RAJASTHAN HIGH COURT

Poonamchand

Vs.

Motilal

First Appeal No. 16 of 1949

(Wanchoo, C.J. and Dave, J.)

12.05.1955

JUDGMENT

Dave, J.

1. This is a jirst appeal by the plaintiff, Poonamchand, in a suit under Order 21 Rule 6 3, Civil Procedure Code.

2. The facts giving rise to it are that defendant 3, Sunderlal and 4, Daudas had a decre e against defendant 5 Gulabdas, and in execution of that decree, they got an attachmen t of a house situated in Bhootron-ka-
Vas at Pokaran. The description of that property is given in para No.2 of the plaint and need not be repeated here. The plaintiff presented an objection petition under Order 2 1 Rule 58, Civil Procedure Code The decree-
holder contested that application on the ground that the house originally belonged to d efendant 1 Motilal, that he and his mother Mt. Dhapi defendant 2 had sold it to Sangid as, Beharilal, who were father and grandfather respectively of the judgment-
debtor Gulabdas defendant 5. The plaintiff's objection-
petition was dismissed. Thereafter the attached property was put to auction and purcha sed by defendant 6 Hemraj.

3. The plaintiff and defendants 1 and 2 are related to each other. They come from a co mmon stock and in order to understand the case it would be proper to give their pedigr ee-table which is not in dispute. It is as follows :

4. The plaintiff's case in the trial Court was that although the disputed property was on ce the joint family property of Akheram, Bulidan and Ram Pratap, it came to his share on a partition in the family and therefore he was its sole owner and that it was also in

his exclusive possession. It was averred that defendant 1 Motilal had no right over the
property and that he or his mother defendant 2 had no authority to dispose it of. It was
further alleged that the sale of the property by defendants 1 and 2 in favour of the ance
stors of defendant 5 was fictitious, or at any rate void against him. It was therefore pra
yed that a declaratory decree be passed to the effect that the plaintiff is the rightful ow
ner of the property and that it is not liable to attachment and sale in execution of the de
cree of defendants 3 and 4. Four defendants, namely No.1, 2, 4 and 5 did not enter app
earance in the trial Court and, therefore, the suit proceeded against them ex parte. Def
endants 3 and 6 contested the suit. Their defence was that the partition between Jeetm
al, Bulidan and Rampratap had taken place in Samwat 1924 and the house in dispute h
ad come to Rampratap's share. Defendant 1 inherited it from Rampratap and, therefore
, he was its rightful owner. It was averred that defendants 1 and 2 had sold this house t
o Beharilal Sangidas, ancestors of defendant 5 and, therefore, defendant 3 had a right t
o get the said house attached and sold in execution of his decree against defendant 5.

5. It may be remarked here that the said plaint and the written statement were filed in t
he Court of the Judicial Officer, Thikana Pokaran. The plaintiff had valued the house i
n dispute at Rs.700. The defendant raised an objection that the suit was undervalued.
The Judicial Officer, Thikana Pokaran, came to the conclusion that the house was valu
ed at Rs.2500 and since it was beyond his jurisdiction to hear the suit, it was transferre
d to the Court of the District Judge, Jodhpur. The learned District Judge then framed t
he following two issues :-

1. Whether the alleged house is in the ownership and possession of the plaintiff and is not liable to attachment and sale in execution of the decree in Case No.3 of 1937-38.
2. What relief the plaintiff is entitled to ?

6. After recording the evidence of both parties, the learned Judge found that there was
a partition in the plaintiff's family in Samwat year 1924, that the house had gone to the
share of Rampratap, that it was sold by defendants 1 and 2 to the ancestors of defenda
nt 5 and, therefore, it was liable to attachment and sale in execution of the decree of de
fendants 3 and 4 against him. The Court also held that the plaintiff was unable to prov
e his title to the property and, therefore, the suit was dismissed. The plaintiff filed an a
ppeal which was heard by a Bench of this Court. It was found by the learned Judges th
at the house was joint family property that the plaintiff had an undefined share therein
and that he was in possession of a part of the house. The appeal was therefore allowed

and it was declared that the whole house could not be attached in execution of the decr
ee.

