though the terms of section 68 of the Evidence Act is clear on the point, it is urged on the appellant's behalf that in the case of lost documents the Court need not insist upon this manner of proof. No authority has been cited for this proposition. On the other hand, the contrary view was taken in the cases of *Karimullah v. Gudar* (2) and *Jadunath Mitra v. Isar Jha and others* (3) where it was stated that the loss or destruction of the document may necessitate the giving of secondary evidence to prove its contents but that if it is a document required by the law to be registered, so long as an attesting witness is available, he must be called. The appellant in the present case did make an attempt to prove proper attestation by calling one, Lachamanam Chettyar in the latter stages of the hearing of the suit. The lower Appellate Court has given good and sound reasons for not believing him. This witness and the appellant's agent Arumu have given conflicting accounts of the circumstances in which Lachamanam came to offer his testimony in Court as an attesting witness of the mortgage bond in suit. Maung Tin said to be the second attesting witness has not been called and no explanation has been given as to whether he was available or not.

Regarding the entries said to have been found in two of the appellant's account books, the lower Appellate Court has drawn attention to the unsatisfactory

H.C.
1948P.R.V.S.P.
CHETTYAR
FIRMv.
U KYI MIN
AND FIVE
OTHERS.U AUNG THA
GYAW, J.

(1) 11 Ran. 26

(2) 82 I.C. 396.

(3) 178 I.C. 198.

H.C.
1948

P.R.V.S.P.
CHETTYAR
FIRM
v.

U KYI MIN
AND FIVE
OTHERS.

U AUNG THA
GYAW, J.

manner in which their production has been explained by the appellant's Agent, Arumu. Owing to conflict of evidence on the point the question whether Chokalingam Chettyar took the original account books with him in his flight to India remained a matter of doubt. However, the claim of the appellant either for a mortgage decree or for a money decree cannot be based on these entries alone. Even if they are accepted as having been made in the ordinary course of business it does not appear in the evidence of Arumu that these entries in the account books produced by him were in his handwriting. Mere proof of the correctness of the entries in the account books would not be sufficient to establish the fact that the transaction in suit did take place as alleged. There must be some evidence to corroborate these entries and such corroboration can best be afforded by the evidence of the person who wrote the account books and in whose presence the transaction took place. [See *Ramgobind Prasad v. Gulab Chand Sahu* (1).] The appellant has not also adduced any evidence to justify the acceptance of the entries in the account books under section 32, clause (2) of the Evidence Act; but even if such proof be given to render the accounts relevant under section 32 (2) of the Evidence Act, the Court is not bound to believe the same without corroboration—a matter on which it must exercise its own judicial discretion. [See *Rampyarabai v. Balaji Shridhar* (2).]

Although the Court may take notice of the abnormal circumstances arising out of the war in a particular case, in the absence of any special legislation, the ordinary provision of law laid down in the Evidence Act cannot be ignored or relaxed. The appellant's suit was rightly dismissed by the lower Appellate Court.

This appeal fails and will be dismissed with costs.

(1) I.L.R. 20 Pat. 273.

(2) I.L.R. 28 Bom. 294.