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I would, therefore, dismiss the appeal and confirm the decree of the lower appellate Court with costs.

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JIRAO.

HAYWARD J. :—I concur.

Decree confirmed.

R. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice and Mr. Justice Heaton.

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NARHARI HARI VAIDYA, MINOR, BY HIS GUARDIAN, THE DEPUTY NAZIR, DISTRICT COURT, NASIK (ORIGINAL PLAINTIFF), APPELLANT v. AMBABAI, KOM BALKRISHNA SAUSARIKAR AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTES*

Indian Evidence Act (I of 1872), section 32—Admission of evidence—Erroneous omission to object to the admission of evidence—Relevancy of evidence.

Plaintiff sued to recover possession of a house. The defendants contended that their deceased father had spent a certain amount of money for the completion of the house and for the purpose of proving this relied upon their father's will and a memo. of expenses prepared by him. In the lower Courts no objection was taken to the admission of the will and the memo. as evidence. In second appeal, it was contended that the evidence was inadmissible :

Held, upholding the contention, that neither the will nor the memo. was admissible in evidence under section 32 of the Evidence Act, 1872 ; the erroneous omission before the lower Courts to object to the admission of evidence did not make that evidence relevant.

Miller v. Babu Madho Das⁽¹⁾, relied on.

SECOND appeal against the decision of R. B. Gogte, First Class Subordinate Judge, A. P., at Nasik, confirming the decree passed by D. M. Mehta, Joint Second Class Subordinate Judge at Nasik.

Suit to recover possession.

* Second Appeal No. 756 of 1917.

⁽¹⁾ (1896) L. R. 23 I. A. 106.

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The plaintiff sued to recover possession of the plaint property, Rs. 330-8-0 for arrears of rent, future rent at Rs. 10 per month till possession, alleging that the plaint property was the ancestral property of the plaintiff; that it was almost completely built by his father Hari; that at the time of Hari's death, building materials to the extent of Rs. 800 were left; that Hari died on the 16th July 1904; that after Hari's death the affairs of the minor plaintiff were looked after by other persons; that Annaji, the deceased father of the defendants, undertook to complete the plaint house on condition that the building materials were to be used; that the house was to be kept in repairs out of rent; that Annaji incurred expense of Rs. 100 to 150 in completing the house; that Annaji died on the 11th September 1912 and though the plaintiff demanded possession, possession was not delivered. Hence the suit.

The defendants contended that there were no house materials left when the plaintiff's father died; that at the cost of Rs. 730 Annaji finished the plaint house at the instance of the Panchas; and that the house was to be given to the plaintiff on Rs. 730 being paid by him.

Before the Subordinate Judge, the defendants relied upon a will of Annaji and a memo. of expenses prepared by him for the purpose of showing that Rs. 730 were spent in completing the plaint house. The Subordinate Judge held that the memo. was a useless piece of evidence and there was nothing to support the version of the defendants that Rs. 730 were spent on the plaint house save the mention made in the will. He decreed that the defendants do put the plaintiff in possession of the plaint property; that the defendants should pay to the plaintiff Rs. 110-8-0 and interest on Rs. 110-8-0 at 6 per cent. per annum from the date of the decree till satisfaction and that the defendants should pay rent at Rs. 6 per mensem to the plaintiff from the institution

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of the suit till the happening of any one of the three events specified in Order XX, Rule 12 (1) (c), Civil Procedure Code, 1908.

On appeal, the First Class Subordinate Judge, A. P., relying on the will of Annaji and the memo. of expenses directed that the plaintiff should recover possession of the house on payment of Rs. 664-0-0 to the defendants.

The plaintiff appealed to the High Court.

D. S. Varde, for the appellant :—The question in the suit is what was the amount spent by Annaji in completing the building. The lower appellate Court relies upon the statement in Annaji's will and the memo. of accounts and holds that Rs. 730 were spent, but the will and the memo. are inadmissible. The statement in the will is not against the pecuniary or proprietary interest of Annaji, nor is the memo. proved to have been made in the ordinary course of business. The appellate Court's finding cannot be accepted. The trial Court excluded the will and the memo. from consideration. Its decree is correct and should be restored with costs.

D. C. Virkar, for the respondent :—The objection as to the inadmissibility of the will and the memo. was not taken in any of the Courts below and cannot be taken for the first time in second appeal: see *Shahzadi Begam v. Secretary of State for India*⁽¹⁾; *Rany Pudmavati v. Baboo Doolar Sing.*⁽²⁾ The case of *Miller v. Babu Madho Das*⁽³⁾ refers to the admission without objection of wholly irrelevant evidence. The statement in the will is admissible. It is against the pecuniary or proprietary interest of Annaji. It says "when Narhari pays up this amount (i.e., Rs. 730) the said

⁽¹⁾ (1907) 34 Cal. 1059.

