(1912) 11 BOM CK 0013

Bombay High Court

Case No: First Appeal No. 182 of 1910

Balmukund Kesurdas		APPELLANT
	Vs	
Bhagvandas Kesurdas		RESPONDENT

Date of Decision: Nov. 12, 1912

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 22 Rule 4

Citation: (1913) 15 BOMLR 209

Hon'ble Judges: Rao, J; Batchelor, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Rao, J.

One Kesurdas Bhaktidas died in 1896, leaving three sons Bhagvandas, Tribhovandas and Balmukunddas. Tribhovandas died unmarried on 8th May 1900. On 19th April 1905 plaintiff Balmukunddas filed this suit to recover possession of certain property from his brother Bhagvandas. He alleged that Bhagvandas had separated from the family during his father''s life-time in or about the year 1886, that after his separation the father Kesurdas lived in union with his two sons the plaintiff and Tribhovandas, and that after their father''s death they continued to live in union as members of a joint family till the latter''s death in 1900, that thereupon the plaintiff alone became entitled by survivorship to the property which was under Tribhovandas''s management, and that after Tribhovandas''s death the defendant wrongfully and fraudulently took possession of the same. Hence this suit.

2. Defendant Bhagvandas contended that he had never separated from his family, that he was joint with his two brothers, and that on Tribhovandas''s death he and the plaintiff were entitled in equal shares to the property in dispute. He further pleaded in the alternative that if the property be held to be the separate and self-acquired property of Tribhovandas, he alone was entitled to the whole of the

property under Tribhovandas''s will.

3. On 10th February 1909 after Bhagvandas had been partially examined, the plaintiff applied for leave to amend the plaint by adding a prayer to the effect that in case the Court came to the conclusion that the plaintiff and defendant were equally entitled to the property in dispute, then the whole of the family property in the possession of each of the parties (including the property in dispute) should be ascertained and divided between them in equal shares. This application for amendment was granted on 4th March 1909 on condition of plaintiffs giving full particulars of the property to be brought into hot and paying additional Court-fees on the value of the said property.

4. On 7th April 1909 Bhagvandas died leaving a widow Ba Jamna and three daughters. Thereupon the widow Bai and one Bhurabhai Jamnadas were brought on the record as the legal representative and assignee respectively of the deceased defendant. Bai Jamna contended that the property in dispute was the separate and self-acquired property of Tribhovandas, that he had made a will by which he bequeathed the whole of the property to her husband Bhagvandas, and that her husband had made a will on 9th January 1901 giving the property to her absolutely. She gave up the contention which had been raised by her husband Bhagvandas that the three sons of Kesurdas were undivided.

5. Bhurabhai contended that Bhagvandas had sold the property in dispute to him on 7th April 1909 and that the plaintiff had no title to the property.

6. The Subordinate Judge held that the three brothers Bhagvandas, Tribhovandas and Balmukunddas were separate in every respect, that the property in suit was the exclusive property of Tribhovandas, that Tribhovandas''s will was proved, and that under the said will Bhagwandas alone was entitled to the property. He, therefore, dismissed the plaintiff''s suit.

7. Against this decision the plaintiff has preferred the present life appeal.

8. It is urged for the appellant in the first place that Bhagvandas having repudiated all interest under Tribhovandas''s will and having admitted that the family property was joint, it was lot open to his widow and legal representative Bai Jamna to jontend that the three brothers were separate, and that Bhagrandas took the property under Tribhovandas''s will. It is 10 doubt true that in para 7 of the written statement the defendant Bhagwandas states that the property in dispute belonged to the joint family and that, therefore, Tribhovandas lad no authority to make a will in respect of that property. [n his deposition he makes a similar statement to the effect ;hat he did not rely upon Tribhovandas''s will and that the property belonged jointly to him and to the plaintiff. The submission paper (Ex. 67) also shows that he had agreed .0 divide the whole property on the footing that it was joint. But it is to be borne in mind that he put forward an alternative are, in para. 8 of his written statement, to the effect that in case the Court held the property in suit to be the separate -f

