1959

Bhinka & Others
v.
Charan Singh

Subba Rao J.

petitions filed by the appellants to the Revenue Board, and the latter by its order dated September 6, 1953, held against them and that order has become final. For the said reasons, we must hold that the suits could not be abated under r. 5 of the amended Rules.

In the result, the appeals fail and are dismissed with costs.

*Appeals dismissed.*

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1959

April 27.

## DOLGOBINDA PARICHA

*v.*

## NIMAI CHARAN MISRA & OTHERS

(S. K. Das, A. K. Sarkar and K. Subba Rao, JJ.)

*Evidence—Admissibility—Joint statement of three persons—Admissibility under s. 32(5) of the Evidence Act, when only one is dead—Opinion as to relationship—Conduct as evidence of opinion—Proof of conduct—Direct evidence—"Opinion", meaning of—Indian Evidence Act, 1872 (1 of 1872), ss. 32(5), 50, 60.*

On the death of H, who as the mother of the last male owner had succeeded to the estate, the respondents claimed the estate and brought a suit for its recovery on the strength of the pedigree which they set up that they were the sons of the half-sisters of the last male owner and therefore came before the agnates. The suit was contested by some of the agnates, of whom the appellant was one, who challenged the correctness of the pedigree, and maintained that the respondents' mothers were not the half-sisters of the last male owner. The trial court agreed with the respondents' case and decreed the suit and this was confirmed by the High Court. The High Court relied on Ex. I, a petition dated November 2, 1917, which S, one of the brothers of the third plaintiff, on his own behalf and on behalf of his brothers had filed in Suit No. 31 of 1917 which was a suit instituted by some of the agnates of H's husband questioning the alienations made by H. In the petition, S alleged that the applicants were the legal claimants to the properties in the suit and prayed to be added as co-defendants to the suit. The petition contained a pedigree which supported the pedigree set up

by the respondents, and the High Court held that Ex. I was admissible under s. 32(5) of the Indian Evidence Act. The oral evidence of P.W. 2 and P.W. 4 supported the respondents' case as to the pedigree set up by them and the High Court held that their evidence was admissible under s. 50 of the Indian Evidence Act. On appeal to the Supreme Court, it was contended for the appellant (1) that Ex. I was not admissible under s. 32(5) of the Indian Evidence Act because (a) the statement therein was a joint statement of three persons of whom one alone was dead, and (b) it was not made before disputes had arisen ; and (2) that the testimony of P.W. 2 and P.W. 4 did not fall within the purview of s. 50 of the Indian Evidence Act and that the High Court erred in admitting and accepting such evidence.

*Held*: (1) that s. 32(5) of the Indian Evidence Act was applicable to the statements as to pedigree in Ex. I because : (a) they were really made by S for self and on behalf of his brothers, and that, in any case, they were as much statements of S as of the other two brothers who are alive.

*Chandra Nath Roy* v. *Nilamadhab Bhattacharjee*, (1898) I.L.R. 26 Cal. 236, approved.

(b) they were made before the precise question in dispute in the present litigation had arisen, as the respondents were not preferential heirs at the time of the previous suit and no question arose or could have arisen then as to the relationship between them and the last male owner.

(2) that the evidence of P.W. 2 and P.W. 4 that they were present at the marriage of the mother of plaintiffs 1 and 2 as also at the Upanayanam ceremonies of plaintiffs 1 and 2, showed the opinion of those witnesses as to the relationship as expressed by their conduct, and was admissible under s. 50 of the Indian Evidence Act.

The word " opinion " in s. 50 of the Indian Evidence Act means something more than mere retailing of gossip or hearsay ; it means judgment or belief, that is, a belief or a conviction resulting from what one thinks on a particular question. Such belief or conviction may manifest itself in conduct or behaviour which indicates the existence of the belief or opinion.

Under s. 50 such conduct or outward behaviour as evidence of the opinion held is relevent and may be proved.

*Chander Lal Agarwala* v. *Khalilar Rahman*, I.L.R. [1942] 2 Cal. 299, approved.

Conduct, as an external perceptible fact, may be proved either by the testimony of the person himself whose opinion is evidence under s. 50 or by some other person acquainted with the facts which express such opinion, and as the testimony must relate to external facts which constitute conduct and is given by persons personally acquainted with such facts, the testimony is in each case direct within the meaning of s. 60 of the Indian Evidence Act.

1959

Dolgobinda Paricha v. Nimai Charan Misra & Others

The observations of Hutchins, J., in *Queen Empress* v. *Subbarayan*, (1885) I.L.R. 9 Mad. 9, that s. 50 of the Indian Evidence Act seems to imply that a person whose opinion is a relevant fact cannot be called to state his own opinion as expressed by his conduct and that his conduct may be proved by others only when he is dead or cannot be called, disapproved.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 206 of 1954.

