SUPREME COURT OF INDIA

Mahasay Ganesh Prasad Ray and Another

v.

Narendra Nath Sen and Others

(Kania C.J. and others)

December 01, 1950

Judgment

Kania C.J.

1. This is an appeal from the judgment and decree of the High Court of Judicature at Patna (Cuttack Circuit) reversing the decree of the Subordinate Judge and dismissing the suit of the plaintiffs. The relevant facts material for deciding the points urged before us in the appeal are these. Rai Bahadur Govind Ballab Ray died on July 30, 1896. By his first wife, who had predeceased him, he had a daughter Sabitri who died about two months after Govind Ballab's death. Govind Ballab left him surviving a widow Sarnamayee, who died in 1935. She gave birth to a son, Lal, who died in infancy, and a daughter, Indubala, who died in 1904. The deceased Govind Ballab Ray had left also certain debutter properties but no decision in respect of those properties was given as the proper contesting parties were not before the Court.

2. It was contended on behalf of the plaintiffs (appellants before us) that they are the next reversioners of Govind Ballab on the death of Sarnamayee. On behalf of the defendants (respondents) it was contended that the first wife of Govind Ballab had given birth to a second daughter Binodini on 29th of Baisakhi 1287 (May 09, 1880) and that Binodini died in 1938 after the written statement had been filed in this suit. It was therefore contended on their behalf that they were the nearer reversioners. It is not disputed that if Binodini was the natural daughter of Govind Ballab the respondents will be the nearer heirs. The whole question therefore which was discussed before us was whether the conclusion of the Subordinate Judge that Binodini was taken in the family by Govind Ballab and treated as a child but was not the natural daughter of Govind Ballab (which finding was reversed by the appellate court), is correct.

3. To repel the contention of the respondents it was strenuously urged that Binodini could not have been born to the first wife of Govind Ballab because Sabitri was born to that lady about six to seven months before May 09, 1880, and therefore the alleged birth of Binodini on May 09, 1880 as a full grown healthy child, who lived for 58 years thereafter, was an impossible story. Before the trial Judge numerous witnesses were called on each side for and against the contention that Binodini was the natural daughter of Govind Ballab. The appellants had, in addition, produced certain old papers alleged to be of the deceased Govind Ballab suggesting that Sabitri was born on the date mentioned by them. The trial Judge, as stated in his judgment, did not feel convinced of the plaintiffs' contention on the oral evidence led by them. As noticed by the High Court, the Subordinate Judge observed "from all that I have discussed in connection with this issue (the birth of Binodini) "it may seem that there are some strong circumstances in support of the defendant's case.....I might have been probably inclined to decide the question of daughtership in favour of the defendants had I not been encountered by certain documents on the plaintiffs' side which I am proceeding to discuss now. The circumstances as also the documents on the side of the defendants can be explained away as I have done but I find no reasonable ground on which I can do away with the plaintiffs' exhibits, especially the account papers (exh. 32 series)."

4. The High Court has quite appropriately started examining the judgment of the Subordinate Judge on the basis of these observations found in his Judgment. They have, in addition, scrutinized

the oral evidence led on behalf of the appellants and respondents and in detail pointed out that the oral evidence on the side of the respondents was certainly of more respectable witnesses and more reliable. In this connection we may point out that the evidence of Khirodemani Dassi (D. W. 3) is the only direct evidence in respect of the birth of Binodini. According to her evidence she was actually present at the time of the birth and her cross-examination does not show why her evidence should be disbelieved in any way. On behalf of the appellants strong reliance was placed on the evidence of Sadanand Dixit (P. W. 13) to show that Binodini was handed over to Govind Ballab after the death of her parents and that he had personally seen the girl being so made over. (After discussion of the evidence of this witness His Lordship proceeded:) In our opinion, therefore, this witness's statement on which the Subordinate Judge put considerable reliance is untrustworthy.

5. The Subordinate Judge, according to his judgment, felt compelled to hold against the respondent because of the accounts (Exh. 32 series) and the entries in the almanac. The High Court has considered these entries carefully and we agree with their line of reasoning in holding that they are not of such a nature and character as to compel the conclusion which the Subordinate Judge thought he was forced to come to. Exhibit 32 series as noticed by the High Court, consists of loose sheets of papers. They have not the probative force of a book of account regularly kept. Being old documents, naturally, the writer is not called and barring the fact that they were produced from the Receiver's possession there is nothing to show their genuineness. Section 90, Evidence Act, does not help the appellants because this is not a case where the signature of a particular person is in question or sought to be established.

