APPELLATE CIVIL.

1926
July, 13.

Before Mr. Justice Sulaiman and Mr. Justice Banerji.

ABDUL AZIZ (PLAINTIFF) *v.* MARIAM BIBI AND ANOTHER (DEFENDANTS).*

Pre-emption—Suit to recover property based partly on a claim as owner and partly on an alleged right of pre-emption—Admission by party to suit—Effect of.

It is not a valid objection to a suit for recovery of possession of immovable property that the claim is based partly on a right of pre-emption and partly on the allegation that some of the property in suit was the plaintiff's own property which had been wrongfully sold by the defendant vendor. *Sabodra Bibi* v. *Bageshwari Singh* (1), *Bhagwati Saran Man Tewari* v. *Parmeshar Das* (2), applied; *Iqbal Haidar Khan* v. *Musammat Wasi Fatma Bibi* (3), distinguished.

An admission made by a party in the course of a suit is conclusive as against that party for the purposes of that suit.

THE facts of this case were as follows:—

The suit was for recovery of possession of part of certain property the subject of a sale and for pre-emption of the rest. The vendor was Musammat Maryam Bibi, the widow of one Ali Raza. The property sold admittedly belonged originally to Ali Raza. The plaintiff claimed to be an "asba" (a residuary) of Ali Raza and entitled to a three-fourths share in his estate. The widow, however, transferred the entire property. Hence this suit. The court of first instance decreed the claim. On appeal the District Judge modified the decree by cancelling the order for possession of three-fourths of the property by right of inheritance and allowing pre-emption of the whole.

* Second Appeal No. 405 of 1925, from a decree of H. E. Holme, District Judge of Cawnpore, dated the 15th of December, 1924, modifying a decree of Gauri Shankar Tewari, Subordinate Judge of Cawnpore, dated the 13th of May, 1924.

(1) (1915) I.L.R., 37 All., 529. (2) (1914) I.L.R., 36 All., 476.
(3) (1922) I.L.R., 45 All., 58.

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The plaintiff appealed to the High Court.

Mr. *Syed Muhammad Husain*, for the appellant.

Maulvi *Iqbal Ahmad* (for whom Maulvi *Mukhtar Ahmad*), for the respondents.

The judgement of the Court (SULAIMAN and BANERJI, JJ.), after stating the facts as above, thus continued :—

On the 31st of March, 1924, the vendee Akbar Ali was examined by the court under order X, rule 1. He made a clear statement that the plaintiff was the uncle of the deceased husband of Musammat Maryam Bibi and was removed by four degrees, and that after Ali Raza's death he began to make collections for a year, and it was in consequence of her not being able to get profits that she transferred the property to him. This was undoubtedly an admission of the plaintiff's allegation that he was a relation within four degrees of the deceased Ali Raza. This admission ought to have been taken as conclusive. In spite of it the learned Subordinate Judge, owing to some oversight or perhaps misapprehension, did frame an issue on the question of relationship. But when he came to write out his judgement he referred to this admission and treated it as an admission of Akbar Ali in the suit. Independently of it, he relied on the statement on oath of the plaintiff and other oral evidence as well as a pedigree filed by the plaintiff, and held that the relationship was established. On appeal the learned District Judge has come to the conclusion that this admission was made by Akbar Ali in an unguarded moment and was apparently a mistaken admission because Akbar Ali could not have any satisfactory knowledge of his own on the point. Both these conclusions are startling. The learned Judge has thought that the admission was governed by section 31 of the Indian Evidence Act which did not

make admissions absolutely conclusive. He has entirely ignored the fact that this was not an admission made on a previous occasion which was sought to be produced as an admission in a case to which section 31 would have applied. It was actually an admission of fact made in a suit and ought to have been treated as conclusive for the purposes of that suit. It is also difficult to understand why the learned Judge thought that Akbar Ali may not have knowledge of this pedigree. Ignoring this important admission the learned Judge has thought that the evidence of the plaintiff is not strong. We are of opinion that the finding of the learned Judge has been vitiated by the circumstances referred to above. It must, therefore, be assumed that the plaintiff is related to Ali Raza, as mentioned by him.

It has been urged on behalf of the respondent that the plaintiff's claim is barred by section 41 of the Transfer of Property Act because the vendee has purchased this property from an ostensible owner. But Akbar Ali has himself admitted that the plaintiff began to make collections of the profits soon after Ali Raza's death and that his widow sold this property to Akbar Ali because she was not able to get the profits. It cannot, therefore, be suggested that she was put in possession of the estate with the consent of the plaintiff. Section 41, therefore, would have no application.

The learned vakil for the respondent has further urged that, inasmuch as the plaintiff claimed possession of part of the property in his own right, he was really trying to put the vendor to proof of his title. His argument is that on the strength of the rulings in the case of *Sabodra Bibi* v. *Bageshwari Singh* (1) and in the case of *Iqbal Haidar Khan* v. *Musammat Wasi Fatima Bibi* (2), the suit was not maintainable.

(1) (1915) I.L.R., 37 All., 529. (2) (1922) I.L.R., 45 All., 53.

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In both those cases the plaintiff was not setting up his own right but was merely denying the title of the vendor Such a position cannot, of course, be taken up by a pre-emptor, because if a vendee has chosen to take the property with all the risks of getting a doubtful title the pre-emptor must offer to be substituted completely in his place. The case, however, is different when the plaintiff's own property has been wrongly sold by the vendor. In such a case there can be no estoppel against the plaintiff which would prevent him from claiming possession of his property. In fact that is the only proper course open to him. If he were called upon to pre-empt his own property he cannot subsequently bring a suit for recovery of any consideration from the vendor. The causes of action for claiming possession of his own property and for claiming pre-emption of the vendor's property are separate and distinct, and there is no ground for not allowing the plaintiff to combine the two in one and the same suit. In *Sabodra Bibi's case* the Bench made it clear that they did not decide that a vendor was entitled fraudulently to insert property to which he had no title. In the case of *Bhagwati Saran Man Tiwari* v. *Parmeshar Das* (1), the same Bench held that there was no defect in the frame of the suit if the plaintiff claimed the property as full owner and in the alternative for pre-emption. There, too, the plaintiff was trying to question the title of the vendor in the first instance, and he was not prevented from doing so. On principle we can see no distinction if the plaintiff is allowed to claim a part of the property as owner, and the remaining portion by pre-emption. Once this principle is conceded, the logical result is that he should get his own property without payment of any

(1) (1914) I.L.R., 36 All., 476.

consideration, and the rest of the property on payment of a proportionate amount of the sale consideration, the presumption being that the consideration is spread over the entire property. There would be no point in decreeing his claim for part of the property as owner, if he is to be compelled to pay the whole consideration. Such a course would be inequitable and unjust.

The courts below have found that Rs. 3,500 entered in the sale-deed is also the true market price of the entire property including the plaintiff's share and that it represents the consideration for the whole. It is unnecessary to consider, what the first court suspected, viz., whether a proportionate part of the consideration was fictitious because the plaintiff's share which could not be validly transferred had been included. The plaintiff's claim for possession of his own share and for pre-emption of the rest on payment of a proportionate amount must be decreed.

We accordingly allow this appeal and set aside the decree of the lower appellate court and restore that of the court of first instance with costs in all courts. We extend the time for payment by one month from this date.

Appeal allowed.