Appeal from the judgment and decree dated March 9, 1951, of the Orissa High Court in Appeal from Original decree No. 14 of 1946, arising out of the judgment and decree dated January 31, 1946, of the Court of Subordinate Judge at Sambalpur in Title Suit No. 16 of 1944.

*L. K. Jha, Rameshwar Nath, S. N. Andley* and *J. B. Dadachanji*, for the appellant.

*S. C. Issacs* and *R. Patnaik*, for the respondents.

1959. April 27. The Judgment of the Court was delivered by

*S. K. Das J.*

S. K. DAS, J.—This appeal on a certificate granted by the High Court of Orissa is from the judgment and decree of the said High Court dated March 9, 1951, by which it substantially affirmed the decision of the learned Subordinate Judge of Sambalpur in Title Suit No. 16 of 1944 except for a modification of the decree for damages awarded by the latter. Two questions of law arise in this appeal, one relating to the interpretation of s. 32, sub-s. (5) and the other to s. 50 of the Indian Evidence Act (I of 1872), hereinafter referred to as the Evidence Act.

The material facts relating to the appeal are susceptible of a simple and concise statement. Three persons Nimai Charan Misra, Lakshminarayan Misra and Baikuntha Pati brought a suit for a declaration of their title to and recovery of possession of certain properties details whereof are not necessary for our purpose. This suit was numbered Title Suit 16 of 1944 in the court of the Subordinate Judge of Sambalpur. The claim of the plaintiffs, now respondents before us, was founded on the following pedigree :—

Sankarsan
Balaram
Bhubana
Baidyanath
Raghunath
Purushottam
Satyabhama = Lokanath = Haripriya alias Srihari (died 1942) (2nd wife)
(1st wife) married 1861 (died 1886)
Anirudha Deft. 7
Sripati Deft. 2
Natabar Deft. 1
Janardan
Satyananda (died 1902)
Devendra Deft. 3
Radha Krushna Deft. 4
Dolgovind Deft. 5
Ramhari Deft. 6
Must. Ahalya (dead) married. Lakhan Pati.
Mst. Brindabati (dead) married. Raghumani.
Mst. Malabati (dead) married. Mandhata Misra.
Satyabadi (dead)
Dasarath (Deft. 8) (given in adoption in another family).
Baikuntha (Plaintiff 3)
Nimai Plaintiff 1
Lakshminarayan Plaintiff 2

*1959*

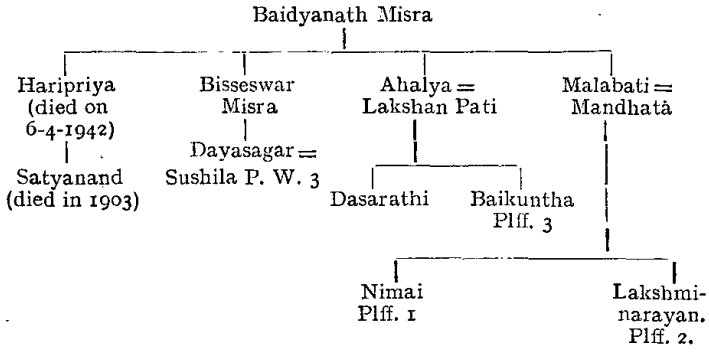
*Dolgobinda Paricha*
v.
*Nimai Charan Misra & Others*

*S. K. Das J.*

The last male owner was Satyananda who died unmarried sometime in 1902-1903, and his mother Haripriya succeeded to the estate. She lived till 1942; but in 1916 she had sold a portion of the property to one Indumati, daughter of Dharanidhar Misra (plaintiffs' witness no. 4) and some of the reversioners, namely, Natabar and Janardan, who were agnates of Haripriya's husband Lokenath Parichha, brought a suit challenging the alienation. This suit was Suit No. 31 of 1917 in the court of the Subordinate Judge, Sambalpur. The suit was decreed on August 31, 1918, and the alienation was declared to be without legal necessity and not binding on the reversion after the death of Haripriya. In 1929 was passed the Hindu Law of Inheritance (Amendment) Act (II of 1929) which *inter alia* gave to a sister's son a place in the order of Mitakshara succession higher than the agnates; before the amending Act a sister's son ranked as a *bandhu*, but under it he succeeded next after the sister. The question whether a half-sister was entitled to get the benefit of the amending Act gave rise to a difference of opinion, but the Privy Council held in 1942, settling the difference then existing between the various High Courts, that the term 'sister' included a 'half-sister'; but a full sister and a half-sister did not take together and the latter took only in default of the full sister. (See *Mst. Sahodra* v. *Ram Babu* (1)). The plaintiffs-respondents claimed on the strength of the pedigree which they set up that they were sons of the half-sister of Satyanand and therefore came before the agnates.

