Barkat Ullah and Another Vs Nisar Husain and Others

Court: Allahabad High Court

Date of Decision: Dec. 19, 1934

Acts Referred: Evidence Act, 1872 â€" Section 32(5)

Hon'ble Judges: Kisch, J; Bajpai, J

Bench: Division Bench

Advocate: K.N. Katju, Mukhtar Ahmad and S.M. Husain, for the Appellant; S.N. Sen and A.H. Khan, for the Respondent

Final Decision: Dismissed

Judgement

Kisch, J.
This is a Plaintiffs'' appeal arising out of a suit for possession of a one-third share in certain zamindari property and mesne profits.

2. This property was the estate of one Mst. Ashraf-un-nissa Bibi who died childless on the 18th of May, 1917. On her marriage to Saiyid

Tajammula Husain, a Deputy Collector, this lady who was born a Sunni had become a Shia adopting the sect of her husband. Her husband

predeceased her. Shortly before her death she executed a deed of waqf of the whole of her property mainly foe religious and charitable objects.

3. Mst. Ashraf-un-nissa Bibi was the daughter of one Akbar Husain who had a son Ata Husain and another daughter Mst. Aziz-un-nissa. Ata

Husain had three sons and a daughter. Mst. Aziz-un-nissa had two sons Barkat Ullah, Plaintiff No. 1 and another who died childless.

4. In 1919 the three sons of Ata Husain brought a suit for cancellation of the deed of waqf executed by Mst. Ashraf-un-nissa on the ground that it

was invalid and for possession of the whole of the property. That litigation was finally decided by the judgment of this Court dated the 27th April,

1925 in First Appeal No. 71 of 1922 in which it was held that the waqf was a valid waqf but was only operative in respect of one-third of the

lady''s property by reason of the deed of waqf having been executed during murz-ul-maut. The sons of Ata Husain were accordingly given a

decree for possession of two-thirds of the property of Mst. Ashraf-un-nissa.

5. Barkat Ullah who was not a party to this litigation lays claim to one-third of the estate of Mst. Ashraf-un-nissa as standing in the same

relationship to the deceased lady as the children of Ata Husain. On the 3rd of September, 1926 he sold half of his rights to the suit property to

Habib Ullah Khan Plaintiff No. 2 who undertook to finance the present litigation.

6. On the 16th of September, 1926 nine years after the death of Mst. Ashraf-un-nissa Barkat Ullah and Habib Ullah Khan instituted the suit out of

which this appeal arises. Besides the three sons and the daughter of Ata Husain they also impleaded as Defendants the mutwalli of the waqf, the

members of the waqf committee and the lessees of a portion of the waqf property.

7. The Plaintiffs, ignoring the previous litigation challenged the validity of the waqf and claimed a one-third share in the whole of the estate of Mst.

Ashraf-un-nissa on the allegation that Barkat Ullah was an heir to the estate being the son of her full sister.

8. The Defendants mutwalli and members of the waqf committee upheld the deed of waqf, while the sons of Ata Husain put the Plaintiffs to proof

of their allegation that Barkat Ullah was an heir of Mst. Ashraf-un-nissa. They contended that his mother was the daughter of Akbar Husain by

another mother and he was, therefore, not entitled to a share in Mst. Ashraf-un-nissa''s estate.

9. It is conceded before us that if Mst. Aziz-un-nissa was only the half sister of Mst. Ashraf-un-nissa her son would not, under the Shia law, be

entitled to any portion of Mst. Ashraf-un-nissa''s estate.

10. The learned Subordinate Judge found that the deed of waqf was valid to the extent of one-third as had been held by this Court in the previous

litigation between the sons of Ata Husain and the mutwalli. This finding has not been challenged before us.

11. The learned Subordinate Judge further held that the Plaintiffs had failed to prove that Aziz-un-nissa was the full sister of Ashraf-un-nissa. He

accordingly dismissed the Plaintiffs'' suit.

12. Thus the only question that we have to consider is the simple question of fact whether the Plaintiffs have proved that Barkat Ullah was one of

the heirs of Ashraf-un-nissa.

13. We have been taken through the whole of the evidence on the record bearing upon this point and we have no hesitation in upholding the

findings of the learned Subordinate Judge.

14. The oral evidence produced by the Plaintiffs to prove the relationship need not detain us long. The learned Subordinate Judge has given good

reasons for holding that all the witnesses produced by the Plaintiffs on the subject are interested or partial witnesses and wholly unreliable. The

finding of the trial Court as to the credibility of the witnesses, whom it had the advantage of seeing in the witness-box, cannot be lightly disturbed.

