Karnataka High Court
Kalappa Shiddappa Uppar And Ors. vs Bhima Govind Uppar And Ors. on 11 February, 1960
Equivalent citations: AIR 1961 Kant 160, AIR 1961 Mys 160, ILR 1960 KAR 382
Author: S Dasgupta
Bench: S Dasgupta, B Kalagate
JUDGMENT S.R. Das Gupta, C.J.

1. The only point which has to be considered in this appeal is whether or not the lower appellate Court was wrong in admitting in evidence statements contained in two Exhibits, being Ex. 58 and 59 in the suit.

2. The case of the plaintiffs in the suit was that they were the owners of the suit plot marked A B C D E F and situated in Uppar Lane, Hukkeri, Belgium District. The defendants deny the title of the plaintiffs. In support of their case the plaintiffs produced the said Exhibits, being Exhibit 58 and Exhibit 59. Ex. 58 is dated 12-1-40 and Ex. 59 is dated 13-4-46. Ex. 58 is a sale-deed executed by one Appiah and his minor sons in favour of the plaintiffs.

The subject matter of the said sale deed was a plot of land situated to south of the land in question in this suit. In that document it was recited that the northern boundary of the said land was a plot owned by the plaintiffs. Ex. 59 was a rent note executed by one Falcru in favour of plaintiff No. 1. In this document also there is a recital to the effect that the site in question in this suit was to the east of his land and is owned by the plaintiffs.

The lower appellate Court admitted these statements in evidence as against the defendants. The lower appellate Court also has taken into consideration these statements and the other evidence which was given in favour of the plaintiffs' title and has held that the plaintiffs have established their title to the suit land. The said Court passed a decree in favour of the plaintiffs. It should be mentioned that the trial Court had come to an opposite conclusion and had dismissed the suit. This appeal has been filed against the said decision of the lower appellate Court.

3. As I mentioned before, the only question raised in tin's appeal was whether or not the lower appellate Court was wrong in admitting the said statements contained in Exs. 58 and 59. The learned Advocate for the appellants contended before us that those statements were inadmissible in evidence. The only sections of the Indian Evidence Act according to him, which can be thought of for the purpose of deciding whether or not these statements are admissible in evidence are Sections 11, 13 and 32 of the Indian Evidence Act. The learned Advocate contended that the statements in question are not admissible under any one o£ the said sections.

4. The 'contention of the learned Advocate for the respondents, on the other hand, was that the statements in question were admissible either under Section 11 or under Section 13 of the Indian Evidence Act. It should be mentioned at the very outset that the question whether or not the said statements are admissible under Section 32 of the Evidence Act does not "rise for consideration in' this case, as the executants of the documents are alive and they were not called to give evidence in this case and it has not been shown that their attendance could jiot be procured without an amount

of delay or expense which, in the circumstances of the case, was unreasonable. It is therefore not necessary to consider as to whether or not the statements in question are admissible under Section 32 of the Evidence Act.

5. The only sections therefore which have to he considered are Section 11 and Section 13 of the Evidence Act. I shall first take up Sec, 11 and determine whether or not the statements in question fall within the said section and are admissible. Section 11 reads as follows;-

"11. Facts not otherwise relevant are relevant (1) if they are inconsistent with any fact in issue or relevant fact:

(2) if by themselves or in connection with any other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable."

The learned Advocate for the respondents strenuously urged before us that the said statements contained in Ex?. 58 and 59 are admissible under Sub-section (2) of this section. He contended that the fact that the statements were made by persons who had no interest in the dispute and at a time when the dispute in question did not arise makes it probable that the plaintiffs were the owners of the suit land. In support of that view he relied on a decision of the Madras High Court reported in Hangayyan v. Innasimuthu Mudali, AIR 1956 Mad 226.

That was a decision of a single Judge of the Madras High Court and the view taken by the learned Judge, who decided that case, was that recitals of boundaries in documents not inter parties will be relevant and admissible under Sections 157, 32(2), 13 and 11 of the Evidence Act; the particular circumstances of the case determining the particular section applicable to the facts of that case, and the probative value to be attached will also equally depend upon the circumstances of each case. The learned Advocate for 'the respondents relied on this decision and contended before us that Section 11(2) would permit the recitals contained in the documents in question to be admitted.

6. I am unable to accept this contention of the learned Advocate for the respondents. In the first place, it has to be noticed that under Sub-section (2) of Section 11 of the Evidence Act only those facts can be admitted, which make the existence or non-existence of any fact in issue Or relevant fact highly probable or improbable. Importance of the word "highly' used before the words "probable or improbable" in the section should not be overlooked.

