(1869) 06 CAL CK 0059

Calcutta High Court

Case No: Special Appeal No. 592 of 1869

Mussamut Amiran and Others		APPELLANT
	Vs	
Mussamut Asihun and Others		RESPONDENT

Date of Decision: June 3, 1869

Judgement

Glover, J.

This was a suit by the widow of Kadir Ali to have an adjudication as to her right of inheritance in her deceased husband''s estate to the extent of 18 out of 96 sehans, into which the property of the deceased is stated to have bean divided according to the rules of Mahommedan law. There were two sets of defendants, the two other widows of the deceased Kadir Ali and his sons and other near relatives. The plaintiff further sued to have two deeds of bai-mukasas, or gifts in lieu of dower, held by the defendants Nos. 1 and 2 set aside on the ground that they were collusive and interfered with her getting possession of her share of the property. The widows were the only parties who defended the suit, the other relatives of Kadir Ali supported the plaintiff''s case; these widows stood upon their deeds of bai-mukasas, and alleged that they had been in possession of the property covered by them from the dates of the deeds, and that the plaintiff had no right to dispossess them. The Court of first instance took up the issue of misjoinder and on that issue the Principal Sudder Ameen decided for the plaintiff, and then on the merits gave the plaintiff a decree for all that she sought. The Judge on appeal held that the suit was barred by section 8 of Act VIII of 1859, inasmuch as it mixed up different causes of action against different parties. Two grounds were taken before us in special appeal: first, that there was substantially no misjoinder; and second, that if there were, u/s 350 of the CPC the Judge ought not to have dismissed the plaintiff''s case in the appeal stage upon what was a mere irregularity which did not affect the merits of the case or the jurisdiction of the Court.

2. With regard to the first objection it appears to me that the Judge was right. The plaintiff''s claim to a share of her husband''s property, namely 18 sehans, was not denied, nor was it denied that the estate of Kadir Ali was divided into 96 sehans; so

far therefore nobody opposed her claim, and if, as her pleader now wishes to make out, this was her case, she had no cause of action; but it is evident that what she did want to have adjudicated (and what was also substantially her ground of appeal to this Court) was, whether or not the two deeds of gift in lieu of dower propounded by the defendants Nos. 1 and 2 were genuine and a sufficient bar to her getting possession of the property sued for. Now these deeds of gift are in favor of two separate persons, and as the Judge finds, for two different properties; the one was executed in the year 1842, and the other in the year 1847. It is contended by the special appellant that her cause of action was not the execution of these deeds of bai-mukasa, but the death of her husband, Kadir Ali; and that therefore it was a matter of absolute indifference to the decision of her case whether these two deeds were executed in favor of one person, or of more persons, or at one time, or at different times. It appears to me that the 8th section of the CPC fully applies to a case of this description.

3. Granting for the sake of argument that the cause of action to the plaintiff herself was one, it is quite clear that the cause of action was not against the same parties, inasmuch as one of the defendants was one of the widows of Kadir Ali and the other another of those widows, and they both claimed under different deeds executed at different times for different properties. The law says that causes of action by and "against" the same parties and cognizable by the same Court, may be joined together in the same suit, but it cannot be inferred that it would be sufficient under the law that the different causes of action should be common to the plaintiff only, and not common against the defendants, and it seems impossible to argue that the causes of action of the plaintiff in this case were substantially against the same parties. The application of section 8 appears to me to have been very properly laid down in the case of Ramoona v. Manicko Moyee Chowdhrain 9 W.R. 525, and I quite concur in the view which was there taken by Justices Phear and Hob-house. With regard to the second point that supposing this to be a misjoinder, the Judge ought not to have decided the case on appeal, upon what after all was merely an irregularity, it appears to me that section 350 of Act VIII of 1859 has no application to the case; the words of that section are "that no decree shall be reversed or modified in appeal or a case remanded to the lower Court on account of any error, defect, or irregularity affecting the merits of the case or the jurisdiction of the Court." Now if the decision of the first Court on the question of misjoinder was a mere irregularity, then no doubt the words of the section would apply; but it appears to me to be something more than an irregularity, something in fact expressly forbidden by section 8 of the Code, and consequently an illegality instead of an irregularity. It cannot, I apprehend, be contended that the words of section 350 refer to irregularities such as are declared by other sections of Act VIII of 1859, to be absolute illegalities barring the hearing of a suit. We have been referred to the case of Shoroop Chunder Paul v. Mothoor Mohan Paul Chowdhry 4 W.R. 109, to show what the Judge ought to have done in a case of this description.