This sound principle has been repeatedly emphasised by their Lordships of the Judicial Committee-Bombay Cotton Manufacturing Company v.

Motilal Shivlal (1915) 39 Bom. 386 (p.c.), Ram Parkash Das v. Anand Das (1916) 43 Cal. 707 (p.c.); and W.C. Macdonald, Registered v. Fred

Latimer (1928) AIR 1929 P.C. 15. In the present case, as we have already observed, the learned Subordinate Judge has given adequate reasons

for disbelieving the Plaintiffs'' oral evidence and there is therefore no justification for us to take a different view of this portion of the evidence.

15. The Plaintiffs rely on four pedigrees produced in the case. None of these pedigrees were produced at the time of the filing of documents; One

was produced by the Plaintiffs at a late stage and the other by various witnesses called by the Plaintiffs. The learned Subordinate Judge regarded

the n all with suspicions. After giving our careful consideration to these documents we are unable to hold that those suspicions were not justified.

16. The first of these documents (Exh. 32) purports to be written by Ali Husain whose daughter Kaniz Fatma was, according to the allegations of

the sons of Ata Husain, the second wife of Akbar Husain and the mother of Aziz-un-nissa. It was produced by the Plaintiffs on the 11th of

November, 1927 and no evidence has been furnished as to how this document came into the Plaintiffs'' possession. The document itself bears no

date. It is in narrative form and recites, among other matters the relationship of the various branches of the author''s family. It mentions that Akbar

Husain had two daughters and one son. Reliance was placed on the omission in this document to note that the two daughters of Akbar Husain

were by different mothers and that the author''s daughter was the wife of Akbar Husain. From an inspection of this document it is obvious that the

narrative has been torn out of some book It begins with the remark ""And my grand-father Mir Saif Ucldin, deceased, also had his own house in

Oudh"", and the pages show signs of stitching. In it the descendants of the various branches of the family are traced but the pages produced do not

deal with the author''s own descendants. The narrative only proceeds as far as the author''s father. Even if this document be accepted as a genuine

document, there is nothing to show that the name of Kaniz Fatma as a daughter of the author and her marriage to Akbar Husain had not been

mentioned on subsequent pages when the author came to deal with his own descendants. It is the Plaintiffs'' own case that Husain Ali had a number

of daughters ipcluding one named Kaniz Bano (vide the Plaintiffs'' application dated the 14th of January, 1929 at page 12.) of the Printed Book).

No explanation has been furnished to show why the complete document was not produced and die fact that the pages produced stop short of the

entries in which one would expect to find the mention of the author''s daughters and their husbands, if any, precludes the Plaintiffs from deriving any

benefit from the omission to state that the daughters of Akbar Husain were by different wives.

17. The next pedigree (Exh. 23) was produced by the Plaintiffs" witness Mohi Uddin and purports to be in the hand-writing of his father Altaf

Husain. It also shows that Mst. Ashraf-un-nissa and Mst. Aziz-un-nissa were the daughters of Akbar Husain, but without any mention that they are

by different mothers, although some of the entries in this pedigree show various persons as having two wives. We are clearly of opinion that this

document is not admissible in evidence.

It is not an original compilation made by independent enquiry but, as stated in the document itself, it is a pedigree prepared from the writings of

Husain Ali the author of the document (Exh. 32.) Even if this document were not held to be a copy, it would still be inadmissible in evidence under

Clause (5) of Section 32 of the Indian Evidence Act. Altaf Husain, the writer of the document died about 1921 and there is nothing on the record

to show when this pedigree was written. On the death of Mst. Ashraf-un-nissa in 1917 the question whether the Plaintiff Barkat Ullah was an heir

was a matter in dispute in the mutation proceedings, that followed on the death of the lady, and therefore the controversy had arisen before the

death of Altaf Husain.

The third pedigree (Exh. 22) was also produced by the Plaintiffs" witness Mohi Uddin and also purports to be in the hand-writing of Altaf Husain.

For the reasons given above this pedigree would also be inadmissible in evidence under Clause (5) of S. 32 of the Indian Evidence Act. It is on a

scrap of paper on which it could have been prepared at any time, and the writing is so different from the writing in Exh. 23 that we find it very

difficult to believe that it has been written by the same person. This document definitely shows Mst. Ashraf-un-nissa and Mst. Aziz-un-nissa as

being the daughters of Akbar Husian by his wife Bibi Hajra. The names of the wives of the other persons mentioned in the pedigree are also given.