7. Against this decision, a review application was filed by defendant 4. The learned Ju
dges, who heard the review application, found that there were two errors apparent on t
he face of the record and, therefore, the application was allowed and the appeal was fi
xed for re-hearing. This is why this appeal has come before us again for decision.

8. Now, a perusal of the pleadings and the statements of the contesting parties shows t
hat it is common ground between them that the house in dispute was at one time the jo
int family property of the ancestors of the plaintiff and defendant 1 Motilal. It is also u
ndisputed that partition of the ancestral property had taken place long long ago and the
house is no longer joint family property. According to the plaintitf it came to his share
in Samwat 1957 when the first defendant's grandfather Rampralap gave it away to hi
m. On the other hand, the defendants' contention is that there was partition in Samwat
1924 between the grandfathers of the plaintiff and defendant 1, namely Bulidan and R
ampratap and the house came to the share of Rampratap, grandfather of defendant 1.

9. The first question which, therefore, confronts the Court for determination is whether
the house had gone to the share of the plaintiff or to that of Rampratap. On this point,
the plaintiff has not produced any documentary evidence. He has remained content by
examining himself. The defendant, on the other hand, has produced two documents Ex
s.D.1 and D.2 which are said to be partition deeds. We have gone through the plaintiff'
s statement and find that it is impossible to place any reliance on it. (After discussion
of the plaintiff's evidence His Lordship proceeded) : The mere statement of the plaintif
f, under the circumstances, is altogether unbelievable and the story put up by him appe
ars to be a myth. On the other hand, Ex.D.1 produced by the respondents is a partition
deed between Jeetmal, Bulidan and Rampratap, ancestors of the plaintiff and defendan
t 1. Similarly, Ex.D.2 is counterpart of Ex.D.1 and it was executed by Rampratap and
Bulidan. Both these documents make it quite clear that there was a partition in the Sa
mwat year 1924 and the house in dispute come to the share of Rampratap, grandfather
of defendant 1. The trial Court has presumed these documents to be genuine under Sec
tion 90, Evidence Act, since they are much mere than thirty years old. Ex.D. 1 shows t
hat it bears an endorsement of the Court of Thikana Pokaran dated 3-2-
1906 since it appears to have been produced in that Court in some suit. This document
bears another endorsement dated 28-7-

1928 of the District Court No.1 Raj Marwar. This clearly shows that the document wa s in existence as early as the year 1906 and there is no-
doubt about the fact that it is more than 30 years old. Learned advocate for the appella nt has tried to urge that even though this document is more than 30 years old, it should not have been presumed to be genuine under Section 90 because it was not produced f rom proper custody. This argument had found favour with the learned Judges, who had decided the appeal on 31-7-
1950. We have given due consideration to this matter and we think that this argument i s not correct. The explanation to Section 90, Evidence Act which, deals with proper cu stody, runs as follows :

> "Explanation.-
> Documents are said to be in proper custody if they are in the place in which, an d under the care of the person with whom, they would naturally be; but no cust ody is improper if it is proved to have had a legitimate origin, or if the circumst ances of the particular case are such as to render such an origin probable."