It is not every fact which may make the existence of a fact in issue probable or improbable, which should be admitted under the said sub-section. It is only those facts which would make the existence of any Fact in issue or relevant fact highly probable or improbable that are admissible under Section 11. This in effect was also the view which seems to have been taken by the very learned Judge who decided the case reported in AIR 1956 Mad 226. His Lordship in the course of his judgment observed as follows:-

"The only two limitations on the use of these documents under Section 11, are: The Court must exercise a sound discretion and see that the connection between the fact to be proved and the fact

sought to be given under Section 11 to prove it must be so immediate as to render the co-existence of the two highly probable. The section makes admissible only those facts which are of great weight in bringing the court to a conclusion one way or the other as regards the existence or the non-existence of the fact in question. The admissibility under this section must, in each case, depend on how near is the connection of the facts sought to he proved with facts in issue and to what degree do they render facts in issue probable or improbable when taken with the other facts in the case."

Applying his test to the present case, I am unable to hold that the recitals contained in the documents in question make the existence or non-existence of the fact in issue so highly probable or improbable that they would be admissible under section 11(2) of the Evidence Act. It should be noted that this is not a transaction which took place entirely between strangers. The document in question was executed by the vendor of the plaintiffs in respect of a different land in favour of the plaintiffs.

This fact, in my opinion, to a great extent minimises the importance of the recitals contained in these documents. If the documents in question had been executed by a stranger in favour of another stranger, there would have been much force in the contention that they having no interest in the subject-matter of the reoitals, great weight should be attached to such recitals. But the same thing cannot be said with regard to a document which is executed by a stranger in favour of ond of the parties to the suit.

The recitals contained in such a document, in my opinion, would not make the existence or non-existence of the fact in issue highly probable or improbable as contemplated in Section 11(2) of the Evidence Act. Some support for this view can also be had from the very case cited before us by She learned Advocate for the respondents (AIR 1956 Mad 226). In that case His Lordship observed that in regard to recitals of boundaries in documents, cases fall under three different classes.

The first class is the class where the recital is in a document inter partes. In such a case the recital.

His Lordship held, is a joint statement made by the patties to the document and therefore relevant against all of them as an admission. The second class of cases are those where the recital is contained in a document between a party and a stranger. "In such a case", His Lordship held.

"the recital is relevant against a party as an admission but is not admissible in his lavour, unless the fact recited is deposed to in court by the executant of the document, in which case the recital will become admissible under Section 157 of the Evidence Act to corroborate the evidence of the executant."

The third class of cases are those where the recital is in a document between strangers. It is with respect to this class of cases that His Lordship held that although the general rule is that ordinarily the recitals contained in such documents are not admissible to prove possession or title as against a person who is not a party to the document still the said rule is subject to exceptions which will again be classed under lour heads, viz. if those documents come within the relevancy and admissibility contemplated under (a) Sections 157 and 155 of the Evidence Act; (b) Section 32(3) of the Evidence

Act; (c) under Section 13 of the Evidence Act; and (d) under Section 11 of the Evidence Act.

It would appear from the judgment of His Lordship that in dealing with this class of cases His Lordship considered whether or not Section 11 would be applicable. But with regard to the second class, which is the class in which die transactions in question in this ease fall, His Lordship definitely held that recitals contained in that class of documents are relevant against the party as an admission but is not admissible in his favour. In my view, the case on which the learned Advocate for the respondents relics goes more in favour of the contention urged before us on behalf of the appellants than in favour of his client.

7. There are however a number of decisions which have taken the view that recitals contained in a document not inter parties are not admissible under Section 11 of the Evidence Act. The first of those cases, to which I would refer, is Radhakrishna v. Sarbeswar, AIR 1925 Cal 684 (2). In that case, the right to possession by lessee of a plot of land was in controversy. That right was denied on the ground that the alleged lessor was not entitled to the plot.

A pattah executed by the lessor in respect of another plot of land, a year previous to the granting of the lease in question, Contained a description of the boundary of the land demised by that pattah. This description clearly evidenced his title to the disputed plot which formed the subject of the lease in question. One of the questions which arose for their Lordships' decision in that case was whether or not the lessor's statement in pattah, previously granted, could be said to come within the provisions of Section 11 and whether that section could be invoked for admitting the said statement.