We find it very difficult to resist the conclusion that this document has been prepared for the purposes of the present suit.

18. The fourth pedigree (Exh. 43) was produced by the Plaintiffs" witness Muzaffar Husain and purports to have been written by his father Abdul

Karim who died 30 years before the su;t. It gives the two daughters of Akbar Husain but does not show that they were by different mothers. It has

also been written on a scrap of paper and could have been prepared at any time. We are unable to place any reliance upon it.

19. It is a significant fact that in the mutation proceedings referred to above, in which Barkat Ullah was claiming to be an heir of Mst. Ashraf-un-

nissa and the sons of Ata Husain were denying the relationship, not one of these documents was produced. Nor has any of them been produced

before any Court. On the other hand as far back as 1893 a pedigree (Exh.BBB Bl) was produced by Ata Husain in a civil suit of that year. This

was only seven years before the death of Mst. Aziz-un-nissa and although Mst. Ashraf-un-nissa and Ata Husain are shown as the children of

Akbar Husain, the name of Aziz-un-nissa does rot appear in the pedigree. The omission of Aziz-un-nisa''s name is not conclusive, but it my not be

without significance that in the only pedigree on the record which has been produced in a Court of law prior to the present litigation the name of

Aziz-un-nissa finds no place. We are therefore unable to hold that the learned Subordinate Judge has erred in placing no reliance on the various

pedigrees produced by the Plaintiffs.

20. The Plaintiffs also placed reliance on the fact that in a diary written by Ata Husain, Mst. Aziz-un-nissa is referred to as his ''hamshira'' and that

this description of Mst. Aziz-un-nissa also finds a place in 2 or 3 letters on the record. It is true that in its literal significance ''hamshira'' means ""a

sister by the same milk""; but the word might also be used loosely in common parlance for a sister who is not a sister of the full blood.

21. Learned Counsel for the Appellants has drawn our attention to the fact that in the mutation proceedings following on the death of Mst. Ashraf-

un-nissa the sons of Ata Husain did not set up the case that Mst. Aziz-un-nissa, the mother of Barkat Ullah, was only a half sister of Mst. Ashraf-

un-nissa. They contented themselves with stating, through their general attorney Mohammad Yahia, that they did not know the relationship which

Barkat Ullah and Hamid Ullah bore to the deceased. In those proceedings however the sons of Ata Husain would have been well aware that the

revenue Court would decide the mutation proceedings on the basis of possession. Admittedly Barkat Ullah was not in possession of any portion of

Mst. Ashraf-un-nissa''s property. In those proceedings the controversy as to possession was between the sons of Nisar Husain and the mutwalli of

the waqf, mutation being eventually ordered in favour of the latter. In these circumstances the sons of Nisar Husain probably considered it quite

unnecessary to go further into the question as to the exact position of Barkat Ullah in the family.

22. Our attention has further been drawn to the depositions of two witnesses Altaf Husain and Ahsan Ali examined on behalf of Barkat Ullah in the

mutation proceedings (Exhs. 35 and 36). In these statements Altaf Husain deposed that Mst. Ashraf-un-nissa and Mst. Aziz-un-nissa were own

sisters of Ata Husain and Ahsan Ali deposed that Ata Husain had two sisters, Mst. Ashraf-un-nissa and Mst. Aziz-un-nissa. The report of the

Naib Tehsildar in the mutation proceedings (Exh. 33) clearly shows that there was a dispute about the pedigree of the family in those proceedings

and the statements of Altaf Husain and Ahsan Ali, who are both dead, having been made after the controversy about the pedigree had arisen, the

statements are inadmissible under Sub-clause (5) of Section 32 of the Indian Evidence Act.

23. Certain minor points in the evidence have been referred to in the course of the argument, to which we do not consider it necessary to refer.

24. On a review of the whole case we have come to the conclusion that no sufficient grounds have been shown for disturbing the finding of the

Court below.

25. It has been held by their Lordships of the Judicial Committee in Naba-kishore Mandal v. Upendrakishore Mandal (4), that ""In appeals the

burden of showing that the judgment appealed from is wrong lies on the Appellant. If all he can show is nicely balanced calculations which lead to

equal possibility of the judgment on either the one side or the other being right, he has not succeeded"".

26. Putting the Appellants'' case at its highest, they have certainly failed to discharge the burden that lay upon them to show that the judgment

appealed from is wrong. That judgment must therefore be upheld.

27. The appeal accordingly fails and is dismissed with costs.