property of Tribhovandas, he alone was entitled to the same under Tribhovandas''s will. The deposition of Bhagvandas 1 being incomplete must try left out of consideration, and the arbitration proceedings fell through owing to the conduct of one party or the other. When the present suit was filed both parties tried to hoodwink the Court by suppressing the real state of facts. Each party set up a case, alleging union or separation, just as it suited his purpose without any regard for the truth. On 2nd December 1908 the plaintiff asked for an adjournment of the case to take legal advice with reference to the subject-matter of the suit. He made a similar application on 16th December 1908, and on 10th February 1909 he at last made up his mind and applied for leave to amend the plaint by putting forward an alternative claim for a partition not only of the property in dispute but also of the whole of the family property in the possession of either party; but when this application was granted on certain conditions, he took no steps whatever to fulfil those conditions. He had family property admittedly worth about Rs. 11,000 in his possession, and although he was ordered by the Court on the 4th March 1909 to bring into hotchpot and pay additional Court-fee, he failed to do so. More than a year after the date of the Court''s order, on the last day of hearing, his pleader during the course of his reply on the whole case put in a list of the property which was to be brought into hotchpot. The list was found to be meagre and inaccurate, and the additional Court-fees were not paid. That being the case, under Order VI, Rule 18, of the Civil Procedure Code, the amendment of the plaint could not be allowed. He must, therefore, be confined to the case as originally set out in the plaint, viz. that Bhagvandas was separate in estate, while he and Tribhovandas were joint.

9. The admissions made by Bhagvandas that the whole of the family property was joint are by no means conclusive. In Heane v. Rogers (1829) 9 B.C. 577 the Court observes " There is no doubt but that the express admissions of a party to the suit or admissions implied from his conduct, are evidence ''and strong evidence against him; but we think he is at liberty to prove that such admissions were mistaken or were untrue and is not estopped or concluded by them, unless another person has been induced by them to alter his condition." This statement of the law is adopted by Lord Denman in Newton v. Liddiard (1848) 12 Q.B. 925. The same principle is laid down in Trinidad Asphalte Company v. Coryat [1896] A.C. 587; Brojendro Coomar Roy Chowdhry v. The Chairman of the Dacca Municipality (1873) 20 W.R. 223: (1906) L.R. 34 I.A. 27 (Privy Council) ; Har Shankar Partab Singh v. Lal Raghuraj Singh (1907) L.R. 34 IndAp 125.

10. It is not shown in the present case that the plaintiff ever acted upon the admissions of Bhagvandas. On the contrary the plaintiff adhered to his case as set out in his plaint up to the death of Bhagvandas. In his deposition he says " The defendant began to live separate from my father since Samvat 1939 (A. D. 1882-1883). When the defendant began to live separate, he was given one house, one shop, pots and pans, &c, and ornaments of the value of Rs. 3,000 ; and he gave up his right...Bhagvandas never lived joint with us after he became separate...He

carried on business in grain in his own name. He kept separate books of account. I and he have separate priests...His business and ours was never carried on in common. Defendant was doing his business separately. I had nothing to do with it."

11. Even in his application for amendment of the plaint, the plaintiff adheres to this case, and applies for a general partition only in the event of the Court''s holding his original case to be disproved. Thus it is perfectly clear that the plaintiff . never acted upon the admissions of Bhagvandas that the three brothers were joint. That being so, neither Bhagwandas nor his widow would be debarred from showing that those admissions were either mistaken or untrue.

12. Mr. Shah relies on Order XXII, Rule 4 of the Civil Procedure Code, which provides that when a defendant dies and his legal representative is made a party to the suit, he may make any defence appropriate to his character as such legal representative. Reference is also made to Daniel''s Chancery Practice, Vol. I, p. 249, where it-is said that a legal representative stands in the same position as the former party, and is bound by his acts. But in the present case, as we have already shown, Bhagvandas put forward an alternative defence. He distinctly claimed the whole of the property of Tribhovandas under his will. In consequence of this alternative defence the Court raised the issues (1) whether the property in dispute was the separate or self-acquired property of Tribhovandas and (s) whether the will of Tribhovandas was proved. These issues were raised during Bhagvandas''s life-time. It was, therefore, open to his legal representative Bai Jamna to rely upon this alternative defence set up by him, and lead evidence upon those issues. In doing so she was not making a defence inconsistent with that set up by her deceased husband or inappropriate to her character as his legal representative, and therefore she cannot be said to have acted in contravention of the provisions of Order XXII, Rule 4, of the Civil Procedure Code.

