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Brajaballav Ghose and Another Vs Akhoy Bagdi and Others

Court: Calcutta High Court

Date of Decision: Nov. 16, 1925

Acts Referred: Criminal Procedure Code, 1898 (CrPC) â€" Section 145

Citation: AIR 1926 Cal 705

Hon'ble Judges: Suhrawardy, J; Mukerji, J

Bench: Full Bench

Judgement

Mukerji, J.
The Defendant No. 1 is the appellant in this appeal. The appeal arises out of a suit to recover possession of a tank and some

paddy land on a declaration of the plaintiff"s title thereto. The plaintiff"s case was that he had purchased the same from the Bariks who were pro-

forma defendants in the suit and that after such purchase he was dispossessed by the principal defendants on the strength of an order obtained by

them in their favour in a proceeding u/s 145, Criminal Procedure Code. The defence of the principal defendants was that the property did not

belong to the Bariks and neither they nor the plaintiffs were in possession thereof. The Courts below have decreed the suit.

2. On behalf of the defendants-appellants two grounds have been urged in support of the appeal. The first ground relates to the reception in

evidence of a kobala, dated the 21st Joistha 1326. It is contended on behalf of the appellants that this document requires registration and that

inasmuch as it was not a registered document, it was not admissible in evidence. It appears that the document purports to have been executed by

the plaintiff"s vendor in favour of the defendant, but that for some reason or other it was not completed nor was it registered. The case of the

defendant is that negotiations in connexion with this transaction fell through and, therefore, the document was left unregistered. There is some oral

evidence on this point and the document, as far as we can make out from the proceedings, was proved in the case for the purpose of

corroborating the oral evidence. The value of the property which the document purported to convey was Rs. 99; still a sale of the property, if it

was made by a document, could only be made by a registered document under the provisions of Section 51 of the Transfer of Property Act. The

sale, however, never took place and the document was proved only to corroborate the plaintiff"s story that the defendant negotiated for the

purchase of the property from the plaintiff"s, vendor, a fact which would suggest that the latter had title to the property. The learned Subordinate

Judge states in his judgment that he agrees in the appraisement of the evidentiary value of this document as made by the learned Munsif and the

learned Munsif in one part of his judgment states that the kobala is not at all a strong piece of evidence of the plaintiff"s vendor"s title. The real use

therefore that has been made of the document is not to show the plaintiff"s vendor"s title but to prove the nature and the terms of the transaction

which as a matter of fact, was not completed but fell through. This is a legitimate use that may be made of this document. As has been laid down in

the case of Sheikh Juman v. Mohammed Nobineoaz 21 C.W.N. 1149, such a document does not confer title and is merely evidentiary, but having

regard to Section 91 of the Evidence Act, it may be used as evidence of the nature and terms of the transaction. This ground therefore is of no

substance and must fail.

3. The other ground taken by the learned advocate appearing on behalf of the appellants is of much substance, That ground relates to the reception

in evidence of a certified copy of the deposition of one Umapada who was not examined as a witness in the present suit but was examined as a

witness in criminal proceedings u/s 145, Criminal P.C., to which I have already referred. Umapada was pro forma defendant in the present suit. In

the proceeding u/s 145 Criminal P.C. the Defendant No. 1 (the appellant before us) was the first party and the plaintiff was the second party.

Umapada was examined as a witness in those proceedings on behalf of the present appellant. In the present suit, Umapada was cited as a witness

by the plaintiff but he did not appear. Subsequently as appears from a hajira to be found on the record, his name was put forward as being present

on a particular day as a witness on behalf of the defendant-appellant. He was, however, not examined and at the time of the argument a certified

copy of the deposition of Umapada as given by him in the proceedings u/s 145, Criminal Procedure Code, mentioned above, was put in on behalf

of the plaintiff and was marked as an exhibit in the case. The appellant contends that the learned Subordinate Judge was wrong in considering this

deposition as a piece of evidence in the case. The learned Judge, as appears from his judgment, has relied upon this piece of evidence a good deal

and in fact the major portion of his judgment deals with the admissibility and evidentiary value of the deposition of Umapada. He has held that this

evidence is admissible u/s 33 of the Evidence Act and that even if it be conceded that it does not come under that section then it may be used in

evidence as an admission against the present appellant. Before dealing with those two matters I should like to observe at the outset that whatever

view may be taken of them, the deposition has not been proved at all. A certified copy of the deposition of a witness would not come in by itself.

In any case it will be necessary to adduce evidence proving the identity of the person who gave the deposition. That does not appear to have been

proved in the present case and it was only in the course of the argument that a certified copy was put in and marked as an exhibit. Now turning to

the learned Judge''s reasoning that the deposition is admissible u/s 33 of the Evidence Act, I find that the learned Judge seems to be of opinion that

although it has not been proved that Umapada had been kept away by the defendant-appellant his evidence is admissible under that section

because he actually appeared on behalf of the defendant as a witness on one particular occasion and that therefore it should be inferred that it

would be useless for the plaintiff to have spent money in order to bring Umapada to Court as a witness. Section 33, however, is perfectly clear on

the point. Evidence will be admissible u/s 33 of the Evidence Act, when the witness is dead, when he cannot be found, when he is unable to give

evidence or is kept out of the way by the adverse party or if his presence cannot be obtained without an amount of delay or expense which the