6. We do not propose to repeat the reasons given by the High Court to show why these documents are not of that compelling nature as thought by the Subordinate Judge. They are all well summarized in the judgment of the High Court. In its judgment the High Court has also pointed out the circumstances under which these account sheets, contended to be of the year 1287, were produced and the way in which they came to be noticed in the Receiver's possession. Bearing in mind these circumstances and the material fact that the important document is not convincingly proved to be of the year 1287 as the figure '8' appears to be torn, we are unable to consider this document as proved of the year 1287.

7. The appellants relied on the account sheets of the year 1297 and the entries therein to support their case that these sheets contained entries of the birth of Indubala. From these sheets it was sought to be argued that they contain entries in respect of the birth of the only two daughters of Govind Ballab, namely Sabitri and Indubala, and therefore Binodini could not be his natural daughter. As pointed out by the High Court, however these account sheets of 1297 have the appearance of fresh ink and are unreliable. No argument could therefore be based on their genuineness.

8. As regards the entries in the almanac, it is necessary only to point out, as has been done by the High Court, that these are again loose sheets of papers with blanks left at different places. The writer is of course not available and therefore the weight which could be attached to documents which on the face of them are regularly kept cannot attach to these papers. The sheets and entries could be substituted or interpolated at different places, if one were so minded. Having regard to these defects therefore it is not possible to say that the entries have been made in the regular course of business and have the necessary probative value. In our opinion therefore the conclusion of the High Court is correct.

9. Mr. Umrigar, following the argument of Mr. Chatterjee who argued the main points in the appeal, contended that there was a preliminary objection to the appeal being heard. He argued that after the Subordinate Judge passed the decree in favour of the appellants the respondents filed the appeal, without the necessary court-fees stamp. On the appellants' objection the matter was

discussed before the Registrar who held that *ad valorem* court-fee must be paid on the appeal. At that time the prayer in the memorandum of appeal was "The appeal be allowed and the plaintiffs' suit be dismissed with costs throughout."

10. Following this decision of the Registrar the present respondents prayed for amendment of their prayer by adding the following "except delivery of possession of schedules 'k, kha, ga', except lot No. 7 of the properties mentioned in the plaint." When this application came before the Court a Division Bench of the High Court permitted the amendment at the appellants' own risk. The matter then again came before the Registrar who, while doubting the prudence of the respondents in making the amendment, held that as the memo stood the court-fee was properly paid on the footing that the decree under appeal was only a declaratory decree. When the present respondents' appeal came for hearing before the High Court, the question of maintainability was argued as a preliminary objection and the High Court held that the objection was sound but allowed the present respondents (who were appellants there) to delete the amendment made by them and gave them time to pay the requisite court-fees.

11. Mr. Umrigar argued that this order of the High Court was wrong, particularly because it took away from the appellants their valuable right to plead the bar of limitation if this appeal was treated as filed on the day the requisite court-fees were paid in the High Court. In our opinion this argument has no substance. In the first place, the decree of the Subordinate Judge, as drafted, is only a declaratory decree and contains no order directing delivery of possession. It is true that in the judgment of the Subordinate Judge there are directions about delivery of possession but they do not appear to have been included in the decree as drawn up.

12. Secondly, the power of the High Court to allow an amendment under Section 149, Civil Procedure Code is clearly one under which the plea of the bar of limitation may be ignored. There are decisions of very high authority taking that view. The contention therefore that by allowing the amendment the High Court took away the present appellants' valuable right to plead the bar of limitation cannot be accepted. It was a matter of discretion for the High Court and the materials put before us indicate no reason to hold that the discretion was exercised so as to violate any recognised principles of law or that by granting leave to amend any gross injustice has been done. As pointed out by the High Court, the payment of court-fees is a matter primarily between the Government and the present respondents and that was the whole fight in respect of this contention. In our opinion therefore the preliminary objection fails.

13. The appeal is therefore dismissed with costs.

Case Number(s)
Not stated in the source

Statute(s) referred

Statute	Section/Article	Para
Indian Evidence Act, 1872	Section 90	5
Code of Civil Procedure, 1908	Section 149	12

Advocate(s)
Not stated in the source text.
(P) – Provisional