Learned counsel for appellant has urged that if these documents were produced by def endants 1 and 2, it could be said that they were in proper custody ; but since they have been produced by the decree-
holder defendant 3, his custody cannot be said to be proper. This argument is not tenab le because defendant 3 has come into the witness-
box and stated on oath that he had got these documents from Sangidas, father of defen dant 5. The witness has stated that the present house was one attached in execution of a decree of one Kishniram. At that time, Sangidas had filed an objection petition. The witness had helped. Sangidas in engaging a Vakil and at that time, he had got these do cuments from him, and since then they were in his possession. This explanation given by the witness is not unnatural or unbelievable. Sangidas had purchased the house fro m defendants 1 and 2 and naturally these, documents should come in his possession fr om defendants 1 and 2. If the witness was helping Sangidas in the previous case, there was nothing extraordinary if he was entrusted with these documents. The second part of the explanation set out above shows that custody is not improper if it is proved to ha ve had a legitimate origin. In the present case, defendant No.3 has proved by his own statement on oath how he had come in possession of these documents. According to th is statement, the origin of his possession is quite legitimate. There is no evidence to th e contrary to show that his possession had an illegitimate origin. The legitimacy of the origin of the plaintiff's possession also finds support from Illustration (c) to Section 90

which runs as follows :

> "(c) A, a connection of B, produces deeds relating to lands in B's possession whi ch were deposited with him by B for safe custody. The custody is proper."

In the present case also, defendant No.3 has stated that these documents were given to him by Sangidas and, therefore, his custody cannot be said to be improper. The trial c ourt, therefore, did not commit any error in raising a presumption about these docume nts under Section 90, Indian Evidence Act. As shown above, these documents were tw ice produced in the courts in the years 1906 and 1928. The plaintiff has not given any evidence to show that any doubt was cast on them ever before. Under the circumstanc es, the trial court rightly held that partition between the ancestors of the plaintiff and d efendant No.1 had taken place as early as Samwat year 1924 and the house in dispute had gone to the share of the first defendant's grandfather.

10. Learned counsel for the appellant has next urged that his client has produced very reliable evidence to show that he was in possession of the property from Samwat year 1982 and, therefore, the trial court ought to have decreed his suit only on the basis of h is possession. According to learned counsel, it is not necessary for the plaintiff to prov e his title in a case under Order 21 Rule 63. In support of his argument, he has referred to the case of *'K. Bhimavva v. G. Nagappa', 1* and drawn our pointed attention to the f ollowing observation:

> "There is one distinction between what has to be proved in a suit under Order 2 1 Rule 63 and that in a suit under Order 21 Rule 103, Civil Procedure Code. So far as the class of suits contemplated by the latter provision is concerned, the Co de lays down affirmatively that the plaintiff should prove his title. So far as suits under Order 21 Rule 63 are concerned all that the Code requires is that the plai ntiff should prove the right to possession.

11. We have given due consideration to this argument and we find it difficult to agree with this view. Order 21 Rule 63 runs as follows :

> "63. Where a claim or an objection is preferred, the party against whom an orde r is made may institute a suit to establish the right which he 'claims to the prope rty in dispute, but subject to the result of such suit, if any, the order shall be con clusive."

It is clear from the wordings of this rule that the plaintiff, who tiles a suit, has got to es tablish "the right which he claims to the property in dispute." When any claim is prefe rred or an objection is made under Order 21 Rule 58, Civil Procedure Code to the attac hment of any property, then according to Rule 59, the claimant or objector is required t o adduce evidence to show that at the date of the attachment, he had some interest in, or was possessed of, the property attached. Then R.61 lays down that if the court, whic h makes the investigation, is satisfied that the property at the time of attachment was i n the possession of the judgment-
debtor as his own property and not on account of any other person, or was in the posse ssion of some other person in trust for him, or in the occupancy of a tenant paying rent to him, the court should disallow the claim. It is clear from R.61 that the court should disallow the petition of the claimant or the objector when it is satisfied that at the time of attachment, the property was in the possession of the judgment-
debtor as his own property and not on account of any other person, or that if it is in the possession of some other person, his possession is on behalf of the judgment-
debtor. Under the circumstances, when the claimant files a suit under Order 21 Rule 6 3, he has got to establish either his title to the property; or if he relies only on his posse ssion, then he has to establish that his possession is in his own right. In such a suit, if t he other party is able to establish the judgment-
debtor's title to the property, then mere possession of the plaintiff would not enable hi m to achieve any success in his suit. Order 21, R.63 does not contemplate that the plai ntiff's suit should be decreed merely on the basis of possession even though the title in the property is proved in the judgment-
debtor. In other words, if it is proved that the title of the property vests in the judgment -
debtor, then the plaintiff cannot be successful merely on the ground of possession unle ss he is further able to establish that his possession was adverse to the judgment-
debtor and that he has perfected his title on the basis of adverse possession.