Court considers unreasonable. The requirements of none of these clauses mentioned in Section 33 of the Evidence Act have been satisfied in the

present case. The mere fact that he did not appear as a witness when cited on behalf of the plaintiff or that he appeared as a witness on behalf of

the defendant on one occasion but was not examined when it has been distinctly found that he was not kept out of the way by the defendant would

not be a ground for admitting the deposition u/s 33 of the Evidence Act. As regards the question of expense what the learned Subordinate Judge

says with reference to it does not show that the presence of Umapada could not be obtained without an amount of expense which would be

considered unreasonable by the Court. Then again there are three provisos to that section. The second proviso is to the effect:

that the adverse party in the first proceeding should have the right and opportunity to cross-examine the witness.

4. Umapada had been examined in the proceedings u/s 145 as a witness on behalf of the defendant who was the first party therein. The defendant

had no opportunity nor the right to cross-examine Umapada; and, in these circumstances it is impossible to hold that this proviso has been

complied with in the present case. I am clearly of opinion therefore that the deposition of Umapada could not go in under the provisions of Section

33 of the Evidence Act. The learned Subordinate Judge then says that even if Section 33 did not apply, the deposition could be used as evidence

of admission as against the present appellants. Umapada is a co-defendant in the present suit with Defendant No. 1 (appellant). The admission

made by him in the proceeding u/s 145, Criminal Procedure Code, when examined as a witness therein is undoubtedly evidence as against him. In

the case of Soojan Bibi v. Achmut Ali [1874] 14 B.L.R. 3, Sir Richard Couch, C.J., dealt with this question and observed as follows:

S. 33 does not apply to the deposition of a witness in a former suit when the witness is himself a defendant in the subsequent suit, and the

deposition is sought to be used against him, not as evidence given between the parties one of whom called him as a witness, but as a statement

mode by him, which would be evidence against him whether he made it as a witness or on any other occasion. It is used against him as an

admission; Section 33 has no application to such a case as the present. The sections of the Evidence Act which do apply are the sections relating

to admissions.

5. The same view has been taken in the case of Ali Mahommed Khan v. Sheikh Moharaj Bepari [1921] Cri.L.J. 186, where it has been laid down

that such a statement can be evidence against the maker of it as a piece of admission. The question that next arises is whether when the statement

may be used as an admission as against Umapada it may not also be used as against Umapada''s co-defendant, viz., the present appellant. That

question has been considered in several cases decided by this Court of which I shall refer to two. In the case of Meajan Malabar v. Alimuddi Mian

[1911] 44 Cal. 130 when dealing with the question of admissibility of an admission as against a co-defendant it was laid down that when several

persons are jointly interested in the subject-matter of a suit, an admission by one of them is receivable in evidence not only against himself but also

against the other defendants, whether they be all jointly suing or sued, provided that the admission relates to the subject-matter in dispute and is

made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered. In a later decision of this

Court in the case of Ambar Ali v. Lutf Ali [1918] 45 Cal. 159, it was pointed out that in such a case it was absolutely necessary that the admission

should relate to the subject-matter in dispute and that it should be made by the declarant in his character of a person jointly interested with the

party against whom the evidence is tendered and that the requirement of the identity in legal interest between the joint owners is of fundamental

importance. It was further pointed out that to hold otherwise would be to permit a litigant to discredit an opponent''s claim merely by joining any

person as the opponent''s co-party and then employing that person''s statements as admission. Indeed, it is not necessary to refer to any cases on

the point because the words of Section 18 of the Evidence Act are perfectly plain. They are these:

If they are made during the Continuance of the interest of the persons making the statements.

6. In the present case Umapada made the statements when he had parted with the interest in favour of the lessee, the Defendant No. 1. In this

view of the matter I am not prepared to accept the reason given by the learned Subordinate Judge that the statement of Umapada as contained in

the aforesaid deposition can be treated as evidence of admission as against the present appellant.

7. The learned vakil for the respondents has argued that even if this evidence be held to be inadmissible we should not interfere with the decision of

the learned Subordinate Judge. He has referred us to the observation which is to be found in the portion of the learned Judge''s judgment which

runs in these words:

I only wish to mention here that even if this deposition be entirely thrown out of the Court, my finding would remain unchanged. Only what can be

easily held on this tangible admission will have to be based on the balance of other evidence and probabilities of the case.

8. We have considered this argument of the respondents very carefully; but having regard to the fact that the major portion of the judgment of the

learned Judge is based upon the deposition of Umapada and also to the fact that the learned Judge does not state what the balance of other

evidence is, nor what the probabilities of the case are, and further because we find that the learned Judge in point of fact based his decision mainly,

if not entirely, upon this deposition of Umapada, we are unable to hold that this is a case in which we should decline to interfere merely because at

the conclusion of the judgment the learned Subordinate Judge has recorded the observation to which I have referred. I am clearly of opinion that

this is a case in which we should interfere. Accordingly I set aside the decree passed by the learned Subordinate Judge and remit the appeal to his

Court so that the deposition of Umapada may be excluded and a decision arrived at on the appeal on the other materials on the record and in the

light of the observations made above. The costs will abide the result.

Suhrawardy, J.

9. I agree.