4. I do not understand that that decision lays down any distinct ruling on the point; it merely sets forth that the Judge in the appellate Court, under Act XXIII of 1861, might, if he chose, have amended the first Court''s proceedings and separated the suits. It may be that the Judge could have done so in this case, but the question is not now whether the Judge could or could not have done so, but whether he was wrong in law in dismissing the plaintiff''s suit on the ground of misjoinder. With regard to the first part of the decision above quoted the learned Judges say that if there had been a misjoinder, they had their doubts as to whether the Judge below was right in taking the steps he had taken in appeal, namely to dismiss the plaintiff''s suit. I do not think therefore that this decision in any way binds us, or that it ought to be taken as a ruling disposing finally of the point in question. It appears to me therefore that the Judge holding that the plaintiff''s case was bad for misjoinder, had no other course open to him than to put the plaintiff out of Court. The decision of the lower appellate Court appears to me to be correct, and I would dismiss the special appeal with costs.

Kemp, J.

5. I regret that I cannot concur in the judgment of Mr. Justice Glover. I am of opinion that the first ground taken in special appeal is a good ground, and that there has been no misjoinder of different causes of action in this suit. The suit was by a widow for her share in the estate left by her husband. Now, under ordinary circumstances, the share of a widow under the Mahommedan law is plain and definite, and there could have been no difficulty whatever in her obtaining the share she was entitled to under the Mahommedan law were it not for the fact that her title was disputed under alleged deeds of bai-mukasa, set up by the two other widows of her deceased husband. The plaintiff therefore sued to have her share declared, and to set aside the two alleged deeds of bai-muknsa which alone prevented her from obtaining the share to which she was entitled under the Mahommedan law. It appears to me that this was a case in which it was absolutely necessary that all the parties interested in this question of succession to the estate of Kadir Ali ought to have been made parties; the decision in the case of Ramoona v. Manicko Moyee Chowdhrain 9 W.R. 525, has reference to a very peculiar case.

6. In that case there were two co-plaintiffs in no way connected with each other suing under four distinct causes of action; one plaintiff suing on two distinct causes of action, against one defendant for one portion of the property, and against the other co-defendant for the other portion of the property; and the other co-plaintiff suing on two distinct causes of action against the two co-defendants in the like manner. In that case, on the particular facts brought before the learned Judges, they held "that the causes of action of the two co-plaintiffs were so distinct in their nature as to be dependent on entirely different evidence for their respective substantiation." In like manner they observed that "the defence of the two co-defendants might easily be imagined to be equally different on the different

causes of action:" they therefore thought that "it would be a monstrous injustice that the defendants should be obliged, in spite of their protest from the beginning, to have their distinct defences to the one claim and the other confused together and tried as one between them and the two several plaintiffs in one action, just as if the two plaintiffs had a common ground of action against them." Now in the present case the plaintiff has a common ground of action as against the two other widows of her deceased husband; the defences of the defendants will not be dependent on entirely different and distinct evidence; in short there is nothing but these two deeds of bai-mukasa which prevent the plaintiff from succeeding in her claim, her share in the estate being admitted and not disputed under the Mahommedan law.

7. I therefore fail to sea why the question of the genuineness or otherwise of these deeds of bai-mukasa should not be tried in this suit, more particularly with reference to the position of the parties; to the fact that the other heirs, that is the sons and daughters of the late Kadir Ali, do not dispute the plaintiff''s claim; and lastly to the fact that this suit will dispose of the whole question of the extent of the plaintiff''s share in the estate, if any, and prevent further litigation. In this view of the case I would reverse the decision of the Judge, and remand the case to the Judge to be tried, as it was tried in the Court of first instance, on the merits. The case is therefore remanded for trial with reference to this judgment u/s 15 of the Letters Patent.