The suit was contested by some of the defendants who were agnates of Lokenath Paricha and of whom the present appellant was one. The contesting defendants challenged the correctness of the pedigree alleged by the plaintiffs-respondents and their main case was that Ahalya and Malabati were not the daughters of Lokenath Parichha but were daughters of Baidyanath Misra, father of Haripriya. The relevant pedigree which the appellant set up was—

(1) (1942) L.R. 69 I.A. 145.




As the High Court has put it, the essential controversy between the parties centred round the question if the plaintiffs-respondents were the sons of the daughters of Lokenath Parichha by his first wife Satyabhama. On this question the parties gave both oral and documentary evidence. On a consideration of that evidence the learned Subordinate Judge held that they were the sons of the daughters of Lokenath Parichha and on that finding the suit was decreed. There was an appeal to the High Court, and it affirmed the finding of the learned Subordinate Judge. The High Court relied on Ex. 1, a petition dated November 2, 1917, which Satyabadi on his own behalf and on behalf of his brothers Baikunth Pati and Dasarath Pati had filed in Suit No. 31 of 1917; this petition contained a pedigree which showed that Ahalya, Brindabati, and Malabati were daughters of Lokenath Parichha by his first wife and Satyabadi, Baikunth and Dasarath were the sons of Ahalya. The admissibility of this document was challenged on behalf of the appellant, but the learned Judges of the High Court held that the document was admissible under s. 32(5) of the Evidence Act. The contention before us is that the document was not so admissible, and this is one of the questions for decision before us.

As to the oral evidence, Narasimham, J., held that the testimony given by three of the witnesses of the plaintiffs-respondents, namely, Janardan Misra (plaintiffs' witness no. 2), Sushila Misrain (plaintiffs' witness no. 3) and Dharanidhar Misra (plaintiffs' witness no. 4) was admissible under s. 50 of the Evidence Act, and

1959

Dolgobinda Paricha v. Nimai Charan Misra & Others

S. K. Das J.

he relied on that testimony in support of the pedigree set up by the plaintiffs-respondents. The learned Chief Justice relied on the evidence of Dharanidhar Misra which he held to be admissible but with regard to the other two witnesses, he said—

"With regard to the other two witnesses relied on by the plaintiffs namely that of P. Ws. 2 (Janardan Misra, aged 62) and 3 (Susila Misrani, aged 43) knowledge of relevant facts as to relationships can seldom be attributed to them. Their evidence, though true, and otherwise acceptable, must be based upon their having heard the declarations of such members of the family as were their contemporaries or upon the tradition or reputation as to family descent handed down from generation to generation and recognised and adopted by the family generally. This may partly, if not wholly, be based upon conduct within the meaning of section 50, such as treating and recognising the mothers of the plaintiffs as Lokenath's daughters, and the plaintiffs as his daughter's sons. They, judged from their respective ages, could not be considered to have direct knowledge of the matters in issue. Scanning their evidence closely, I find that they have in no way deposed about such conduct of the members of the family of Lokenath as could be attributed to the knowledge or belief or consciousness of those who had special means of knowledge of the relationships or that the relationship was recognised and adopted by the family generally. In the circumstances, I entertain some doubt as to the acceptability of their statements in evidence."

On behalf of the appellant, it has been contended that the testimony of none of the aforesaid three witnesses fell within the purview of s. 50 of the Evidence Act and the High Court was in error in admitting and accepting that evidence or any part thereof, and according to learned counsel for the appellant, the whole of it was hearsay pure and simple—some of it being even second or third-hand hearsay. Thus the second question for our consideration is if the testimony of the witnesses mentioned above or of any of them, is admissible evidence within the meaning of s. 50 of the Evidence Act.

We proceed to consider the second question first. The Evidence Act states that the expression " facts in issue " means and includes any fact from which either by itself or in connection with other facts the existence, non-existence, nature or extent of any right, liability or disability asserted or denied in any suit or proceeding necessarily follow ; " evidence " means and includes (1) all statements which the Court permits or requires to be made before it by witnesses in relation to matters of fact under enquiry ; and (2) all documents produced for the inspection of the Court. It further states that one fact is said to be relevant to another when the one is connected with the other in any one of the ways referred to in the provisions of the Evidence Act relating to the relevancy of facts. Section 5 of the Evidence Act lays down that evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are declared to be relevant and of no others. It is in the context of these provisions of the Evidence Act that we have to consider s. 50 which occurs in Chapter II, headed " Of the Relevancy of Facts ". Section 50, in so far as it is relevant for our purpose, is in these terms :—

" S. 50. When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact ".