Their Lordships came to the conclusion that the said statement was not admissible in evidence under Section 11 of the Evidence Act as it can hardly fee said to be affected within the meaning of that lection. This leads me to another question namely whether the statements in question are facts as Contemplated in Section 11 of the Evidence Act. What Section 11 of the Evidence Act says is that facts not otherwise relevant are relevant if they make the fact in issue highly probable or improbable.

It may very well be contended, and that is the view which seems to have been taken by their Lordships of the Calcutta High Court in that case, that recitals contained in a document are not facts as mentioned in Section 11 of the Evidence Act and therefore are not admissible under the said section. The same view also seems to have been taken in a Full Bench decision of the Patna High Court in Soney Lall v. Darbdeo Narain Singh, AIR 1935-Pat 167.

In that case also a question arose as to whether the recitals as regards boundaries in documents between strangers are admissible in evidence. Their Lordships held that Section 11 has no application to such recitals on the ground that Section 11 "deals with relevant facts". In a later decision of the Calcutta High Court in Brojo Mohan v. Gaya Prasad, AIR 1926 Cal 948 their Lordships also dealt with the question as to whether or not such statements appearing in a document between; third parties are admissible against parties to the suit and held that they were not admissible amongst others under Section 11 of the Evidence Act. These decisions, in my opinion, negative the contention of the learned Advocate for the respondents, viz-that the statements in

question are admissible under Section 11 of the Evidence Act.

8. Corning to Section 13 of the Evidence Act, I am also unable to hold that the statements in question are admissible under the said section. Section 13 has two parts and they read as follows:-

"13. Where the question is as to the existence of any right or custom, the following facts are relevant :-

(a) any transaction by which the right or custom in question was created, claimed, modified, recognised, asserted or denied, or which was inconsistent with its existence;

(b) particular instances in which the right at custom was claimed, re cognised or exercised, or in which its exercise was disputed, asserted or departed from."

The question which arises for our decision in this case is whether or not because of the recitals appearing in the documents in question it can be said that the right of the plaintiffs was in any way claimed, recognied or asserted so as to make it admissible under Section 13 of the Evidence Act. In my opinion, it is difficult to hold, because of such recitals, that the plaintiffs' right to the suit land was claimed or recognized or asserted.

In a Full Bench decision of the Calcutta High Court, Brojendra v. Mohim Chandra, AIR 1927 Cal 1, the meaning of the expression 'claim' as appearing in the said section was gone into by their Lordships. It was held in that case that the word "claim" implies that the right is asserted to the knowledge and in the presence of a person whose right will be derogated by the establishment of the claim, and the mere assertion of the right in a document to which the person, against whom the right is asserted, is not a party and of which he knows nothing, is not to claim the right.

This was also the view taken by the High Court of Rajas than in the case reported in Madanlal v. Durgadutt, . Their Lordships held that where the recitul is in a document between strangers, it is not a particular instance in which a right was claimed, recognized or exercised or a transaction by which a right was claimed or asserted within the meaning of Section 13 and they are inadmissible to show that any party to the suit is or is not the owner of an adjoining land which has been mentioned as one of the boundaries in such documents.

I respectfully agree with the view taken by their Lordships of the Full Bench of the Calcutta High Court on this point. In my opinion also it is difficult to hold that by merely reciting the boundaries in a document, not inter partes, the right in question can be said to have been claimed. This question was more elaborately gone into by their Lordships of the Calcutta High Court in another case reported in AIR 1923 Cal 684 (2). Dealing with the question of claim, Mr. Justice Suhrawardy in his judgment observed as follows:-

"It remains therefore to consider whether in the present case the right to the land in suit was 'claimed' by the plaintiff's lessor by describing it as belonging to him in giving the boundaries of a contiguous plot of land let out under Exhibit 4.

The word 'claim' has not been defined in the Act nor, so far as we are aware, has it received the judicial interpretation. In the Oxford Dictionary the verb 'claim' is said to mean '(1) to demand as one's own or one's due; to seek or ask for on the ground of right; (2) to assert and demand recognition of an alleged right, title, possession, attribute, acquirement or the like; to assert one's own; to affirm one's possession of: Sense (1) claims delivery of a thing;

sense (2) the admission of an allegation.' The word therefore denotes a demand or assertion in relation to a thing or attribute as against or from some person or persons, showing existence of a right to it in the claimant. A bare statement may or may not be a claim according to the attending circum stances in which it is made.*** The illustration under Section 13 affords some indication of the meaning to be attached to the words used in the section. To give 'claim' a wider meaning will practically neutralise the effect of Section 21 and make all statements wherein a right is stated to exist provable on behalf of the person making them, however, recent they may be.

