

(1963) 09 PAT CK 0005
In the Patna High Court
Case No : A.F.A.D. No. 576 of 1962

Mahabir Mahton and Others		APPELLANT
	Vs	
Mt. Sonmati Kuer and Others		RESPONDENT

Date of Decision : 23-09-1963

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 1, 100, 101
Evidence Act, 1872 — Section 13, 40, 41, 42, 43

Citation : AIR 1964 Patna 66

Hon'ble Judges : K. Ahmad, J

Bench : Single Bench

Advocate : Lal Narain Sinha and Uday Sinha, for the Appellant; Rai Paras Nath and Ramjit Prasad, for the Respondent

Final Decision : Dismissed

Judgement

K. Ahmad, J.—The suit which has given rise to this appeal by the defendants was for partition of immovable properties described in detail in Schedules 1 and 2 of the plaint and for allotment of a separate takhta of -/8/- annas share therein to the plaintiff. Both the Courts below have decreed the suit. The parties thereto are admittedly members of a common family. Their common ancestor was one Sukan Mahton, who had two wives. By the first wife, he had a son, Loki Mahton, and Loki Mahton in his turn had a son, Ram Keshwar Mahton. By the second wife, Sukan Mahton had three sons, Girwar Mahton, Bundel Mahton and Mahabir Mahton. Bundel predeceased his father. Girwar died leaving a son, Kashi Mahton. Kashi Mahton is also now dead with out any issue. The plaintiff, Sonamati Kuer, is the widow of this Kashi Mahton. The third son, Mahabir Mahton, is defendant No. 1, and his sons and grandson have been impleaded as defendants 2 to 5.

2. In this Court the case has been argued oh; the admitted footing that on the date Kashi Mahton died, the heirs of Sukan Mahton by his second wife were inter se joint as contemplated, by the Mitakshara School of Hindu Law. The claim of the plaintiff, however, was that Kashi Mahton died in the year 1939, that is to

say, after the passing of the Hindu Women's Rights to Property Act, 1937. Therefore, it was claimed that she was entitled to one-half of the properties owned and possessed by the heirs of Sukan Mahton by his second wife, or one-fourth of what Sukan Mahton had left on his death. Further, it appears that the properties of which partition was sought were of two classes;

(i) the ancestral property which has been detailed in the plaint in Schedule 1, and (ii) the acquired properties standing either in the name of defendant No. 1 or in the name of his wife or that of the wife of his son, which have been detailed in Schedule 2 of the plaint. According to the plaintiff, these acquisitions as well were made out of the common family fund, and, therefore, she was entitled to her share therein as well.

3. In answer thereto, the plea in defence was two fold; (i) that Kashi Mahton died sometime in 1933, that means, before the passing of the Hindu Women's Rights to Property Act, 1937, and, therefore, his widow, who as already stated is the plaintiff in the present case, could not inherit, any of his properties on his death, the family then being joint, and (ii) that the acquisitions on the properties mentioned in Schedule 2 of the plaint were the personal acquisitions of the purchasers out of their personal funds, and, therefore, the plaintiff was in any case not entitled to any share in those properties.

4. The trial Court, on hearing the parties, negatived both these pleas raised on behalf of the defendants and decreed the suit. In appeal, it appears, the claim of the plaintiff was contested only on the ground that the date of death of Kashi Mahton as found by the trial Court was wrong and it should have been held as the year 1933- The Court of appeal below has not agreed with this contention, and accordingly, the suit by the appellate Court also has been decreed.

5. In this Court Mr. Lal Narain Sinha appearing for the appellants has again raised both the aforesaid pleas and the submission made by the learned counsel is that the findings given on those points by the Courts below are perverse and erroneous in law.

6. So far as the date of death of Kashi Mahton is concerned, that is based on the oral testimony of the witnesses examined on behalf of the parties and two circumstances relied upon by the plaintiff in support of the evidence of her witnesses. The submission made by Mr. Sinha is that so far as the evidence of the witnesses examined on behalf of the plaintiff is concerned, that taken by itself has not been accepted by the Court of appeal below as sufficient and conclusive on the point of date of death of Kashi Mahton. In support of this contention, my attention has been drawn by learned counsel to the concluding portion of the discussion which deals with the evidence of the plaintiff's witnesses. Therein, the Court of appeal below has observed:

"If these were the only evidence upon which a finding had to be made there would be grounds to say that the plaintiff has not by her evidence established beyond doubt that Kashi Mahton died in the year 1939".

