
(1913) 07 CAL CK 0009

In the Calcutta High Court

Case No : Appeal from Appellate Decree No. 1134 of 1911

Jeheto Sheikh

APPELLANT

Vs

Jaibannessa Bibee

RESPONDENT

Date of Decision : 30-07-1913

Acts Referred:

Citation : (1913) 07 CAL CK 0009

Final Decision : Dismissed

Judgement

1. The Plaintiff, who is the Appellant, brought this suit or a mortgage bond against the Defendant who is a purdanashin lady. The facts antecedent to the institution of the present suit are these :-- The document in question was presented by Jehali Sheikh, the mortgagee, on the 2nd October 1901, before a Special Registrar, viz., Mahomed Amiruddin, who, it appears, was at the time acting for the Registrar. On the denial of execution by the executant (Defendant in the present suit), the Special Registrar, still acting for the Registrar, refused registration of that document. He however after making an enquiry during which he examined the attesting witnesses, registered the document on the 11th March 1902. He signed this order describing himself as acting for the Registrar.

On the 17th August 1909, the present suit was instituted by the mortgagee. It appears however that during the interval all the attesting witnesses but one died. During the trial of the suit before the Munsif the depositions recorded during the registration enquiry were tendered as relevant evidence under sec. 33 of the Evidence Act. That Court admitted that evidence and relying on it gave a decree to the Plaintiff. The Defendant thereupon preferred an Appeal to the District Judge who allowed the appeal and dismissed the suit on 8th February 1911. The Plaintiff has now appealed to this Court and the only question raised in the present Appeal is whether under sec. 33 of the Evidence Act the deposition of the deceased witnesses are admissible or not. The finding of the lower Appellate Court is against the admissibility of that evidence. The lower Appellate Court has however observed to the following effect regarding the statement of the

deceased witnesses :--

If that evidence can be accepted as legally admissible I must hold that the finding of the lower Court is correct and that the appeal should be dismissed." The above finding is tantamount to this that if the lower Appellate Court had ruled in favour of the admissibility of those statements it would have dismissed the appeal and affirmed the decree passed by the first Court. We have therefore to see as to whether these statements are relevant and admissible.

2. The word "evidence" means and includes all statements which the Court permits or requires to be made before it by witnesses in relation to matters of fact under enquiry : such statements are called oral evidence (sec. 3 of the Evidence Act).

3. The word "Court" includes all Judges and Magistrates and all persons, except arbitrators, legally authorised to take evidence (sec. 3, Evidence Act).

4. Let us now turn to sec. 33 of the Evidence Act. It, no doubt, relates also to evidence given by a witness before "any person authorised by law to take it." It is further provided by that section that the proceeding should be 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 and that the questions in issue were substantially the same in the first as in the second proceeding. Let us now see whether the necessary requirements of this section of the Evidence Act were present or not at the time when the depositions were tendered in evidence. The witnesses whose statements were tendered were dead at the time : the proceeding before the Special Registrar was between the parties to the present suit. It appears from the record that those witnesses were cross-examined on behalf of the Defendant and the question in issue in the previous proceeding as in the suit itself was whether the Defendant had executed the document in question. The only thing to be seen is whether the previous proceeding was a judicial proceeding or whether the Special Registrar was authorised by law to record the statements of those witnesses. We find from the record that those statements were made on solemn affirmation.

5. The Appellant's contention is that the registration proceeding was a judicial proceeding or at any rate the Special Registrar was a person authorised by law to take that evidence. We have been referred to sec. 75 of the Registration Act (Act III of 1877 which was then in force) which empowers the Registrar for the purpose of any enquiry under sec. 74 "to summon and enforce the attendance of witnesses and compel to give evidence, as if he were a Civil Court." This is a power given to the Registrar : we have therefore to see whether the Special Registrar who is a Sub-Registrar had any power to summon and enforce the attendance of any witness and compel him to give evidence before him. Before we decide this question we have to observe that under sec. 72 of the Act no appeal is allowed to the Registrar if the Sub-Registrar refuses to register a document on the ground of denial of execution by the executant. Sec. 73 of the

Act provides that in the case of a refusal by a Sub-Registrar, on a denial of execution, the aggrieved party "may apply to the Registrar to whom such Sub-Registrar is subordinate in order to establish his right to have the document registered." Sec. 74 provides that in the case of a refusal by a Sub-Registrar as also where such denial is made before a Registrar, the Registrar can make an enquiry. Then comes sec. 75 which empowers the Registrar "to summon and enforce the attendance of witnesses and compel them to give evidence, as if he were a Civil Court."

6. On behalf of the Respondent it has been contended that the Special Registrar was the officer who in the first instance had refused the registration, and it was improper on his part to order the registration of that document because it amounted to sitting on appeal against his own order and we have been referred to the proviso of sec. 7 of the Act which runs thus :--

Provided that no such authorisation shall enable a Sub-Registrar to hear an appeal against an order passed by himself under this Act.

7. There can be no doubt that the whole proceeding in the Registration office would have been improper if the law had allowed an appeal against an order of refusal by a Sub-Registrar on a denial of execution by the executant but as already pointed out no appeal is allowed by the Act when such a refusal order is passed by a Sub-Registrar. The aggrieved party may approach the Registrar in such a case with an application "in order to establish his right to have the document registered." Such a procedure cannot be treated as an appeal and hence sec. 7 of the Act has no application.

8. We have now to determine as to whether the Special Registrar was a person authorised by law to record the statements of witnesses in an enquiry under sec. 74 of the Registration Act.

9. Sec. 69 empowers the Inspector-General to make rules consistent with the Act. The rules to be made are required to be submitted to the Local Government for approval and after such approval they are further required to be published in the Official Gazette. On such publication those rules have the force of law.

10. With reference to sec. 7 of the Act the rule framed by the Inspector-General is to the following effect:--

The Sub Registrar at the head-quarters of a District (Special Registrar) whose office has been amalgamated with that of the Registrar, will, besides performing his own duties as Sub-Registrar act as the working Deputy of the Registrar exercising as a matter of routine all the functions of a Registrar, except the powers of supervision and control under sec. 68, and that of hearing appeals against orders refusing to register under sec. 72. On such occasions the Sub-Registrar should describe himself as acting for the Registrar." Under sec. 69 of the Act this rule has the force of law. It is therefore clear that excepting the power of hearing an appeal against an order of refusal by a Sub-Registrar on the

ground of a denial of execution by the executant, he can, in accordance with the above rule, act for the Registrar in the case of an application under sec. 73. If under sec. 73 of the Act an application is made to the Registrar, the Sub-Registrar on the strength of the above rule can exercise the powers of a Registrar as given in cl. 4 of sec. 75 of the Act.

11. The above being the view that we have taken of the law on the subject we hold that the Sub-Registrar, Mahomed Amiruddin, had the power to summon witnesses and to compel their attendance before him to give evidence. That being our view we are of opinion that the proceeding during which the Sub-Registrar summoned the witnesses, examined them and recorded their statements on solemn affirmation and when the Defendant cross-examined those witnesses, was not an improper one. The evidence given by the deceased attesting witnesses is relevant and admissible in the present suit. The lower Appellate Court has found that if those statements had been admissible it would have dismissed the appeal and affirmed the finding of the first Court. We have already found that the statements of the deceased attesting witnesses are relevant and admissible in the present suit. For the above reasons we set aside the judgment and decree of the lower Appellate Court and decree the suit by restoring the judgment and decree of the first Court. The Respondent will pay the costs of the present Appeal to the Appellant.

Richardson, J.

I agree.