On a plain reading of the section it is quite clear that it deals with relevancy of a particular fact. It states in effect that when the Court has to form an opinion as to the relationship of one person to another the opinion expressed by conduct as to the existence of such relationship of any person who has special means of knowledge on the subject of that relationship is a relevant fact. The two illustrations appended to the section clearly bring out the true scope and effect of the section. It appears to us that the essential requirements of the section are—(1) there must be a case where the court has to form an opinion as to the

1959

*Dolgobinda Paricha*
v.
*Nimai Charan Misra & Others*

*S. K. Das J.*

relationship of one person to another; (2) in such a case, the opinion expressed by conduct as to the existence of such relationship is a relevant fact; (3) but the person whose opinion expressed by conduct is relevant must be a person who as a member of the family or otherwise has special means of knowledge on the particular subject of relationship; in other words, the person must fulfil the condition laid down in the latter part of the section. If the person fulfils that condition, then what is relevant is his opinion expressed by conduct. Opinion means something more than mere retailing of gossip or of hearsay; it means judgment or belief, that is, a belief or a conviction resulting from what one thinks on a particular question. Now, the "belief" or conviction may manifest itself in conduct or behaviour which indicates the existence of the belief or opinion. What the section says is that such conduct or outward behaviour as evidence of the opinion held is relevant and may, therefore, be proved. We are of the view that the true scope and effect of section 50 of the Evidence Act has been correctly and succinctly put in the following observations made in *Chandu Lal Agarwala* v. *Khalilar Rahman* (1):—

"It is only 'opinion as expressed by conduct' which is made relevant. This is how the conduct comes in. The offered item of evidence is 'the conduct', but what is made admissible in evidence is 'the opinion', the opinion as expressed by such conduct. The offered item of evidence thus only moves the Court to an intermediate decision: its immediate effect is only to move the Court to see if this conduct establishes any 'opinion' of the person, whose conduct is in evidence, as to the relationship in question. In order to enable the Court to infer 'the opinion', the conduct must be of a tenor which cannot well be supposed to have been willed without the inner existence of the 'opinion'.

When the conduct is of such a tenor, the Court only gets to a relevant piece of evidence, namely, *the opinion of a person.* It still remains for the Court to weigh such evidence and come to its own opinion as

(1) I.L.R. [1942] 2 Cal. 299, 309.

to the *factum probandum*—as to the relationship in question."

We also accept as correct the view that s. 50 does not make evidence of mere general reputation (without conduct) admissible as proof of relationship: *Lakshmi Reddi* v. *Venkata Reddi* (1).

It is necessary to state here that how the conduct or external behaviour which expresses the opinion of a person coming within the meaning of s. 50 is to be proved is not stated in the section. The section merely says that such opinion is a relevant fact on the subject of relationship of one person to another in a case where the court has to form an opinion as to that relationship. Part II of the Evidence Act is headed "On Proof". Chapter III thereof contains a fascicule of sections relating to facts which need not be proved. Then there is Chapter IV dealing with oral evidence and in it occurs s. 60 which says inter alia :—

"S. 60. Oral evidence must, in all cases whatever, be direct; that is to say—

if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense in that manner;

if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds."

If we remember that the offered item of evidence under s. 50 is conduct in the sense explained above, then there is no difficulty in holding that such conduct or outward behaviour must be proved in the manner laid down in s. 60; if the conduct relates to something which can be seen, it must be proved by the person who saw it; if it is something which can be heard, then it must be proved by the person who heard it; and so on. The conduct must be of the

(1) A.I.R. 1937 P.C. 201.

*1959*

*Dolgobinda Paricha* v. *Nimai Charan Misra & Others*

*S. K. Das J.*

person who fulfils the essential conditions of s. 50, and it must be proved in the manner laid down in the provisions relating to proof. It appears to us that that portion of s. 60 which provides that the person who holds an opinion must be called to prove his opinion does not necessarily delimit the scope of s. 50 in the sense that opinion expressed by conduct must be proved only by the person whose conduct expresses the opinion. Conduct, as an external perceptible fact, may be proved either by the testimony of the person himself whose opinion is evidence under s. 50 or by some other person acquainted with the facts which express such opinion, and as the testimony must relate to external facts which constitute conduct and is given by persons personally acquainted with such facts, the testimony is in each case direct within the meaning of s. 60. This, in our opinion, is the true inter-relation between s. 50 and s. 60 of the Evidence Act. In *Queen Empress* v. *Subbarayan* (1) Hutchins, J., said :—

"That proof of the opinion, as expressed by conduct, may be given, seems to imply that the person himself is not to be called to state his own opinion, but that, when he is dead or cannot be called, his conduct may be proved by others. The section appears to us to afford an exceptional way of proving a relationship, but by no means to prevent any person from stating a fact of which he or she has special means of knowledge."