But thereafter it has taken into consideration the two circumstances relied upon by the plaintiff and has finally come to the conclusion that:

"When this circumstance put along with the evidence of P. Ws. 1, 2, 5, 6, 8 and 9, the inference can be made that the plaintiff's case that Kashi Mahton died in the year 1939 must come to be accepted".

According to Mr. Sinha, at least one of the two circumstances relied upon by the Court below in support of the evidence of the P. Ws. is not relevant and admissible in evidence and, therefore, the finding arrived at by it, as submitted by Mr. Sinha, is perverse and erroneous in law. That circumstance relates to the finding given in the judgment of the previous partition suit No. 12 of 1955. That was instituted by Ram Keshwar Mahton, the heir and successor of Sukan Mahton by his first wife, against all the heirs of Sukan Mahton by his second wife, including the present plaintiff and the present defendants. In that suit, the common defence set up by all heirs of Sukan Mahton by his second wife, including the present plaintiff and the defendants, was that there was already a previous partition and, therefore, the plaintiff of that suit was not entitled to any further partition.

Then, in the alternative, there was also a plea raised on behalf of the present plaintiff, namely, Mosammat Sonamati Kuer, that if the Court came to the conclusion that the suit for partition, as constituted, was maintainable, then her share to the extent of one-fourth should also be partitioned. This prayer of Mosammat Sonamati was obviously based on the assumption that, in fact, as was asserted by her in that suit, Kashi Mahton died in the year 1939. To meet that part of the defence pleaded by Mosammat Sonamati other co-defendants therein asserted that Kashi Mahton died in the year 1933, as is now pleaded by the defendants in the present suit, and, therefore, Mosammat Sonamati was not entitled to any share in the land owned and possessed by her deceased husband as successor of Sukan Mahton by his second wife.

That suit, however, was dismissed on the ground of the first common plea alone, namely, that there was already a previous partition. But to answer the issue raised between the co-defendants, namely, whether Mohammat Sonamati was at all entitled to any share in the properties, the Court also went into the question of the date of death of Kashi Mahton which was, in fact raised by a specific issue as to whether Kashi Mahton died in the year 1939, as claimed by Sonamati, or in the year 1933, as pleaded by Mahabir and his sons and grandsons impleaded therein as co-defendants of Sonamati. The trial Court, on an elaborate consideration of the entire evidence on the record, answered this issue between the co-defendants there in favour of Sonamati and found that Kashi Mahton died in the year 1939, and not in 1933. But as the suit was dismissed on the main common plea that there was already a previous partition between the heirs and successors of Sukan Mahton by his first wife, on the one side, and his heirs and successors by his second wife, on the other, no relief could be granted to Sonamati in regard to the prayer made by her in that suit. There was an appeal

taken by Ramkeshwar Mahton against that judgment and decree, but that too was dismissed.

7. It is the decision of this partition suit which has now been relied upon as the first circumstance on behalf of the plaintiff in support of her case that Kashi Mahton died in the year 1939, and not in the year 1933, and the Court of appeal below has in view of this circumstance along with the other, which I shall deal hereafter, has accepted the evidence of the P.Ws. The submission made by Mr. Sinha is that the finding given in the previous partition suit that Kashi Mahton died in the year 1939, and not in the year 1933, is not admissible in law, and, therefore, should not have been relied upon by the Court of appeal below to supplement the merit of the evidence given by the P. Ws. In support of this contention reliance has been placed by learned counsel on the decisions in Purnima Debya and Another Vs. Nand Lal Ojha and Others, and Ranchhoddas Krishna-das v. Bapu Narhar, ILR 10 Bom 439. The former is the Bench decision of this Court. Therein Fazl Ali, J., (as he then was), dealing with this question observed:

"The next point urged was that the decisions in the Small Cause Court suit as well as in certain other proceedings which followed it including the proceedings before the settlement officers, even though they might not operate as *res judicata*, should be treated as evidence in the case, and some stress was laid on the fact that the learned Subordinate Judge had in the face of so many decisions, come to a finding that the two cousins were joint at the time of Ramlal's death.

