

Bindeshwari Singh and anr. Vs. Ramraj Singh and ors.

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Court : Allahabad

Decided On : Sep-27-1938

Reported in : AIR1939All61

Appellant : Bindeshwari Singh and anr.

Respondent : Ramraj Singh and ors.

Judgement :

Mohammad Ismail, J.

1. This is a defendants' appeal from a decree of the learned Civil Judge of Azamgarh which affirmed a decree of the learned Munsif of Haveli in that district. It is common ground that one Achraj Singh died some time in the year 1909. Mt. Sonbarsa Kunwar the widow of the deceased, succeeded her husband and remained in possession of the property till her death which occurred on 31st May 1922. Upon the death of the widow, several persons claiming to be reversioners to the last male owner applied to the Revenue Court for the mutation of their names. Ultimately, the defendant Bindeshwari Singh was successful on the ground of possession and his name was recorded in the village papers. The order of the mutation Court was passed on 2nd March 1923. The present suit was instituted on 8th May 1924 on the allegation that the plaintiff's father Sadashiv Singh who died on 1st May 1923 was the nearest reversioner to Acharaj Singh, the last male owner. The suit was contested by the defendant on the ground that he

(Bindeshwari) had preferential claim to the plaintiffs. Defendants 2 and 3 are subsequent transferees and their title depends on the proof of Bindeshwari Singh's title to the property in suit. The Courts below upon a consideration of the evidence have recorded a definite finding in favour of the plaintiff and have held that Sadashiv Singh was entitled to succeed as a sapinda and that he was within seven degrees from the common ancestor Bandi Shah. The appeal appears to be concluded by this finding on a question of fact. The decision of the Court below however has been challenged by learned Counsel for the appellants on legal grounds. It has been strenuously contended that the documentary evidence produced by the plaintiff and relied upon by the Courts below was not admissible in evidence inasmuch as it does not fulfil the conditions laid down in Section 32(5), Evidence Act.

2. The documents referred to above are Exs. 15 and 9. Ex. 15 is a copy of the plaint in Suit No. 25 of 1887 which gives a part of the pedigree produced in this case. It begins from Harkunwar Shah downwards. The suit was brought for redemption by one Baijnath Singh on the allegation that he was entitled to the relief as an heir to the mortgagor named Sangram Singh. The pedigree appended to the plaint tallies with the pedigree given by the present plaintiff of his own branch. The next document relied upon is also a copy of the plaint in a suit instituted in the year 1922 by several persons some of whom are, according to the plaintiff's pedigree, members of the family of Acharaj Singh. In that suit, the defendant Bindeshwari Singh and the plaintiff's father, Sadashiv Singh were arrayed as defendants along with several other persons with whom we are not concerned. In that plaint also Sadashiv Singh is shown within seven degrees from Bandi Shah, the common ancestor of the plaintiff, and Acharaj Singh. The defendant Bindeshwari Singh is also shown in the pedigree and his position according to the pedigree is 10th from the common ancestor. It appears from the judgments of the Courts below and the grounds of appeal filed in the Court of the learned Civil Judge that no objection with regard to the admissibility of these documents was ever raised by the defendants. It is contended by learned Counsel for the respondents that it is not open to the appellants to raise this objection at such a late stage of litigation. Reference has been made to *Shahzadi Begam v. Secy. Of State* (1907) 34 Cal. 1059. In that case in order to prove the genealogical

table of the family a copy of a document was produced which was alleged to have been filed in an earlier litigation in 1884 in a suit to establish the same fact. This document was admitted in the first Court without objection and the Court held the document to be genuine and admissible in evidence, but on appeal the High Court held it to be a forgery. Their Lordships of the Judicial Committee in appeal held that it was too late to object to the admissibility in evidence of a document which had been admitted without objection in the first Court.

3. The next case cited by learned Counsel (or the respondents on this point is *Jahangir v. Sheoraj Singh* (1915) 2 A.I.R. All. 334. In that case a certain document purporting to be a family pedigree was produced in evidence in a mutation case by one Jairaj. The record of the Revenue Court containing the aforesaid document was produced in the Civil Court where the plaintiff's relationship to one Hulas was in question. It appears that no objection to the admissibility of this document was raised at the trial although in the grounds of appeal to the District Judge the admissibility of this document was challenged. At p. 819 the learned Chief Justice made the following observation:

Objection to the admissibility of evidence at the late stage in litigation is not to be encouraged. The proper time to object to the admissibility of evidence is at the trial when the evidence is tendered and it is then that the Court should rule as to the admissibility or inadmissibility of the evidence. When the objection is taken at the proper time the party wishing to produce the evidence may be able to take steps to make the evidence admissible. If the objection is not taken until a late stage of the litigation it may mean that an Appellate Court is obliged to decide against the party on a technical ground or the time of the Court is taken up in retrying matters which ought to have been disposed of at the original hearing, the result being loss of public time and additional and unnecessary expense to the litigant.

4. The document was ultimately admitted in evidence. Learned Counsel for the appellants however contends that it is open to him to question the admissibility of the documents although no objection to that effect was taken in the Courts below. In *Krishnaswami Pathar v. Ramachandra Ayyar* : AIR1931 Mad601 it was held that when a piece of evidence is irrelevant, the erroneous omission before the lower

Courts to object to the admission of that evidence does not make that evidence relevant. In the present case there is no question about the relevancy of Exs. 15 and 9. The objection raised by learned Counsel for the appellants which will be noticed later cannot be disposed of without a reference to the evidence produced in the case. There is No. discussion of those points in the judgments; of the Courts below for the simple reason that those points were never urged before them. Under the circumstances, to allow the appellants to object to the admissibility of these documents will amount to retrying the case which is not permissible in second appeal. In my judgment therefore, the appellants are precluded from objecting to the admissibility of Exs. 15 and 9 at this stage. I however propose to deal briefly with the objections as counsel for the parties have addressed me at some length in support of their respective contentions. It is not disputed that the plaintiffs of both plaints are dead but the statement of every dead person is not admissible in evidence. It is incumbent on the party relying upon the statement of a deceased person under Section 32 (5) to prove : (a) that the person making the statement had special means of knowledge, and (b) that the statement was made before the question in dispute arose.

