
(1938) 08 PAT CK 0039
In the Patna High Court

Baiju Lal Pathak

APPELLANT

Vs

Smt. Maina Dai and Others

RESPONDENT

Date of Decision : 02-08-1938

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 144

Citation : AIR 1939 Patna 25

Hon'ble Judges : Dhavle, J;Agarwala, J

Bench : Full Bench

Judgement

Dhavle, J.—This appeal arises out of a suit brought by Srimati Maina Dai as one of the three sisters of Babu Lachhuman Lal Pathak (who died in February 1932) for recovery of her one-third share in the properties left by her brother. Some of the properties claimed by her stood in the names of defendants to 9, but the suit failed in respect of them, and we are not concerned with them in this appeal. Baiju Lal Pathak, defendant 3, was a first cousin of Lachhuman Lal, and he resisted the plaintiff's claim on the ground that he was joint with Lachhuman Lal and was entitled to the properties, and had actually taken them by right of survivorship. This plea was overruled by the lower Court, and Baiju Lal appeals.

2. It appears that shortly before the institution of the suit there was a proceeding u/s 144, Criminal P.C., between Srimati Maina Dai and Baiju Lal, in which the latter succeeded. Before the first date fixed in the suit a written statement was filed on behalf of Baiju Lal admitting the plaintiff's claim. The case came on for hearing about a year afterwards; and when 7 or 8 witnesses had been examined for the plaintiff, a petition was filed by the mother of the appellant, alleging that he was of unsound mind and asking that she may be allowed to act as his curator in the case. The learned Subordinate Judge directed the mother to have defendant 3 examined by the Civil Surgeon and said that her application would be considered after taking into account the evidence of the Civil Surgeon.

3. The Civil Surgeon apparently examined defendant 3 the next morning, but wanted to examine him again before giving an opinion about the mental

condition of defendant 3. The learned Subordinate Judge did not consider it desirable, in view of the stage that the case had reached, to give further time to the mother of defendant 3 to produce evidence regarding the mental condition of defendant 3 or to appoint her as curator without any evidence. He therefore ordered that "defendant 3 may, if he likes, appear in the case and give proper evidence." Shortly afterwards a petition was filed stating that his previous written statement had been filed "under undue influence of the plaintiff and her husband," and that he was a man of weak intellect. Upon this allegation the learned Subordinate Judge thought fit to postpone for a day the cross-examination that was going on, in order to investigate the circumstances in which the written statement had been filed.

4. The curious result was that though the learned Subordinate Judge, on the evidence that was produced. before him, came to the conclusion that the written statement admitting the claim of the plaintiff had been filed under undue influence and misrepresentation from the plaintiff and her husband and was therefore not. binding on him, he still left himself without any opportunity of properly going into the question of the mental condition of defendant 3. Defendant 3 was actually examined as a witness in the case, and the learned Subordinate Judge observes that he replied to all questions in a proper manner like a sane man. It was however only by his judgment in the case that he rejected the application of the mother for the appointment of a curator for defendant 3 "as the evidence in the record does not warrant the appointment of any curator for defendant 3".

And the learned Judge went on to find that

defendant 3 has failed to prove that he is incapable of managing his affairs, or that the appointment of a curator is necessary.

5. Now, on the face of it, the procedure adopted by the learned Subordinate Judge was irregular. There was an allegation before him that defendant 3 was of unsound mind or weak intellect and incapable of managing his affairs. That allegation, which by Order 32, Rule 15, Civil P.C., is placed on the same footing as an allegation of minority and requires similar treatment, the learned Subordinate Judge was not in a position to reject forthwith. On the contrary he says that

as this matter arose in the midst of the hearing of the case, the decision about the allegation of defendant 3 that he is of unsound mind was not made then, and defendant 3 was allowed to give evidence in support of the written statement filed by his mother.

The mental weakness was thus, not directly put in issue at all, and it was only because there was on record a written statement which defendant 3 challenged as due to undue influence and misrepresentation that some evidence was apparently given regarding his actions; and it is on this evidence that the learned Subordinate Judge ultimately comes to the conclusion that defendant 3 had

failed to prove that he was incapable of managing his affairs. This overlooks the consideration that if the defendant were in fact suffering from mental infirmity, he would be incapable of proving anything unless a guardian ad litem was first appointed for him; he would not otherwise be effectively joined as a party defendant. As the learned Subordinate Judge was not in a position to reject the allegation of weakness of mind, he should have tried that issue like any material issue in the case by placing defendant 3 under a (provisional) guardian ad litem or curator; and the course to be followed subsequently would have depended on what was established at the inquiry into the mental condition of the party: compare *Kasi Doss v. Kassim Sait* (1893) 16 Mad. 344.