***** In my judgment the statement made in exhibit 4 that the land to the west of the land demised under that pattah belonged to the plaintiff's lessor is a more recital and dies not amount to a claim and cannot be proved on behalf of the plaintiff and hence that document is inadmissible in evidence".

These decisions clearly support the view urged before us by the learned Advocate for the appellants, namely, that the recitals in question cannot constitute "claim" as contemplated in Section 13 of the Evidence Act. I am in entire agreement with the same.

9. I am also unable to hold that by the recitals in the documents in question, reciting the boundaries of the land covered by Exhts. 58 and 59 and stating therein that the same belonged to the plaintiffs, the plaintiffs' right to the land in question has either been exercised or recognized or asserted. In the first place, it should be mentioned that the assertion, if any, is not made by the plaintiffs. The assertion is made by his vendor.

I am doubtful whether Section 13 of the Indian Evidence Act contemplates such a kind of assertion. In any event, I am of the opinion that such recitals do not amount either to assertion of a right or recognition of such right as contemplated in Section 13 of the Indian Evidence Act. In this connection, I would refer to the observations of their Lordships of the Madras High Court in the case of Karuppanmi v. Rangaswami, AIR 1928 Mad 105 (2). Dealing with this very question, Mr. Justice Jackson, in his judgment, observed as follows :-

"It is obviously a mere statement of boundary and as such cannot be classed with any of the verbs in Section 13 created, claimed, modified, recognised, asserted or denied; 'mentioned' would be appropriate verb, which means considerably less than asserted. Therefore it must be held that Exhibits E, H, A and B are not admissible in evidence."

In my opinion, this contention of the learned Advocate for the respondents, viz. that the recitals contained in Exhibits 58 and 59 are admissible under Section 13 of the Evidence Act has to be negatived.

10. Before concluding my judgment, I should mention that the learned Advocate for the respondents referred to a decision of the Patna High Court in Sabran Sheikh v. Odoy Malito, AIR 1922 pat 488, in support of his contention that such statements are admissible in evidence. This decision was considered in a subsequent decision of the Patna High Court in Ram Nandan Prasad v. Tilak-dhari Lal, AIR 1933 Pat 636.

The learned Judge in dealing with that case in his judgment observed that the said case was distinguishable inasmuch as it dealt with an ekrarnama in favour of one of the parties to the suit, and the document was apparently in the nature of a title deed regarding the disputed land itself. His Lordship further referred to the various decisions of the Calcutta High Court and came to the conclusion that such recitals are not admissible in evidence.

In my opinion also, the case reported in AIR 1922 Pat 488 is distinguishable on the ground mentioned in the case reported in AIR 1933 Pat 636. In any event, I am not prepared to agree with the view, if that was the view taken by their Lordships of the Patna High Court in the case reported in AIR 1922 Pat 488, that such recitals are admissible in evidence either under Section 13 or under Section 11 of the Evidence Act.

11. In the result, I hold that the lower appellate Court was wrong in admitting the said statements in evidence.

12. The question which then arises for our consideration is what course we should follow in this appeal. Mr. Mahajan appearing for the respondents urged before us that the lower appellate court independently of these recitals has come to the conclusion that the plaintiffs have established their case. I am unable to accept that contention, it appears from its judgment that the lower appellate Court has taken the rentals along with the other evidence adduced on behalf of the plaintiffs and has come to the conclusion that the plaintiffs have established their case. It is not possible to say what conclusion the lower appellate court would have come to if it had discarded these statements altogether from consideration.

As observed by their Lordships of the Supreme Court in Dhirajlal v. I. T. Commissioner, Bambay, (S) AIR 1955 SC 371, when a Court of fact acts on material, partly relevant and partly irrelevant, it is impassible to say to what extent the mind of the Court was affected by the irrelevant mate-trial used by it in arriving at its finding, and such a finding is vitiated because of the use of inadmissible material and thereby an issue of law arises, in our opinion this case should be sent back to the tower appellate Court for a rehearing of the appeal without the statements contained in the recitals in question.

13. In the result, therefore, the decree of the lower appellate Court is set aside and this case is sent back to the lower appellate Court for a re-bearing of the whole appeal without any reference to Exhibits 58 and 59. The costs of this appeal will abide by the final result of this case.

Kalagate, J.

14. I agree.

15. Order accordingly.