While we agree that s. 50 affords an exceptional way of proving a relationship and by no means prevents any person from stating a fact of which he or she has special means of knowledge, we do not agree with Hutchins, J., when he says that the section seems to imply that the person whose opinion is a relevant fact cannot be called to state his own opinion as expressed by his conduct and that his conduct may be proved by others only when he is dead or cannot be called. We do not think that s. 50 puts any such limitation.

Let us now apply the tests indicated above to the testimony of the two witnesses, Janardan Misra and

(1) (1885) I.L.R. 9 Mad. 9, 11.

Dharanidhar Misra. As to Sushila Misrain, she was aged about 43 when she gave evidence in 1946. It is unnecessary to consider in detail her evidence, because if the evidence of the other two older witnesses be admissible, that would be sufficient to support the finding arrived at by the courts below and her evidence would also be admissible on the same criteria as the evidence of the other two witnesses.

The first question which we must consider is if Janardan Misra and Dharanidhar Misra had special means of knowing the disputed relationship. Janardan Misra was aged about 62 in 1946, and he was related to the family of Baidyanath Misra. Kashi Nath Misra was his grand-father and was a brother of Baidyanath Misra. Obviously, therefore, Janardan Misra had special means of knowing the disputed relationship, being related to Baidyanath and therefore to Haripriya, who was the second wife of Lokenath. He said in his evidence that he knew Lokenath Parichha, had seen his first wife Satyabhama and remembered the marriage of Haripriya with Lokenath Parichha. Obviously, therefore, he fulfilled the condition of special knowledge. He further said that he attended the marriage of Malabati, daughter of Lokenath, when Lokenath was living. That marriage took place in the house of Lokenath. He also said that he was present when the first two daughters of Malabati were married and also at the time of the Upanayan ceremonies of plaintiffs 1 and 2. According to the witness, Shyam Sundar Pujari, a son of a sister of Lokenath, acted as a maternal uncle at the time of the marriage of the eldest daughter of Malabati and Dayasagar Misra carried Radhika, second daughter of Malabati, at the time of her marriage.

The question is whether these statements of Janardan Misra as to his conduct are admissible under s. 50, Evidence Act. Learned counsel for the respondent has contended before us that even apart from s. 50, the evidence of Janardan Misra is direct evidence of facts which he saw and which should be treated as directly proving the relationship between Lokenath

1959

Dolgobinda Paricha v. Nimai Charan Misra & Others

S. K. Das J.

and his daughters. We do not think that learned counsel for the respondent is right in his submission that Janardan's evidence directly proves the relation between Lokenath and his alleged daughters, Ahalya, Brindabati and Malabati. Janardan does not say that he was present at the birth of any of these daughters. What he says is that he was present at the marriage of Malabati which took place when Lokenath was living and in Lokenath's house; he was also present at the marriages of the first two daughters of Malabati and also at the time of the Upanayan ceremonies of plaintiffs 1 and 2. This evidence, in our opinion, properly comes within s. 50, Evidence Act; it shows the opinion of Janardan Misra as expressed by his conduct, namely, his attending the marriage of Malabati as daughter of Lokenath and his attending the marriages and Upanayan ceremonies of the grand-children of Lokenath. We do not think that it can be suggested for one moment that Janardan Misra attended the marriage and other ceremonies in the family as a mere casual invitee. He must have been invited as a relation of the family and unless he believed that Malabati was a daughter of Lokenath and the others were grand-children of Lokenath to whom the witness was related, he would not have said that he attended those ceremonies as those of the children and grand-children of Lokenath. This, in our opinion, is a reasonable inference from the evidence and if that is so, then the evidence of Janardan Misra was clearly evidence which showed his belief as expressed by his conduct on the subject of the relationship between Lokenath and his daughters and Lokenath and his grand-children.

Janardan also said that one Shyamsundar Pujari acted as maternal uncle at the time of the marriage of the eldest daughter of Malabati. There is some evidence in the record that Shyamsundar Pujari was son of Lokenath's sister. This was, however, disputed by the appellant. The High Court has not recorded any finding on the relation of Shyamsundar Pujari to Lokenath. If it were proved that Shyamsundar was a son of Lokenath's sister, he would have special

means of knowledge as a relation of the family and his conduct at the time of the marriage of Malabati's daughter would also be admissible under s. 50. But in the absence of any finding as to any special means of knowledge on the part of Shyamsundar, the latter's conduct will not be admissible under s. 50. We need not say anything more about Shyamsundar, as the High Court has not based its finding on the conduct of Shyamsundar.