12. We may point out that in an earlier case, -
N. Venkayya v. D. Raghavayya', 2 another Judge of the same High Court made the fol lowing observation:

> "This Court has held, see -
> *'Pakirayya v. Kama Sastri, 3* that the terms of Order 21 Rule 63 are wide enough to include a suit based upon title. The point to be observed is that

> the rule does not specifically say either that it is possession on the date of the claim proceedings that should be established or that it is the title of the claimant that should be established. The words are "the claimant may institute a suit to establish the right which he claims to the property in dispute." In order to prove that he has a right to the property in dispute a consideration of his title as well as of possession will be relevant. The two questions cannot be separated one from the other, for, in finding out who is in possession of the property the question as to who has title to it will be very relevant because ordinarily possession will follow title. I am mentioning this only to illustrate the statement that the terms of the order are wide enough to include title as well.

The lower Court was therefore wrong in leaving the question of title open for another litigation when it was specifically raised in the case, and, as I have said, found upon by the Court on remand."

13. In the case of -
'Swamirao Sriniwas v. Bhimabai Padappa', 5 which was under Order 21 Rule 63, it was observed as follows :

> "Once the plaintiff had proved that at any rate half the house B belonged to his judgment-
> debtor, then the only person entitled to dispute his right to attach that house would be a person who claimed that the house belonged to him. Any other person as an outsider, could have no title to interfere in attachment proceedings by urging that as a matter of fact the property attached did not belong to the judgment-debtor. I should go so far as to say this, that a claimant in attachment proceedings must prove that he himself is the owner of the attached property. If he fails to do that, then he has no further interest in the proceedings."

14. Similarly in another case -
'Udho Das v. Khair Mohammad, 5 it was observed as follows :

> "Since the suit is one to set aside the decision of an executing Court under Order 21 Rule 63, Civil Procedure Code it is for the plaintiff to prove his title and if it is found that there is no conclusive evidence on the question of title the plaintiff's suit must fail."

15. In the present case, the respondents have proved that the title of the house vested in Rampratap, grandfather of defendant No.1 after the partition of Samwat 1924 and, therefore, the appellant cannot get a decree merely on the basis of possession unless he is further able to prove that his possession was adverse to defendant No.1 and that he had perfected his title on that basis.
16. We have now to see whether the plaintiff has been able to prove his possession and also his title on that basis. (After discussion of some documentary evidence His Lordship proceeded :) Learned counsel for the appellant has raised an objection that this document is not admissible in evidence under Section 33, Evidence Act, because Jogidas was examined as the appellant's witness and he had no right and opportunity to cross-examine him. In support of his argument, he has referred to the following commentary appearing in Monir's Principles and Digest of the Law of Evidence (Edn.3) at p.351 :

> "Similarly, a party has no right or opportunity to cross-examine his own witnesses, and it seems that the evidence given in a former proceeding by the witnesses of a party will, in a subsequent proceeding, be inadmissible against the party on whose behalf the witnesses appeared in the first proceeding. Thus, where in proceedings under Section 145, Criminal Procedure Code, U appeared as a witness for the first party, his deposition was, in a subsequent proceeding in which the first party was a defendant, held inadmissible against the first party."