5. According to the pedigree Baijnath is a member of the family and as such he is expected to have knowledge with regard to the pedigree of the family. It is contended by learned Counsel for the appellants that there should be independent evidence to prove that J3aijnath was a member of the family and as such had special means of knowledge of the pedigree appended to his plaint. I agree that the pedigree itself is not sufficient to prove that Baijnath is a member of the family and that independent evidence to prove that fact must be adduced by the plaintiff. Ram Raj Singh plaintiff examined himself in the case and he has proved the pedigree which contains the name of Baijnath Singh. He has also stated that Baijnath, the plaintiff in Suit No. 25 of 1887, was a member of the family. The evidence of the plaintiff may be weak or strong, but it is not open to me in second appeal to weigh the evidence of the witnesses.

6. It cannot be said therefore that there is no evidence on the record to prove that Baijnath had special means of knowledge. Boference has also been made to a compromise Ex. 4 dated 22nd October 1869. In this there is a reference to one

Bajinath Singh, son of Raghubar Singh. Several other persons mentioned in the pedigree are to be found in this compromise. It is argued that the pedigree in this compromise which was arrived at between the members of the family in 1869 was repeated in 1887 and as such corroborates the statement contained in the plaint Ex. 15. In my opinion this document is not of much help to the plaintiff because I am not; aware of any evidence which connects Bajinath, the plaintiff in Suit No. 25 of 1887, with Bajinath figuring in the compromise. There is no doubt a very strong probability that the persons named in the compromise are the same as those mentioned in the plaint, but this by itself is not sufficient to discharge the burden which lay on the plaintiff. As stated before, the statement of the plaintiff does prove that Bajinath is a relation and as such has special means of knowledge of the pedigree contained in Ex. 15.

7. The next point that has been argued by learned Counsel for the appellants is that the pedigree in Ex. 15 was not made before the dispute with regard to the pedigree-arose. In other words it is post litem motam and has no evidentiary value. Learned Counsel for the appellants has relied upon several rulings in support of his contention : see Kashi Singh v. Balraj Singh (1911) 10 I.C. 199, Bhima Singh v. Mt. Sunder (1922) 9 A.I.R. Oudh. 218 and Subbiah Mudaliar v. Gopala Mudaliar : AIR1936 Mad808 . In the last mentioned case, Subbiah Mudaliar v. Gopala Mudaliar : AIR1936 Mad808 , the learned Judges of the Madras High Court held:

The condition of ante litem motam involves the idea that the dispute, if any, on the former occasion must not be the same in substance as the dispute in the later suit. In other words, the statement now sought to be used will not be excluded if it merely related to some other matter foreign or, collateral to the matter in controversy on the, former occasion.

8. In the abovementioned case reference was made to a ruling of their Lordships of the Judicial Committee in Kalka Prasad v. Mathura Prasad (1908) 30 All. 510. Their Lordships at page 523 observed as follows:

In order to make a statement inadmissible on this ground the same thing must be in controversy before and after the statement is made.

9. Applying this test to the facts of the present case I have no hesitation in holding that. Ex. 15 is admissible in evidence and the statement of Baijnath in the plaint was made before the present controversy arose. As already stated, the suit, No. 25 of 1887, was brought long before the death of Achraj Singh. The question whether Sadashiv Singh was the nearest reversioner to Achraj Singh was not in question at the time. In the present case, it is not disputed that Sadashiv Singh is a descendant of Bandi Shah. The only question in controversy is whether he is within seven degrees of Bandi Shah or eight degrees. In the plaint, Baijnath Singh had to show his position in the family and he showed that he was a descendant of Ghura Singh's brother. The main dispute in the present case is whether Ghura Singh was the son of Harkunwar Shah or of Kunjal Singh. This question was not in controversy in 1887 and no dispute could possibly arise at the time with regard to the relationship of Sadashiv Singh. From the evidence it does not appear that the pedigree was ever challenged by the defendants in that suit. I living regard to all the circumstances I bold that this pedigree is admissible.

10. The objection with regard to Ex. 9 proceeds on somewhat different grounds. It is alleged that the plaint contained statements of several persons only some of whom are dead and as no attempt has been made to produce the plaintiffs who are still alive this document cannot be accepted in evidence. We do not know the circumstances under which the plaintiffs who are still alive were not summoned. It may be that their addresses were not known or that they are living at such a long distance that their production is beyond the means of raised in plaintiffs. As no objection was raised in the trial Court the plaintiffs had no opportunity to adduce evidence on this important I point. It is suggested that the plaintiffs who are still living are on bad terms with it ho plaintiff of the present suit. It is not necessary to determine this question as in my opinion the plaint is admissible in evidence although the evidentiary value of it is not very high : see Chandra Nath v. Nilmadhab Bhattacharjee (1899) 26 Cal. 236. I do not consider it necessary to discuss the merits of this case. The Courts below have recorded a definite finding in favour of the plaintiff and have held that Sadashiv Singh was the nearest reversioner of Achraj Singh. The only point that has been raised in this appeal relates to the admissibility of the documents Exs. 15 and 9 and I have already held that they were properly relied upon by the Courts below. Under the circumstances

I affirm the decree of the Court below and dismiss the appeal with costs. Leave to appeal under Letters Patent is refused.

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