The same criteria apply to the evidence of Dharanidhar Misra, who was aged 96 at the time when he gave evidence. He was the maternal uncle of Janardan Misra. Dharanidhar's evidence showed that he knew Lokenath Parichha and his two wives, Satyabhama and Haripriya. He also had special means of knowing the disputed relationship, though he was not directly related to Lokenath. He said that Lokenath was two years older than him and the witness attended the marriages of Radhika and Sarjoo and the "thread" ceremonies of Lakshminarayan and Nimai. The witness further added that though he did not remember if he was invited to the marriage of Mandhata's daughters, he was invited to the feasts which followed the marriage. He said that the feasts took place in the house of Mandhata and he attended the "gansana" and marriage feasts of Mandhata's daughters. The same criteria which make the evidence of Janardan Misra admissible under s. 50 also make the evidence of Dharanidhar Misra admissible under the same section.

We may in this connection refer to one of our own decisions, *Sitaji* v. *Bijendra Narain Choudhary* (1), wherein the following observations were made :—

"A member of the family can speak in the witness-box of what he has been told and what he has learned about his own ancestors, provided what he says is an expression of his own independent opinion (even though it is based on hearsay derived from deceased, not living, persons) and is not merely repetition of the hearsay opinion of others, and provided the opinion is expressed by conduct. His sources of

(1) A.I.R 1954 S.C. 601.

1959

Dolgobinda Paricha v. Nimai Charan Misra & Others

S. K. Das J.

information and the time at which he acquired the knowledge (for example, whether before the dispute or not) would affect its weight but not its admissibility. This is therefore legally admissible evidence which, if believed, is legally sufficient to support the finding ". It is true that Dharanidhar Misra was not directly related to the family of Lokenath. He was, however, distantly related to Haripriya. He was a friend of Lokenath Parichha and lived in the same neighbourhood. His evidence showed that he knew him and the members of his family quite well. That being the position, his evidence that he attended the marriage ceremonies and the Upanayan ceremonies of several members of the family undoubtedly showed his opinion as expressed by his conduct.

We are accordingly of the view that the evidence of both Janardan Misra and Dharanidhar Misra was admissible under s. 50 and the learned Judges of the High Court committed no error of law in admitting and considering that evidence. We are concerned here with the question of admissibility only. As to what weight should be given to their evidence was really a matter for the courts below and both the learned Chief Justice and Narasimham, J., accepted the testimony of Dharanidhar Misra and Narasimham, J., further relied on the testimony of Janardan Misra also.

We now proceed to a consideration of the first question, namely, the admissibility of the document Ext. 1. The High Court has held the document to be admissible under sub-section (5) of s. 32 of the Evidence Act. We must first read s. 32 (5):

"S. 32. Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:—

(1) .....

(2) .....

(3) .....
(4) .....
(5) When the statement relates to the existence of any relationship by blood, marriage or adoption between persons as to whose relationship by blood, marriage or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised.
(6) .....
(7) .....
(8) ....."

Now, four conditions must be fulfilled for the application of sub-s. (5) of s. 35: firstly, the statements, written or verbal, of relevant facts must have been made by a person who is dead or cannot be found, etc., as mentioned in the initial part of the section; secondly, the statements must relate to the existence of any relationship by blood, marriage or adoption; thirdly, the person making the statement must have special means of knowledge as to the relationship in question; and lastly, the statements must have been made before the question in dispute was raised. There is no serious difficulty in the present case as to the first two conditions. Exhibit 1 contained a pedigree which showed that Lokenath had three daughters by his first wife, the daughters being Ahalya, Brindabati and Malabati; it also showed that Ahalya had three sons Satyabadi, Baikuntha and Dasarath, of whom Baikuntha was one of the plaintiffs in the present suit and the other two plaintiffs Nimai and Lakshminarayan were shown as sons of Malabati. Exhibit 1 was signed by Satyabadi on his own behalf and on behalf of his brothers Baikuntha and Dasarath. Satyabadi is now dead. So far as Satyabadi is concerned, there can be no doubt that the first two conditions for the application of sub-s. (5) of s. 32 are fulfilled. It has been contended that as Dasarath and Baikuntha are alive (Baikuntha being one of the plaintiffs) and as the statement was the joint statement of three persons of whom one alone is dead, the first and preliminary condition necessary for the application of s. 32 is not

1959

Dolgobinda Paricha v. Nimai Charan Misra & Others

S. K. Das J.

fulfilled. We do not think that this contention is correct, and we are of the view that the position is correctly stated in *Chandra Nath Roy* v. *Nilamadhab Bhattacharjee* (1); that was a case in which the statements were recitals as to a pedigree and were contained in a patta executed by three sisters, two of whom were dead and it was pointed out that the statement in the patta was as much the statement of the sisters who were dead as of the sister who was alive. In the case before us the statements as to pedigree in Ex. 1 were really the statements of Satyabadi, who signed for self and on behalf of his brothers. Assuming, however, that the statements were of all the three brothers, they were as much statements of Satyabadi as of the other two brothers who are alive. We, therefore, see no difficulty in treating the statements as to pedigree in Ex. 1 as statements of a dead person as to the existence of a relationship by blood between Lokenath and his daughters Ahalya, Brindabati and Malabati—the relationship which is in dispute now.