Here again, I am afraid the learned advocate for the appellant is attempting to place his case too high. The question as to whether a certain judgment pronounced in another case is or is not relevant is to be governed by Sections 40 to 42, Evidence Act. It is conceded that these judgments would not come under Sections 40 to 42 and Section 43 clearly provides that such judgments as are not relevant under these sections are irrelevant unless the existence of such judgment is a fact in issue or is relevant under some other provisions of this Act. The question as to whether there are any other provisions in the Act which would make such judgments relevant has been debated in a series of cases in this country.

In *Gujja Lal v. Fatteh Lall* ILR 6 Cal 171, it was held by the Full Bench of the Calcutta High Court, Mitter, J., dissenting that a former judgment which is not a judgment in rem, nor one relating to matters of public nature, is not admissible in evidence in a subsequent suit either as *res judicata* or as proof of the particular point which is decided, unless between the same parties or those claiming under them. A question arose in this case whether such a judgment was admissible u/s 13, Evidence Act, and Garth, C. J., expressed an opinion that the former judgment was not a transaction and that the right claimed in the particular suit was not a right within the meaning of Section 13.

On the other hand, in *Collector of Gorakhpur v. Palakdhari Singh* ILR 12 All I , a

Full Bench of the Allahabad High Court came to a different conclusion and held (Brodhurst, J. dissenting) that such judgments were in many cases admissible u/s 13. The view that was put forward in this case was that the majority of the learned Judges of the Calcutta High Court had put too narrow a construction on the word "right" as used in Section 13 and that the term "right" includes not only incorporeal rights, but a right of ownership. It was further held that though the judgment itself was not a transaction, the suit or the litigation in which it was pronounced might be treated as a transaction or an instance in which a right may have been asserted, acknowledged or denied. The point has been considered so exhaustively in these two judgments that I do not think it is necessary for me to deal with it at any great length.

It appears however that although in many cases the Judges have expressed the view that the decree if not conclusive evidence is not evidence at all : see Mahendra Lal v. Rosomoyi Dasi ILR 12 Cal 207, Surendra Nath v. Brojo Nath ILR 13 Cal 352 , Krishnaswami Ayyangar v. Rajagopala Ayyangar ILR 18 Mad 73, Ramaswami v. Appavu ILR 12 Mad 9, Subramanyan v. Paramaswaran ILR 11 Mad 116. There are, on the other hand, a large number of cases where the Courts have shown their inclination towards the view propounded by Mitter, J. in ILR 6 Cal 171, In Abinash Chandra v. Paresh Nath 9 Cal WN 402, Ghose, J., observed :

"I am disposed to hold that the Judicial Committee in Ram Ranjan v. Ram Narain Singh 22 Ind App 60 and Bitto Kunwar v. Kesho Pershad Misser 24 Ind App 10, rather adopted the views expressed by Mitter, J. in ILR 6 Cal 171, wherein the learned Judge held that a judgment though not inter partes may be received in evidence u/s 11 or Section 13, Evidence Act"

See also Tepu Khan v. Rajani Mohan Das ILR 25 Cal 522, Lakshman Govind v. Amrit Gopal ILR 24 Bom 591, Dharnidhar v. Dhundiraj Ganesh 5 Bom LR 230, Mahamad Amin v. Hasan ILR 31 Bom 143. Thama v. Kondan ILR 15 Mad 378. (here the judgment was held to be admissible to prove the result of an admission). It appears that in certain special circumstances the Judicial Committee also has not questioned the admissibility of such judgments. In Run Bahadur Singh v. Lucho Koer ILR 11 Cal 301 , Sir R.P. Collier observed:

"Although the judgment in the rent suit is not conclusive still their Lordships cannot help attaching some weight to the decision of the Munsif and the Subordinate Judge, both natives, who heard the same case as that now before us, and a good deal of the same evidence. It may be added that the judgment in the certificate suit in which the plaintiff set up the same case was the same; it was the same, also, and the case and evidence much the same, in proceeding before a Magistrate requiring the plaintiff to enter into recognizance to keep the peace. All the native Judges who have heard the case - and it has been heard by them four times - have concurred in their judgment upon it."