6. The fact that an abnormal written statement admitting the claim of the plaintiff was filed--abnormal because not long before defendant 3 had actually succeeded against the plaintiff in the proceedings u/s 144, Criminal P.C.--was itself sufficient to suggest doubts about whether the man was in his right mind. The learned Subordinate Judge somehow put these doubts away and came to the conclusion on no direct evidence that he refers to, that the written statement was due to undue influence and misrepresentation from the plaintiff and her husband, and it is a man in this condition that is called upon to prove his case after adopting a written statement that was subsequently filed by his mother. No finding arrived at in these circumstances against defendant 3 could be held to be binding on him.

7. The procedure adopted by the learned Subordinate Judge has moreover had the unfortunate result of affecting the trial on the merits. Time was applied for, but not given, though it is obvious that defendant 3, even if he had been in a normal condition of mind, could not be reasonably expected to be ready with any evidence at that stage, for he had originally admitted the claim of the plaintiff, and it would only be after the mother's written statement was adopted for him by the Court that issues could be framed as between him and the plaintiff, and before this was done, no question of evidence would arise so far as he was concerned. Attempts were moreover made on his behalf in his then condition to put in papers to prove his case, and the papers seem to have been rejected on the ground that they had not been filed in time. The substantial issue as between plaintiff and defendant 3 was whether or not Lachhuman Lal and defendant 3 were joint or separate. Admittedly a deed of partition had been executed in December 1914, but the case that defendant 3 attempted at that stage to establish was that that partition deed was only a paper transaction and that he and his cousin still remained joint. The learned Subordinate Judge negated this plea, and in doing so relied among other things on the fact that defendant 3 had sold his residential house to one Kesho Lal in the lifetime of Lachhuman Lal.

8. It has been urged before us that this sale, which is not questioned, was in respect of a house acquired by defendant 3 from an aunt under a registered document. Property so acquired by the defendant would not prima facie be the property of the joint family at all, and Mr. Sushil Madhab Mullick, who appears for

the appellant, has complained that defendant 3 did not have a proper opportunity of proving that the house was so acquired by defendant 3. It is impossible to hold that the complaint is without substance. This is but one instance of how the procedure followed by the learned Subordinate Judge has actually affected the case on the merits.

9. The decree of the lower Court must therefore be set aside. Defendant 3 has died during the pendency of the appeal; it would otherwise have been necessary to remand the case to the lower Court, with a direction that the question of his mental condition be properly gone into first and the case afterwards tried on proper issues framed in accordance, with the law. Defendant 3 has been replaced on the record by a sister's Son, who is anxious, and not unnaturally to assert the rights of Baiju Lal and defend the case properly. The question of the mental condition of Baiju Lal cannot now be further investigated, and in the circumstances, the parties before us have agreed (in order not to throw away labour already gone through so far as can be helped); that the case be remanded to the lower Court with the following directions: That the defendant-appellant will be allowed to amend the written statement filed by the mother of Baiju Lal (deceased defendant 3) or file an independent written statement of his own. On the issues then, arising, the defendant-appellant will be further allowed to adduce evidence, both oral and documentary, and ask for the cross-examination of such of plaintiffs' witnesses as he may consider necessary. The plaintiff, on the other hand, will have the right to cross-examine the defendant's witnesses and give such further evidence, oral and documentary, in proof of her claim as she thinks fit.

10. I would therefore allow this appeal, set aside the decree of the lower Court as against the appellant, and remand the case to that Court for further trial. The lower Court will deal with the case on the lines indicated, and will deal with it as expeditiously as may be and not later than the end of the year in any case. The costs of the hearing in this Court will abide the event. As Appeal No. 126 of 1934, arising out of the same case, has been kept pending at the instance of the plaintiff-appellant, the learned Subordinate Judge is requested to intimate to this Court as soon as he disposes of the case on remand. This will enable the High Court office to place Appeal No. 126 of 1934 before the Bench without delay.

Agarwala J.

I agree.