The more important point for consideration is if the statements as to pedigree in Ex. 1 were made, to use the words of sub-s. (5), before the question in dispute was raised. The High Court held that the statements were made *ante litem motam*. Learned counsel for the appellant has very strongly contended before us that the High Court took an erroneous view in this matter. Let us first see the circumstances in which Ex. 1 was filed and dealt with in Suit No. 31 of 1917. We have said earlier what that suit was about. It was a suit brought by some of the reversioners for a declaration that the alienation made by Haripriya in favour of Indumati was without legal necessity and, therefore, not binding on the reversion after the death of Haripriya. The suit was filed on August 27, 1917. On November 2, 1917, certain other persons made an application to be added as parties to the suit on the footing that they had the same interest in the suit as the plaintiffs. That application was disposed of by the learned Subordinate Judge by the following order—

"In a suit like the present, it is not necessary

(1) (1898) I.L.R. 26 Cal. 236.

that all the reversioners should be made parties. So I reject the petition."

Exhibit 1 was filed on November 5, 1917. In that petition Satyabadi alleged: "The applicants are the legal claimants to inherit the properties left by Lokenath .....the applicants therefore beg that they may kindly be made co-defendants". It was further alleged that the plaintiffs of that suit had no legal right over the share in dispute, and this was followed by a pedigree given in para. IV of the petition. This petition (Ex. 1) was put up on November 27, 1917, and the learned Subordinate Judge disposed of the petition by the following order:—

"The petition of Satyabadi Pati and others was put up in the presence of the plaintiff's pleader. He objects to the same. The petition is, therefore, rejected."

Ultimately, the suit was decreed on August 31, 1918, on the finding that the alienation by Haripriya was without legal necessity and did not bind the reversion after her death.

The learned Judges of the High Court took the view that in Suit No. 31 of 1917 no dispute arose as to the alleged relation between Lokenath on one side and Ahalya, Brindabati and Malabati on the other. The dispute in that suit was about the validity of the alienation made by Haripriya and the suit having been filed by some of the reversioners on behalf of the reversion, no issue was raised or could be raised as to whether Lokenath had any daughters by his first wife. Such an issue was not relevant to the suit and furthermore nobody could anticipate in 1917 that the sons of a sister or half-sister would be preferential heirs in the order of Mitakshara succession. They, therefore, held that the statements in Ex. 1 were *ante litem motam* and admissible under sub-s. (5) of s. 32, Evidence Act.

On behalf of the appellant it has been argued that for a declaratory decree in respect of an alienation made by a Hindu widow or other limited heir, the right to sue rests in the first instance with the next reversioner and the reversioner next after him is not entitled to sue except in some special circumstances

1959

Dolgobinda Paricha v. Nimai Charan Misra & Others

S. K. Das J.

and therefore the question as to who the next reversioner was arose in the suit of 1917; and Ex. 1 did raise a dispute as to who the last male owner was—Lokenath or Satyanand—and also showed that there was a dispute if the plaintiffs of that suit were entitled to the property in dispute there. The existence of such a dispute, it has been argued, affected the statements in Ex. 1 and what Satyabadi said therein were not "the natural effusions of a party who must know the truth and who speaks upon an occasion when his mind stands in an even position without any temptation to exceed or fall short of the truth" (as per Lord Chancellor Eldon in *Whitelocke* v. *Baker*) (1). Learned counsel has also relied on the decision in *Naraini Kuar* v. *Chandi Din* (2) where it was held that s. 32(5) did not apply to statements made by interested parties in denial, in the course of litigation, of pedigrees set up by their opponents.

We do not think that in Suit No. 31 of 1917 any question as to the relationship of Lokenath with Ahalya, Brindabati and Malabati arose at all. It is to be remembered that even according to the pedigree set up by the appellant one of the plaintiffs is a son of Ahalya and two others are sons of Malabati. What is now in dispute is whether Ahalya and Malabati were daughters of Lokenath Parichha. That is a question which did not at all arise for consideration in Suit No. 31 of 1917; nor did it arise in the proceedings which the application of Satyabadi (Ex. 1) gave rise to. *Prima facie*, there is nothing to show that a dispute as to the relationship of Lokenath with Ahalya and Malabati arose at any stage prior to or in the course of the proceedings which arose out of Ex. 1; that would be sufficient to discharge the onus of proving that the statements in Ex. 1 were *ante litem motam*. Natabar, one of the plaintiffs in the suit of 1917, who might have given evidence of any such dispute if it existed, said nothing about it. We have referred to the circumstances in which Ex. 1 was filed and disposed of. It is true that the order of the learned Subordinate Judge rejecting the petition Ex. 1 is somewhat cryptic and it does not show what objection the

