

Muhammad Umar Khan Vs. Amtul Rahim Bibi

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Court : Allahabad

Decided On : Feb-05-1923

Reported in : AIR1923All311; 71Ind.Cas.965

Judge : Ryves and ;Daniels, JJ.

Appellant : Muhammad Umar Khan

Respondent : Amtul Rahim Bibi

Judgement :

1. These appeals arise out of three connected suits filed by the plaintiff-appellant, Muhammad Umar Khan, for his share as heir to the extent of one-third of Ahmad AH Khan deceased. In two of the suits he claims partition by metes and bounds of different properties together with certain rents alleged to have been wrongly realised by the defendants. In the third suit he claims joint possession of the fractional share to which he is entitled. The suits were disposed of by the Court below in one judgment and were dismissed on the ground that they were barred by Order II, Rule 2, of the Code of Civil Procedure by reason of a suit previously filed by the plaintiff against Musammat Amtul Rahim and Musammat Mariam Bibi, defendants in these suits, and one Musammat Ruqayya Begam who is not a party to this litigation. The learned Munsif held that Order II, Rule 2, had no application to the facts of the case. The learned Subordinate Judge in a very brief judgment overruled him and dismissed the suits.

2. In view of this conflict of opinion it is important to see what precisely the nature of the previous suit was. That suit was concerned with certain property which Ahmad Ali Khan had sold in his lifetime to Musimmat Ruqaiyya Begam and Amtul Rahim. The plaintiff's cause of action was, first, that according to him the sale-deed was a fictitious transaction and without consideration, and, second, that as heir to Ahmad Ali Khan he was entitled to a one-third share in the property of the latter.

3. So far as his claim to be heir of Ahmad Ali Khan is concerned, this portion of the cause of action is common to the previous suit and to the present suits. It is clear, however, that this allegation alone would not entitle the plaintiff to succeed in the previous suit. He was met by the plain fact that at the time of Ahmad Ali Khan's death the property did not stand in Ahmad Ali Khan's name. Ahmad Ali Khan had parted with it in his lifetime by a registered sale-deed. Unless that sale-deed was set aside, it stood in the way of the plaintiff's claim and the plaintiff could claim no relief. It appears to us clear, therefore, that the learned Munsif was right in holding that Order II, Rule 2, does not apply. In the Full Bench case of *Murti v. Bhola Ram* 6 A. 65 A.W.N. (1894) 65 : 8 Ind. Dec. (N.S.) 106 (F.B.) the plaintiff's cause of action is defined as consisting of every fact which it would be necessary for the plaintiff to prove if traversed in order to support his right to the judgment of the Court. The same criterion was adopted in the more recent Bombay case of *Sonu Khushal Khadake v. Bahinibai Krishna* 33 Ind. Cas. 950 : 40 B. 351 : 18 Bom. L.R. 45 in which it was added that one test which is valuable in considering whether the causes of action are identical is whether the evidence which would suffice to enable the plaintiff to obtain a decree in both suits is the same. Judged by the criterion laid down in these two cases it is clear that the causes of action in the previous suit and the present suits were not identical.

4. The learned Counsel for the respondent has sought to support the decree of the Court below as regards two of these suits on another ground, also based on Order II, Rule 2. He alleges that the plaintiff has wrongly filed three suits and that there was only one cause of action for all three of the present connected suits. This plea was never raised in the Trial Court where the plaint in the first suit might, if necessary, have been amended, and we do not think that we should allow it to be

raised now. For the reasons already given, we allow the appeal, and, as the cases were decided in the Court below on a preliminary point, we remit the appeals to that Court under Order XLI, Rule 23, for decision on the merits. The appellants will get their costs of these appeals in this Court including fees on the higher scale. Other costs will abide the result.

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