Mst. Ulfat And Ors. vs Zubaida Khatoon And Anr. on 6 November, 1950

Equivalent citations: AIR1955ALL361, AIR 1955 ALLAHABAD 361

JUDGMENT

Kidwai, J.

1. The following pedigree will help to elucidate the facts of the case :

M T . U L F A T = S I R A J U D D I N |
_____|_____
| | | | Mt. Sajiram Mt. Mahumudan Qadeor Mt. Asiran Zahir Uddin =Jamil (Deft. 2)
O.S.P. =Abdul Rashid (Death 1942)=Zubeda =Ali Mohammad 1931 (Pltt. 1) (Deft. 3) |
Mt. Fahmida (Pltf.2)

2. Zubeda and Fahmida, mentioned in the above pedigree, instituted the suit out of which this appeal arises against the appellants for the following reliefs : (1) A decree against all the defendants for the partition of a ten annas share in the property left by Zahiruddin which, the plaintiffs alleged, was the entire property entered in list A attached to the plaint and which was in the possession of Ulfat and Mohmudan though a small portion of it -- the goods in the tailors shop -- was in possession of All Mohammad. (2) A decree for dower amounting to Rs. 250/- against defendants 1 and 2; and (3) A decree against defendant No. 1 for the recovery of the jewelry mentioned in list B attached to the plaint which was alleged to belong to the plaintiff No. 1 and was said to have been entrusted by her to defendant No. 1.

3. All the defendants filed a joint written statement. They alleged: (1) That none of the property mentioned in list A was the property of Zahiruddin; (2) That plaintiff No. 1 remitted her dower and cannot now claim it; (3) That plaintiff No. 1 did not leave any jewelry with defendant No. 1; (4) That in fact plaintiff No. 1 had taken away some money and jewelry belonging to defendant No. 1; (5) That the suit is bad for misjoinder of causes of action; and (6) That Zahiruddin had purchased a house in the name of plaintiff No. 1 and that should also be included' in the suit.

3a. The trial court held : (1) That plaintiff No. 1 had not relinquished her dower; (2) That all the property in list A was property left by Zahiruddin; (3) That defendant No. 1 had taken possession of the ornaments belonging to plaintiff No. 1; (4) That the house standing in the name of plaintiff No. 1 does not form part of the assets of Zahiruddin.

4. It appears from the Judgment of the trial court that the issue as to misjoinder was not pressed and the court held that there was no misjoinder. On the findings arrived at by the court the suit was

decreed for all the reliefs claimed. It was further directed that, if defendant No. 1 failed to return the ornaments given in list B, she should pay the price of the ornaments at the current market rates of silver and gold.

5. The defendants appealed and the learned District Judge, Lucknow, upheld the findings arrived at by the learned Civil Judge. He, however, held that there was a misjoinder of causes of action but he held that the merits of the case were not affected and that consequently by reason of Section 99, C. P. C., he could not interfere. With regard to the ornaments he modified the decree of the Civil Judge and confined the decree to a return of the ornaments or payment of Rs. 1300/- the amount mentioned in the plaint as the value of the ornaments.

6. The defendants have come up in appeal. Their learned Advocate contended : (1) That the suit was bad for multifariousness and a question of jurisdiction was affected; (2) That there was no evidence to prove that house entered at item No. 1 of list A belonged to Zahiruddin and the courts below have relied upon inadmissible evidence to prove this; (3) That the evidence as to the entrustment of the ornaments to defendant No. 1 was insufficient and, in any case, the weight and value of the ornaments were not proved; (4) That, in any case, dower was due not only from defendants 1 and 2 but also from the plaintiffs themselves and so a decree for Rs. 250/- could not have been passed against the defendants.

7. With regard to the first point, it was urged: (a) That the relief for return of ornaments was claimed only against defendant No. 1 by plaintiff No. 1 and could not have been joined with a suit against all the defendants for a partition of the assets of a deceased person; and (b) That dower was claimed only by one of the plaintiffs against two of the defendants; and it should have been claimed , against the other plaintiff also, which affected the merits of the case.

8. The first objection is perfectly valid. In view of Order II Rule 5 C. P. C. the claim against Mst. Ulfat as heir could not be joined with the claim against her in her personal capacity. Further, although the cause of action as to dower could be combined with the cause of action relating to division of inheritance since in respect of both causes the suit was against the heirs as such, plaintiff No. 2 was also one of the persons who should have been sued or the claim reduced proportionately. Neither of these courses was adopted. Thus the suit was certainly multifarious. Nevertheless that cannot be allowed to affect the decision now by reason of Order II, Rule 7, C. P. C. 8a. Order II, Rule 7, C. P. C. provides:

> "All objections on the ground of misjoinder of causes of action shall be taken at the earnest possible opportunity and, in all cases where issues are settled at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived."

9. In the present case the objection was taken at the earliest opportunity, i.e., in the written statement, but it was subsequently not pressed. In these circumstances it cannot be allowed to defeat the suit at a later stage. Vide -- Hazurimal Malawa Mal v. Ghulam Husain', AIR 1928 Lah 289 (A) and -- 'Nathubhai Ichharam v. Narayanacharya Ramacharya', AIR 1927 Bom 470 (B).