(7) (1807) 13 Ves. 510, 514. (8) (1886) I.L.R. 9 All. 467.

plaintiff of that suit took and on what ground the learned Subordinate Judge rejected the petition. If, however, the various orders made by the learned Subordinate Judge, particularly the orders dated November 2, 1917, and November 27, 1917, to which we have earlier made reference are examined, it seems clear to us that the learned Subordinate Judge was proceeding on the footing that in a suit of that nature it was not necessary to make all the reversioners parties, because the reversioners who brought the suit represented the entire body of reversioners. From the judgment passed in the suit (Ex. Cl) it does not appear that the question as to who the next reversioners were was at all gone into. That may be due to the circumstance, pointed out by the High Court, that Purushottam, uncle of Janardan and Natwar, was then alive. He was admittedly then the nearest reversioner, but as he did not join as a plaintiff he was made a *proforma* defendant. The nearest reversioner having been added as a party defendant in the suit of 1917, no question of title arose in that suit as between the reversioners *inter se*. Such a question of title was wholly foreign to the nature of that suit. Nor, do we find anything in the judgment, Ex. Cl, to show that it was ever suggested in that suit that the last male owner was not Satyanand. The sons of the half-sister of Satyanand were not preferential heirs at the time and we agree with the learned Judges of the High Court that no question arose or could have arisen in that suit as to the relation between Lokenath on one side and Ahalya and Malabati on the other. That being the position, the statements as to pedigree contained in Ex. 1 were made before the precise question in dispute in the present litigation had arisen.

It has next been argued by learned counsel for the appellant that in admitting Ex. 1 under s. 32(5) the courts below assumed that Satyabadi had special means of knowledge as to the relation between Lokenath and his alleged daughters Ahalya and Malabati. The argument has been that unless it is assumed that Satyabadi is the grand-son of Lokenath, he can have

1959

Dolgobinda Paricha v. Nimai Charan Misra & Others

S. K. Das J.

no special means of knowledge as to the disputed relationship. Learned counsel for the appellant has referred us to the decision in *Subbiah Mudaliar* v. *Gopala Mudaliar* (1) where it was held that for a statement in a former suit to be admissible under s. 32(5) the fact that the person who made the statement had special means of knowledge must be shown by some independent evidence, otherwise it would be arguing in a circle to hold that the document itself proves the relation and therefore shows special means of knowledge. In *Hitchins* v. *Eardley* (2) the question of the legitimacy of the declarant was in issue and the same question was necessary to be proved in order to admit his declarations. That was a jury case and the question relating to the admissibility of evidence being a question of law had to be determined by the Judge; but the same question being the principal question for decision in the case had to be determined by the jury at the conclusion of the trial. In the difficulty thus presented, *prima facie* evidence only was required at the time of admission. We do not think that any such difficulty presents itself in the case under our consideration. As to Satyabadi's special means of knowledge, we have in this case the evidence of Janardan Misra and Dharanidhar Misra, which evidence independently shows that Satyabadi was the grand-son of Lokenath, being the son of his daughter, Ahalya. It may be stated here also that it was admitted that Ahalya was Satyabadi's mother, and that would show that Satyabadi had special means of knowledge as to who his mother's father was.

Therefore, we agree with the High Court that Ex. 1 fulfilled all the conditions of s. 32(5), Evidence Act and was admissible in evidence.

We have already said that it is not for us to consider what weight should be given to the oral evidence of Janardan and Dharanidhar or to the statements in Ex. 1. The courts below have considered that evidence and have assessed it. We do not think that we shall be justified in going behind that assessment.

Learned counsel for the appellant wished also to

(1) A.I.R. 1936 Mad. 808. (2) (1871) L.R. 2 P. & D. 248.

argue the point that the Privy Council decision in *Mst. Sahodra's case* (1) was wrong and that a half-sister was not entitled to get the benefit of the amending Act of 1929. The Privy Council decision was given at a time when it was binding on the courts in India and it settled differences of opinion which then existed in the different High Courts. That decision was taken as settling the law on the subject and on the faith of that decision a half-sister has been held in subsequent cases to be entitled to the benefit of the Amending Act. The High Court dealt with the case in 1951 after the Constitution had come into force and the Privy Council jurisdiction in Indian appeals had ceased. No point was taken on behalf of the appellant in the High Court that the Privy Council decision should be re-opened and the question of the right of a half-sister re-examined. In these circumstances, we did not allow learned counsel for the appellant to argue the correctness or otherwise of the Privy Council decision.

The contentions as to the admissibility of Ex. 1 and the oral evidence of Janardan Misra and Dharanidhar Misra being devoid of merit, the appeal fails. We accordingly dismiss the appeal with costs in favour of the contesting respondents.

*Appeal dismissed.*

(1) (1942) L.R. 69 I.A. 145.