Similarly in ILR 19 All 277 : 24 Ind App 10 , it was held that a prior judgment was admissible though not conclusive evidence in the case. In one case AIR 1922

241 (Privy Council) it was observed that a previous decision was entitled to some weight as the facts of the case were nearer to the ken of the Court which decided it : see also ILR 22 Cal 533 : 22 Ind App 60 and Dinomoni Chowdhurani v. Brojo Mohini ILR 29 Cal 187: 29 Ind App 24 .

In some cases again a distinction has been made between a judgment which is inter partes and one which is not so, a distinction which has not been lost sight of even in ILR 6 Cal 171 and sometimes it has also been emphasized that although a judgment given in a different case will not be generally admissible under the English law, it should not be supposed that the Indian Evidence Act is a mere servile copy of the English law. Apart however from the case law on the subject, it appears to me that the Evidence Act itself does not draw a distinction between a judgment which is not inter partes and a judgment which is inter partes except where the judgment is clearly res judicata. The logical view, therefore, seems to me to be that unless a judgment is relevant under Sections 40 to 42, Evidence Act, it is not evidence at all so far as regards the matter which it decides. It is true that Section 43 provides that a judgment other than that mentioned in Sections 40 to 42 though otherwise inadmissible may be admissible if it is relevant under some other provisions of this Act. Also in view of the numerous decisions of the various High Courts in this country as well as the decisions of the Privy Council in ILR 29 Cal 187 : 29 Ind App 24 , it is now, in my opinion, too late to say that a litigation or a suit is not a transaction and that the word "right" as used in Section 13 must be interpreted in the somewhat narrow sense in which it was construed in ILR 6 Cal 171. Taking this view as I do I am inclined to think that a judgment other than a judgment referred to in Sections 40 to 42 may be admissible to prove that a right was asserted or denied u/s 13, Evidence Act or to explain or introduce facts in issues or to explain the history of the case. In some cases it has also been held that "it may be used to prove an admission made by the ancestor of one of the parties (though the decisions on this point are not unanimous) or to show how certain property was dealt with in the past".

8. On the basis of this authority, the submission made by Mr. Sinha is that the finding given in the previous Partition Suit No. 12 of 1955 as to the date of death of Kashi Mahton should not have been taken into consideration by the Court of appeal below in supplementing the merit of the evidence given by the P. Ws. In my opinion, apart from the fact that the finding as given there was in substance a recognition of the right as claimed here by the plaintiff, this much in any case is obvious that it was at least on that occasion claimed and asserted, and by the other side denied. Therefore, even without entering into the controversy as to whether the finding as given in that case in regard to the date of death of Kashi Mahton is here admissible in law, we can use it at least as an instance of the fact this right was on that occasion claimed and asserted and finally recognized by the Court, as provided in Section 13 of the Evidence Act, Therefore, it cannot be held as altogether inadmissible in law and to this extent, I think, even the aforesaid authority, gives full support, as is evident from the following

observation made therein.

"This being my view, although I would not go so far as to hold that the judgments which are on the record of the present case were inadmissible, I would proceed to decide this case not upon the findings which, have been arrived at in favour of the appellant in those judgments but upon the other evidence adduced in the case".

In other words, in that case too, the view expressed did not go to the length of laying down that the judgment of the previous suit was altogether inadmissible in law. It is, however, a different matter that so far as the weight of that admissible evidence is concerned, it will vary from case to case, and in the final analysis will be controlled much by the circumstances present in each case. Likewise in ILR 10 Bom 439 also, there is an observation to the effect that it shall not be admissible in law, but that view of the law is based exclusively on the construction that has been given therein to Section 13 of the Evidence Act, as is evident from the following passage :

"Upon the whole, although we might have wished that the door had been opened somewhat wider for the admission of this class of evidence, we are of opinion that, upon the proper construction of the Evidence Act, the judgment in question is not admissible in evidence against the defendant"".