It appears that this commentary is based on the observation made by learned Judges of the Calcutta High Court in the case of -
'Brajballav Ghose v. Akhoy Bagdi, 6 We have gone into the case, and we find that in that case an objection was raised by the appellant with regard to the admissibility of the previous deposition of one witness, viz. Umapada, Learned Judges found that his statement was not admissible firstly, because the identity of the person who gave the deposition was not proved. Then it was further found that none of requirements of Section 33, Evidence Act, was satisfied because the witness himself was alive. Then lastly in passing, it was also observed by the learned Judges as follows :

> "Umapada had been examined in the proceedings under Section 145 as a witness on behalf of the defendant who was the first party therein. The defendant had no opportunity nor the right to cross-examine Umapada; and in these circumstances it is impossible to hold that this proviso (second proviso to Section 33) has been complied with in the present ca

se." These observations no doubt lend support to the argument of the appellant's learned counsel but they do not seem to be free from doubt. Section 33 of the E vidence Act runs as follows :

"33. Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving in a subseque nt judicial proceeding, or in a later stage of the same judicial proceeding, the tru th of the facts which it states, when the witness is dead or cannot be found, or in capable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay

or expense which, under the circumstances of the case, the Court considers unreasona ble :

Provided-

that the proceeding was between the same parties or their representatives-in-interest ;

that the adverse party in the first proceeding had the right and opportunity to cross-examine ;

that the questions in issue were substantially the same in the first as in the second proc eeding.

Explanation-

A criminal trial or inquiry shall be deemed to be a proceeding between the pros ecutor and the accused within the meaning of this section."

17. The point in issue relates to the second proviso appearing in the above section. A p lain reading of the wordings of this proviso seems to mean that in order to make the ev idence of a witness in a. previous case admissible, the adverse party in the first procee ding should have the right and opportunity to cross-examine that witness. This proviso therefore obviously protects the right of the "advers e party in the first proceeding" and not the right of the person who produces and exami nes the witness. The adverse party in the first proceeding would be the party against w hom the witness is produced in the previous proceeding and not the person who produ ces the witness himself. If the interpretation which is sought to be put by the appellant' s learned counsel is accepted, it would mean that the person producing the witness in t he first proceeding will have the advantage of using the evidence of that witness in a s ubsequent proceeding between the same parties, while the adverse party in the first pr

oceeding would be deprived of using the same statement if it goes in its favor.

18. Learned counsel wants to read the proviso as if it ran as follows : -
"The adverse party in the subsequent proceeding had the right and opportunity to cros s-
examine the witness in the first proceeding." If the legislature had drafted the proviso i n this manner, then the Court could have no option but to interpret it as it would have s tood. But when the words "in the proceeding" have been used just after the words "adv erse party" and not at the end of the clause, then it does not seem proper for the Courts to change the sequence of words to suit the interpretation. The question to be consider ed is as to what was meant by the words "the adverse party in the first proceeding." Or dinarily this would mean that if the witness is produced by a complainant in a previous criminal proceeding or by a plaintiff in a previous civil proceeding, then the adverse p arty in the first proceeding would be the accused or the defendant as the case may be. If on the other hand, the witness is produced by the accused or the defendant in the fir st proceeding, then the adverse party would be either the complainant or the plaintiff, according as it is a criminal or a civil proceeding. It' may be pointed out that the secon d proviso should be read in the context of the first proviso. The first proviso clearly lay s down that the first proceeding in which the witness was examined must be between t he same parties or their representatives in interest. This means that if the parties or the ir representatives in interest are not the same in both the proceedings, the provisions of Section 33 would not be attracted. Now let us examine whose interest the second prov iso seeks to protect. It seems to lay down that unless the adverse party in the previous proceeding has the right and opportunity to cross-
examine the witness, his evidence should not be admissible in a subsequent proceedin g between the same parties. In other words, it lays down that the statement of a particu lar witness should be tested by both the parties in order to make it admissible in the lat er proceeding. The object of this proviso seems to protect those parties against whom t he previous proceedings might have gone ex parte, or those who could have no right or opportunity to cross-examine them for some reasons. It would also protect co-
plaintiffs or co-defendants who may not have the right or opportunity to cross-
examine the witness produced from their own side. But it seems rather strange that the person who himself examines a certain witness should be permitted in a subsequent p roceeding to raise an objection that the statement should not be admitted because he h ad no right or opportunity to cross-
examine him. It also seems unfair that a person producing a witness in the previous pr oceeding should be able to utilize the statement in a subsequent proceeding, while the

