

(1923) 11 CAL CK 0013
In the Calcutta High Court

Jagadish Chandra De and Others

APPELLANT

Vs

Harihar De

RESPONDENT

Date of Decision : 22-11-1923

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 103
Evidence Act, 1872 — Section 32, 32(3)

Citation : AIR 1924 Cal 1042

Hon'ble Judges : Mookerjee, J

Bench : Division Bench

Judgement

Mookerjee, J.—This is an appeal under Clause 15 of the Letters Patent from the judgment of Mr. Justice Walmsley in a suit for recovery of possession of land on declaration of title, for establishment, of a right of way and for other incidental reliefs. The suit was decreed in part in the trial Court. On appeal by the defendants their objections were overruled and the cross-objections of the plaintiffs were re-allowed with the result that the Subordinate Judge decreed the claim in full. That decree has been affirmed by Mr. Justice Walmsley. On the present appeal, which has been preferred by three of the-defendants, it has been urged that the-judgment of the Subordinate Judge is based upon inadmissible evidence and cannot be supported. We are of opinion that this contention is well founded and must prevail.

2. It appears that in 1900 there was a litigation between the predecessors-in-interest of the parties to this suit. The first and second defendants in that suit were the predecessors-in-interest of the first seven defendants in this suit, and the third, fourth and fifth defendants in that suit, then minors, are now appellants. A consent decree was made in that suit as between parties other than the present appellants and the suit was decreed ex parte against them. They have contended in the present litigation that they are not bound by that decree because they were not effectively represented for the purposes of that suit by their mother whose names appeared as their guardian ad litem, though she never consented to act in that capacity; as a matter of fact, she did not enter

appearance on behalf of her minor children. This contention is supported by the decision of this Court in *Krishna, Chandra Mondol v. Jogendra Narain Rai* (1914) 20 C.L.J. 469 where the principle was enunciated that a Court is not competent to appoint the mother of the infant defendants as their guardian ad litem without her express consent.

3. In view of the difficulty mentioned, an attempt was made in the Court below to utilise the consent decree under the provisions of Section 32, Clause (3) of the Indian Evidence Act. That section provides that statements, written or verbal, made by a person who is dead, are relevant facts, when the statements are against the pecuniary or proprietary interest of the person making them. The Subordinate Judge has held that recitals in the consent decree are statements within the meaning of Section 32 and he has relied upon those recitals in various portions of his judgment. We are of opinion that the recitals in the consent decree are not statements within the meaning of Section 32. There are no recitals in the consent decree as to the previous rights of the respective parties in the subject-matter of the litigation. On the other hand it is stated at the outset that, regardless of the rights of the parties, they had come to an arrangement that in future their rights would be regulated in the manner specified. In substance, the decree sets out the terms of the arrangement between the parties and does not embody the statements of the parties as to their rights in the subject-matter of the litigation. Consequently, the recitals in the decree cannot be used as evidence u/s 32.

4. We may add that the respondent has urged that no objection was taken in the trial Court to the reception of the decree in evidence on the ground now formulated.. This, however, is of no avail to the respondent. The question is not one of mode of proof, as in *Girindra v. Rajendra* (1897) 1 C.W.N. 530 *Ali Mahammad Khan and Others Vs. Sheikh Maharaj Bepari and Others*, and *Gopu v. Rajammal* AIR 1922 Mad. 394 but of relevancy of evidence; and as; pointed out by Sir Richard Couch in *Miller v. Babu Madho Das* (1896) 19 All. 76 an erroneous omission to object to evidence which is not admissible under the provisions of the Indian Evidence Act does not make it admissible *Lichiram Motilal Vs. Radha Charan Poddar and Others*, . It has further been urged that there is no substance in the objection taken, because the judgment of the Subordinate Judge is in essence based upon evidence, other than the consent decree. We have carefully examined the judgment and we are unable to hold that the Subordinate Judge arrived at his conclusion independently of the recitals in the decree which are frequently mentioned in different parts of his judgment. Consequently, the case does not fall within the scope of the decision in *Womesh Chunder Chatterjee v. Chundee Churn Roy Chowdhry* (1881) 7 Cal. 267 where it was ruled that, on second appeal, though the High Court has, generally speaking, no right to look at the evidence to decide. whether the remaining evidence, after exclusion of evidence erroneously admitted, is sufficient to warrant the finding of the Court below, the case may be disposed of by the High Court without a remand, where the lower Court has arrived at its conclusion upon other grounds. Here, the

judgment of the Subordinate Judge shows that his conclusion is based as much upon the recitals in the decree as upon the other evidence on the record.

5. We have been finally invited by the respondent to look at the evidence; but we are not in a position to do so, even under the terms of Section 103, C.P.C. That "section provides that-

In any second appeal, the High Court may, if the evidence on the record is sufficient, determine an issue of fact necessary for the disposal of the appeal, but not determined by the lower Appellate Court.

Here the question has been determined by the lower Court, and that decision cannot be supported because it is based in part on evidence improperly admitted.

6. The respondent has contended, as a last resort, that although recitals in the decree may not be admissible in evidence u/s 32, the fact that there was a previous litigation between the predecessors-in-interest of the parties and that the litigation terminated in a consent decree, may be relevant for the determination of the present controversy. The distinction between the admissibility of the factum of a judgment and of the findings in a judgment has been frequently recognised : Kashi Nath v. Jagat Kishore (1915) 20 C.W.N. 643 Baidya Nath Dutt Vs. Alef Jan Bibi and Others, , Sarada v. Uma Kanta AIR 1923 Cal. 485 Tripurana Seethapati Rao Dora Vs. Rokkam Vencanna Dora and Others, , but we need not, at this stage, consider the applicability of that doctrine to this case. We need only decide now that the recitals in the decree are not admissible in evidence u/s 32 of the Indian Evidence Act; and that the decree itself is not operative against the appellants.

7. The result is that this appeal is allowed the judgment of Mr. Justice Walmsley act aside and the case remanded to the Subordinate Judge for reconsideration in the light of the observations now made by this Court. The appellants are entitled to their coats in this appeal under the Letters Patent; but the costs of the hearing before Mr. Justice Walmsley will abide the result.