The learned Judges who decided that case took the view that the words "right" and "transaction" as used in Section 13 of the Evidence Act have got very restricted import and are not wide enough to cover a judgment of this class within its terms. But to me, if I may say so with all respect, there seems no valid justification for attributing any such a restricted import to the words "right" and "transaction" as used in Section 13 of the Evidence Act, and at least to this extent, I get full support even from the case of Purnima Debya and Another Vs. Nand Lal Ojha and Others, which has been relied upon by Mr. Sinha,

Lastly, under the Evidence Act, admissibility is the rule and exclusion the exception; and as such the words used in the enactment has to be construed with a leaning to include evidence, and not to exclude it. Looked at thus from that point of view also, I think, it is now too late to assert that judgment in the previous litigation, though not operating as *res judicata* or admissible u/s 40 or 41 of the Evidence Act, is barred from admissibility even u/s 13 of the Act. Rightly, therefore, I think, reliance has been placed by Mr. Rai Parasnath appearing for the respondents, in support of the contrary view, on the decisions in AIR 1922 241 (Privy Council) , *Secy. of State Vs. Brajendra Kishore Rai Choudhury and Others*, , *Guttee Koiburto v. Bhukut Koiburto*, 22 Suth WR 457, *Neamut Ali v. Gooroo Doss*, 22 Suth WR 365 and *Naranji Bhikha Bhai v. Dipa Umed*, ILR 3 Bom 3. Therefore, in that view of the matter, I think, the first submission made by Mr. Sinha has to fail.

9. Then comes the other circumstance which also has been relied upon by the Court of appeal in support of the evidence of the P.Ws. That is about the

admission which defendant No. 1 as D.W. 1 is said to have made in the course of his evidence. In the opinion of the Court of appeal, this lends support to the claim made by the P.Ws. that Kashi Mahton died in the year 1939, and not in the year 1933, and, therefore, it has used it as a settler on the point, Mr. Sinha originally submitted that this approach made by the Court below was also erroneous and that D. W. 1 as a matter of fact did not make any such admission. But finally learned counsel has given up this part of the submission made by him and confined it to the simple objection that even if the first circumstance as already discussed be held as inadmissible, then that by itself is sufficient to warrant a remand of the case, for, this Court is not in a position to assess as to how much it influenced the mind of the Court below in accepting the evidence of the aforesaid P. Ws., as has been done by it. But in view of the finding already given by me as to the relevancy of the first circumstance, this part of the submission made by Mr. Sinha has become academic and, therefore, needs no further discussion. I, therefore, hold that the finding as given by the Court below on the question of the date of death of Kashi Mahton has been rightly arrived at and is now concluded in second appeal.

10. The next submission made by Mr. Sinha is about the self-acquisitions of the properties detailed in schedule 2 of the plaint. In answer to this, I think, it will be enough for me to refer here to the observations made by the Court of appeal in paragraph 5 of its judgment. It is, however, necessary to point out here that in the judgment under appeal there are two paragraphs, both numbered as paragraph No. 5. But what I refer to here is the latter paragraph 5. Therein the learned Additional District Judge has observed that :

"The defendants do not put up a contest on any other point and the claim to 8 annas made by the plaintiff in the event of the proof of the fact that her husband died in 1346 Fs. is practically conceded. It is not said that if she were proved to be entitled to any share as has been claimed in this suit it would be less than 8 annas of the property mentioned in schedules but the main defence in the suit is that Kashi Mahton having died before passing of the Hindu Women's Rights to Property Act in the year 1933, the whole property passed by survivorship to Mahabir and the widow was entirely excluded".

In other words, the Court below has in this part of the judgment clearly stated that the case of self-acquisitions after its rejection by the trial Court was not pressed again before it in appeal. That being so, it is now not open to be raised in second appeal. Thus this part of the submission also as made by Mr. Sinha has to be rejected.

11. In the result, therefore, I hold that the appeal is without substance and the same is dismissed. But in the circumstances of the case, there would be no order for costs.

12. Before I leave this case, I may mention here that there are two letters filed on behalf of the Advocates of the parties who appeared for them in the Court

below. According to one letter, the question of personal acquisition as pleaded in the written statement was not at all pressed at the appellate stage, but according to the other letter this point was also argued in this state of affidavits, I think, it will be enough for me to say that there is no material on the record justifying my finding that what the Court of appeal below has stated in the judgment under appeal is wrong. With these observations I leave the two letters to stand on their own respective merits.