adverse party should be denied the right of using the same statement against the party producing the witness in case such a deposition goes in its favor. It may be urged that i f a witness produced by a party in the previous proceeding goes hostile to him, his inte rest in the subsequent proceeding is likely to be affected; but it may be pointed out tha t Section 33 does not enjoin upon the Court that the statement of such a witness must b e believed. This section only deals with relevancy. In other words, it only makes the st atement of such a witness admissible in evidence. It would always be open to the pers on against whom the statement is produced to show that it should not be believed for r easons given by him. In the present case, this witness was produced and examined by the plaintiff himself in proceedings taken by him under Order 21 Rule 58. The previou s proceeding was between the same parties. The witness was cross-
examined by the adverse party in the previous proceeding namely, the defendant. If th e evidence of this witness were favorable to the plaintiff, he would have certainly prod uced it himself. According to learned counsel that could not be objected to under the s econd proviso, but now because the same evidence is sought to be utilized by the defe ndant, an objection is raised that it should not be held admissible. This is obviously un just. If the wording of the second proviso were as the learned counsel wants it to be re ad, then it could be interpreted in that manner; but the words "in the first proceeding" f ollow soon after "the adverse party" and therefore there is no reason why they should be interpreted in that way.

19. Next, even if it be assumed that this statement is inadmissible in evidence, it does not advance the case of the appellant. (After discussion of further evidence His Lordsh ip proceeded) :

20. Appellant's learned counsel has also referred to a few other documents which are marked Exs. P.3 to P.7. Regarding these documents, it would suffice to say that they ar e not the original documents. They are only copies. The original documents have not b een proved in any manner and, therefore, they are inadmissible in evidence.

21. It was also urged on behalf of the appellant that the sale deeds in favour of Beharil al Sangidas (Ex.D.1 and D.2) were fictitious. This argument is not tenable. The respon dents have produced a sale-
deed Ex.D.7 which is a registered document. It has been proved by the statements of t he witnesses D.W.5 Shivnath and D.W. Rambux. The evidence of these witnesses has-
not been shaken in any way. The appellant has not produced any evidence to throw an y doubt on the sale-

deed and we see no reason to disbelieve that it was fictitious. It appears from Ex.D.4 that Sangidas had obtained a patta of the house on Jeth Vad 7 Samwat 1971. It has been urged that this patta was obtained by fraud. There is not much force in this argument also. It appears that defendants 1 and 2 had at first executed a sale-deed in the month of Jeth Samwat 1971 and Sangidas got the patta thereafter but when it was thought that a registered sale-deed was necessary and, therefore, it was later on executed on 2-10-1915. The mere fact that another sale-deed Ex.D.7 was executed and registered in Samwat 1972 (2-10-1915) does not necessarily prove that the sale in Samwat 1971 was fictitious or that the patta Ex.D.4 was also obtained by fraud.

22. We agree with the trial Court that the appellant has not been able to establish his title. Taking advantage of the absence of Motilal and Beharilal Sangidas from Pokaran he managed to get a rent-note from Jogidas and got possession of the property in 1944 from him. But his possession for a small time is not sufficient to establish his right over the property. The house having been sold by defendants 1 and 2 to the ancestors of defendant 5, defendants 3 and 4 who were decree-holders against defendant 5 had a right to get the property attached and sold in execution of their decree. The plaintiff's suit was rightly dismissed by the trial Court and the appeal is also therefore dismissed with costs.

Appeal dismissed.

Cases Referred.

1. AIR 1949 Mad 718
2. AIR 1935 Mad 596
3. AIR 1933 Mad 328
4. AIR 1921 Bom 368
5. AIR 1942 Lah 192
6. AIR 1926 Cal 705