10. With regard to the dower however, there must be some modification of the decree. Defendants 1 and 2 are only liable to pay 6/10 of the debts since they inherit only 6/16 of the property of Zahiruddin. A decree for Rs. 250/- should not, therefore, have been passed against them but only a decree for Rs. 93/12/-.

11. The lower courts have relied upon Ex. 2, a plan of house No. 1 filed by Zahiruddin in the office of the Municipal Board in order to secure a permit to build, Ex. 3 the permit granted by the Municipal Board and Ex. 4 a statement made by Mst. Ulfat in a criminal case which she filed against plaintiff No. 1 to prove the ownership of the house entered at item 1 of list A. The defendants have filed one document, Ex. A.34 to show that Ulfat paid Rs. 10 Nazrana to Murad Ali for some land. The courts below relying upon Exs. 2 to 4 have held that house No. 1 is proved to have belonged to Zahiruddin. It was contended that Ex. 4 was not admissible in evidence to prove the admission since, although Ulfat came into the witness box, it was not put to her.

12. Ex. 4 was recorded in the following circumstances: Mst. Ulfat filed a criminal complaint against her daughter-in-law, Zubaida, alleging that she had entrusted some gold ornaments and cash to the said daughter-in-law who had misappropriated them. In support of her complaint she made a statement in court. During the course of cross-examination Mst. Ulfat stated that Zahiruddin left three houses at his death. These three houses could not include the house purchased in the name of Zubaida (and which has been held to belong to Zubaida) because Ulfat proceeded to state that she was in possession of three houses. Thus, this was a clear admission that the three houses -- mentioned at items 1 to 3 of list A -- were part of the property left by the deceased,

13. When the plaintiffs instituted the present suit they filed a copy of this statement in support of their case treating it as an admission. The defendants' Advocate admitted the genuineness of the document. Thereafter, Ulfat came into the witness box but she made no attempt to explain this admission; she only denied that she had made any statement to the effect that Zahiruddin left three houses. She was cross-examined at length on this aspect of the case but Ex. 4 was not put to her. It was contended on the strength of -- 'Firm Malik Des Raj Faqir Chand V. Firm Piara Lal Aya Ram', AIR 1946 Lah 65 (FB) (C), that the admission could not be relied upon in the circumstances of the case.

14. AIR 1946 Lah 65 (PB) (C), fully supports the contention of the appellants, but with all respect I am not prepared to follow it. The decision purports to rest upon -- 'Bal Gangadhar Tilak v. Sriniwas Pandit', AIR 1915 PC 7 (D), but the case before the Privy Council was one in which certain statements were sought to be relied upon not as admissions by parties but to contradict witnesses produced in the case. Neither in the notes of arguments as reported in the Indian Appeals nor in the judgment of their Lordships was any reference made to Section 21 of the Evidence Act and only the effect of Section 145 is considered. Further as I have already pointed out, no question of relying upon the previous statements as admissions of the parties arose in that case.

15. The decision in AIR 1946 Lah 65 (FB) (C), itself refers to earlier decisions in which a different view was taken and it loses sight of the Privy Council decision in -- 'Rani Chandra Kunwar v. Narpat Singh', 34 Ind App 27 (E). In that case the question was whether one Makund Singh had been

adopted by Raja Kishen Singh. The party relying upon the adoption sought to prove it by producing some earlier statements of Makund Singh to the effect that he had been adopted. Makund Singh was himself examined in the case. He was asked about his earlier statements, as in the present case, and he attempted some sort of an explanation, but the statements were not actually put to the witness. Nevertheless, reliance was placed upon them by their Lordships as admissions and the burden was thrown upon Makund Singh to show that they were wrong on the principle that what a party himself admits to be true may reasonably be presumed to be so, though "the party making the admission may give evidence to rebut this presumption, but unless and until that is satisfactorily done, the fact admitted must be taken to be established."

16. Having regard to the decision in the last mentioned case which was directly in point, the admission of Mst. Ulfat contained in Ex. 4 was admissible in evidence and, in absence of any satisfactory explanation, the courts below were quite right in relying upon it. There is nothing in Ex. A.34 "to connect it with house No. 1 in list A.

17. The evidence of P. W. 3 Hafiz Mohammad Husain proves the various articles of jewelry entrusted to Mst. Ulfat. P. W. 1 Zubaida herself proves their value. The courts might have disbelieved this evidence as being interested, but they have not done so. The value of their evidence cannot, however, be gone into in second appeal and, since it has been accepted as true by the lower courts, the findings arrived at by these courts cannot be interfered with.

18. With regard to dower, I have already indicated that the plaintiffs were only entitled to a decree for Rs. 93/12/-.

19. The result is that the decree of the lower appellate court is modified to this extent that the decree for dower is reduced to Rs. 93/12/-instead of Rs. 250/- payable out of the assets left by the deceased Zahiruddin. With this modification, the appeal is dismissed. The parties will give and receive costs in all courts in proportion to their success and failure in the suit. The stay order, dated 7-11-49 is vacated.

Ghulam Husain J.

20. I agree with the order proposed.