Abdul Aziz Vs Mt. Mariyam Bibi and Another

Court: Allahabad High Court

Date of Decision: July 13, 1926

Final Decision: Allowed

Judgement

1. This is a plaintiff''s appeal arising out of a suit for recovery of possession of part of the property sold and for pre-emption of the rest. The vendor

was Mt. Maryam Bibi, the widow of Ali Raza. The property sold is admittedly what originally belonged to Ali Raza. The plaintiff claimed to be an

asba"" (a residuary) of Ali Raza and entitled to a three-fourths share in his estate. The widow however transferred the entire property. On 31st

March 1924, the vendee Akbar Ali was examined by the Court under Order 10, Rule 1.

2. He made a clear statement that the plaintiff was the uncle of the deceased husband of Mt. Maryam Bibi and was removed by four degrees, and

that after Ali Raza''s death he began to make collections for a year, and it was in consequence of her not being able to get the profits that she

transferred the property to him. This was undoubtedly an admission of the plaintiff''s allegation that he was a relation within four degrees of the

deceased Ali Raza. This admission ought to have been taken as conclusive, In spite of it the learned Subordinate Judge owing to some oversight or

perhaps misapprehension did frame an issue on the question of relationship. But when he came to write out his judgment he referred to this

admission and treated it as an admission of Akbar Ali in the suit. Independently of it he relied on the statement on oath of the plaintiff and other oral

evidence as wall as a pedigree filed by the plaintiffs, and held that the relationship was established. On appeal the learned District Judge has come

to the conclusion that this admission was made by Akbar Ali in an unguarded moment and was apparently a mistaken admission because Akbar

Ali could not have any satisfactory knowledge of his own on the point. Both these conclusions are startling. The learned Judge has thought that the

admission was governed by Section 31, Evidence Act, which did not make admissions absolutely conclusive. He has entirely ignored the fact that

this was not an admission made on a previous occasion which was sought to be produced as an admission in a case to which Section 31 would

have applied. It was actually an admission of fact made in a suit and ought to have been treated as conclusive for the purposes of the suit. It is also

difficult to understand why the learned Judge thought that Akbar AH may not have knowledge of this pedigree. Ignoring this important admission

the learned Judge has thought that the evidence of the plaintiffs is not strong. We are of opinion that the finding of the learned District Judge has

been vitiated by the circumstances referred to above. It must therefore be assumed that the plaintiff is related to Ali Raza as mentioned by him.

3. It has been urged on behalf of the respondent that the plaintiff"s ""claim is arrred by Section 41, T.P. Act because the vendee has purchased this

property from an ostensible owner. But Akbar Ali has himself admitted that the plaintiff began to make collections of the profits soon after Ali

Raza"s death and that his widow sold this property to Akbar Ali because she was not able to get the profits. It cannot therefore be suggested that

she was put in possession of the estate with the consent of the plaintiff. Section 41 therefore would have no application.

4. The learned vakil for the respondent has further urged that inasmuch as the plaintiff claimed possession of part of the property in his own right,

he was really trying to put the vendor to proof of his title. His argument is that on the strength of the rulings in the case of Musammat Sahodra Bibi

Vs. Bageshri Singh and Another, and in the case of Iqbal Haidar Khan and Another Vs. Musammat Wasi Fatima Bibi and Lachmi Narain and

Others, the suit was not maintainable. In both those cases the plaintiff was not setting up his own right but was merely denying the title of the

vendor. Such a position cannot of course be taken up by a pre-emptor because if a vendee has chosen to take the property with all the risks of

getting a doubtful title the pre-emptor must offer to be substituted completely in his place. The case however is different when the plaintiff"s own

property has been wrongly sold by the vendor. In such a case there can be no estoppel against the plaintiff which would prevent him from claiming

possession of his property. In fact that is the only proper course open to him. If he were called upon to pre-empt his own property he cannot

subsequently bring a suit for recovery of any consideration from the vendor. The causes of action for claiming possession of his own property and

for claiming pre-emption of the vendor"s property are separate and distinct, and there is no ground for not allowing the plaintiff to combine the two

in one and the same suit. In Sahodra Bibi"s case the Bench made it clear that they did not decide that a vendor was entitled fraudulently to insert

property to which he had no title. In the case of Bhagwati Saran Man Tiwari Vs. Parmeshar Das and Others, the same Bench held that there was

no defect in the frame of the suit, if the plaintiff claimed the property as full owner, and in the alternative for pre-emption There too the plaintiff was

trying to question the title of the vendor in the first instance, and he was not prevented from doing so. On principle we can see no distinction if the

plaintiff is allowed to claim a part of the property as owner and the remaining portion by pre-emption. Once this principle is conceded the logical

result is that he should get his own property without payment of any consideration, and the rest of the property on payment of a proportionate

amount of the sale consideration the presumption being that the consideration is spread over the entire property. There would be no point in

decreeing his claim for part of the property as owner, if he is to be compelled to pay the whole consideration. Such a course would he inequitable

and unjust.

5. The Courts below have found that Rs. 3,500 entered in the sale deed is also the true market price of the entire property including the plaintiff''s

share and that it represents the consideration for the whole. It is unnecessary to consider what the first Court suspected, viz., whether a

proportionate part of the consideration was fictitious because the plaintiff''s share which could not be validly transferred had been included. The

plaintiff''s claim for possession of his own share and for pre-emption of the rest on payment of a proportionate amount must be decreed.

6. We accordingly allow this appeal and set aside the decree of the lower appellate Court and restore that of the Court of first instance with costs

in all Courts including in this Court fees on the higher scale. We extend the time for payment by one month from this date.