⁽²⁾ (1847) 4 Moo. I. A. 259.

⁽³⁾ (1896) L. R. 23 I. A. 106.

house is to be delivered back into his possession. Narhari on attaining majority should pay this sum to me or to my heirs under the will and take possession of the same." Annaji here admits ownership of Narhari subject to the condition on the fulfilment of which he was to get possession. The memo. is prepared in the ordinary course of business. Annaji being a village Joshi could not be expected to have kept account books like those of a money-lender. The case should be sent down for a fresh finding.

MACLEOD, C. J.:—The plaintiff sued to recover possession of the plaint property, Rs. 330-8-0 for arrears of rent, and future rent at Rs. 10 per month until possession, alleging that the property was ancestral property of the plaintiff; that it was almost completely built by his father Hari; that at the time of Hari's death building materials to the extent of Rs. 800 were left; that Hari died on the 16th July 1904; that after Hari's death the affairs of the minor plaintiff were looked after by other persons; that Annaji, the deceased father of the defendants, undertook to complete the plaint house on condition that the building materials were to be used; that the house was to be kept in repairs out of rent; that Annaji incurred expense to the extent of Rs. 100 to 150 in completing the house; that after Annaji's death in 1912 although plaintiff's guardian demanded possession, possession was not delivered.

The trial Court decreed that the defendants should put the plaintiff in possession of the plaint property; that the defendants should pay to the plaintiff Rs. 110-8-0 and interest on Rs. 110-8-0 at 6 per cent. per annum from the date of decree till satisfaction, and that the defendants should pay rent at Rs. 6 per mensem to the plaintiff from institution of the suit till the happening first of any one of the three events mentioned in

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Order XX, Rule 12 (1) (c) of the Civil Procedure Code. On appeal the lower appellate Court directed that the plaintiff should recover possession of the house on payment of Rs. 664-0-0 to the defendants.

The main question in the suit is what was the amount spent by Annaji, the father of the defendants, in completing the building? The defendants said that the amount was Rs. 730, and they relied upon Annaji's will and a memo. of expenses prepared by Annaji which showed that Annaji had spent that amount. It does not appear that any objection was taken in the trial Court to the admission of the will and the memo. as evidence. The trial Judge held that the memo. was a useless piece of evidence. There was nothing to support the version of the defendants that Rs. 730 were spent on the plaintiff's house save the mention made in the will, and apparently the trial Judge did not rely upon the statement in the will.

In appeal again it does not seem to have been argued that the will and the memo. were inadmissible in evidence. The learned Subordinate Judge said that Annaji's relationship with plaintiff and Annaji's willingness to complete the house at the request of the Panchas led him to say that Annaji would not name a bogus sum in his will. The memo. was carefully examined by him which showed that all the items except the two items of Rs. 38-8-0 and Rs. 27-8-0 were spent on the repairs of the house, and after taking an account he came to the conclusion that the plaintiff was to pay Rs. 664 to the defendants.

It has now been urged before us in second appeal that neither the will nor the memo. was admissible under section 32 of the Evidence Act, and it seems quite clear to us that that contention is a sound one, as the statement in Annaji's will that he had spent Rs. 730 in

effecting the repairs of the house is not a statement made against the pecuniary or proprietary interest of Annaji, nor can it be said that the memo. said to be made by him, was made in the ordinary course of business. The Legislature has provided that statements made by deceased persons shall only be admissible in evidence when certain conditions are fulfilled. We are satisfied that neither the will nor the memo. are admissible under section 32 of the Evidence Act. But it has been argued that in second appeal we should not consider the admissibility of this evidence as no objection was taken to its admission in either of the lower Courts. At first sight that seems a reasonable proposition, as if pleaders in the lower Courts do not take objections to the admission of evidence, then the Judges in the lower Courts do not consider whether it is admissible or not, and we do not have the advantage of their opinion on that question. But it has been laid down by the Privy Council in *Miller v. Babu Madho Das*⁽¹⁾; that the erroneous omission before the lower Courts to object to the admission of evidence does not make that evidence relevant, and, therefore, their Lordships in the appeal before them laid down that they must, as the High Court ought to have done, entirely disregard that evidence. Following that decision, we must in this appeal entirely disregard the will and the memo. The result follows that they are not evidence, and that they cannot be relied upon to prove what Annaji spent on this house. In our opinion, therefore, the appeal must succeed and the decree of the trial Court be restored. The defendants must pay the plaintiff's costs in this Court and in the lower appellate Court.

Decree reversed.

J. G. R.

⁽¹⁾ (1896) L. R. 23 I. A. 106.

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