13. Moreover it is not correct to say that Bhagvandas had elected not to take under Tribhovandas''s will. As a matter of fact he accepted the bequest, took possession of the property bequeathed to him, and within a year after Tribhovandas''s death he made his own will (Ex. 165) by which he gave the property . bequeathed to him to his wife Bai Jamna. Further he appears to have relied upon the will in a Suit (No. 8 of 1901) which he had brought against the present plaintiff. Lastly he retained possession of the property left to him by Tribhovandas till his death. This course of conduct clearly and unmistakably shows, that far from repudiating, he had elected to take under, Tribhovandas''s will.

14. It may be further noticed in this connection that this being an ejectment suit, the plaintiff can only succeed on the strength of his own title. He cannot be allowed to abandon his own case and adopt that of the defendant and claim relief on that footing: see Shibkristo Sircar v. Abdool Hakeen ILR (1879) Cal. 602; Mukhoda Sodndury Dasi v. Ram Churn Karmokar ILR (1882) Cal. 3.

15. The next question is, whether the property in dispute was the joint property of the plaintiff and Tribhovandas as alleged in the plaint. On this point we have the evidence of the plaintiff alone, entirely uncorroborated by any other evidence. On the contrary there is the undisputed fact that on 7th December 1897 the plaintiff passed a release to Tribhovandas (Ex. 176) by which in consideration of his receiving property worth about Rs. 3,000 he gave up his claim to the remaining assets of a shop which he and Tribhovandas had been carrying on in partnership. The plaintiff admits that after the date of this release Tribhovandas alone had the management of the shop upto his death. This release is quite incompatible- with the alleged status of union between Tribhovandas and the plaintiff. It proves on the contrary that they were divided.

16. It was next contended that Tribhovandas''s will (Ex. 169) & was not genuine and that the evidence in support of the will was not satisfactory. Two witnesses, Exs. 168 and 169, were examined on behalf of Bai Jamna. Both of them depose that they attested the will at the request of Tribhovandas and that the testator admitted having signed it. One of these attesting witnesses Ex. 168 no doubt says in cross-examination that Tribhovandas had told him that the will was 1 merely nominal. It is clear that this statement was made at the instigation of the plaintiff. We agree with the Subordinate Judge in his view that this witness was tampered with.

17. Mr. Shah contends that this evidence is not sufficient, as the will was not signed in the presence of the attesting witnesses, while the writer was not examined. It is impossible to say at this distance of time whether the writer is alive or dead. If he is alive, there was nothing to prevent the plaintiff from examining him, and it is not necessary that the testator should sign the will in the presence of the attesting witnesses. It is a sufficient acknowledgment by a testator of his signature to his will, if he makes the attesting witnesses understand that the paper which they attest is his will, even though they do not see him sign it: see Gwillim v. Gwillim (1859) 3 Sw. & Tr. 200, Smith v. Smith (1866) L.R. 1 P. & D. 143; Beckett v. Howe (1869) L.R. 2 P. & D. 1.

18. The will was produced by Bhagvandas in Suit No. 8 of 1901, filed by him against the present plaintiff so far back as 9th January 1901, as appears from the Court''s endorsement on the back of the will. Plaintiff knew or must be taken to have known of the existence of this will, and yet he took no steps to impeach either the factum or the validity of the will before the institution of this suit. Under these circumstances we hold that the will of Tribhovandas is satisfactorily proved.

19. Lastly, it is contended that the plaintiff was not allowed any opportunity to rebut the defendant''s evidence in favour of the genuineness of the will. With regard to this point it may be noted that the suit was filed in the District Court of Broach in 1905 and was transferred to the First Class Subordinate Judge''s Court in 1907. The case dragged on for several years. The plaintiff gave numerous applications to call

witnesses but not one was examined; and finally on 20th June 1910 the plaintiffs pleader stated in his purshis Ex. 161 that "he had no further evidence to adduce at present." He did not state that he had reserved any evidence to rebut, if necessary, X% the defendant''s evidence. On 20th June defendant''s evidence was closed. On that day plaintiff applied for leave to give rebutting evidence and asked for four or five days time to do so. The application was granted and the case was adjourned to 2nd July 191o. On that day, instead of examining any witnesses, the plaintiff applied to the Court to summon four witnesses, two of whom had been named before and not called. Under these circumstances the Subordinate Judge was right in rejecting this application. It cannot fairly be contended that the plaintiff was not given any opportunity to call rebutting evidence.

20. The will being satisfactorily proved, the title to the property in dispute is now vested in Bai Jamna, and plaintiff''s claim must be rejected."

21. We confirm the decree and dismiss the appeal with costs.