
(1918) 09 MAD CK 0009
In the Madras High Court

Lanka Lakshmanma and Another

APPELLANT

Vs

Lanka Vardhanamma and Another

RESPONDENT

Date of Decision : 03-09-1918

Acts Referred:

Registration Act, 1908 — Section 41(2)

Citation : (1919) ILR (Mad) 103 : (1919) 19 LW 698 : (1918) 35 MLJ 657

Hon'ble Judges : John Wallis, C.J.;Seshagiri Aiyar, J

Bench : Full Bench

Judgement

John Wallis, C.J.—Objection has been taken in this case that the Subordinate Judge has wrongly admitted in evidence depositions of

persons dead at the date of the trial, which had been made by them at an enquiry held by the Sub-Registrar u/s 41(2) of the Indian Registration

Act (Act XVI of 1908), when the will or authority to adopt which is in question in this suit was -presented for registration. Such depositions have

been frequently admitted and acted on without objection, but there is no authority on the point, and it is necessary to consider the question of their

admissibility u/s 33 of the Indian Evidence Act. It may be said at the outset that the legislature clearly intended to give a wide scope to the section

and to go beyond the English law, because it renders admissible, not only evidence given by a witness in a judicial proceeding, but also evidence

given by a witness ""before any person authorised by law to take it,"" and also provides that a criminal trial or enquiry shall be deemed to be a

proceeding between the prosecutor and the accused within the meaning of the section. In the earliest case, Godbolt 326 and 327 it was laid down

that,"" when a witness was dead or could not be found, his deposition in an English Court in a cause betwixt the same parties, plaintiffs and

defendants, may be allowed to be read to the jury." Taylor on Evidence, paragraph 464 says "Where a witness has given oral evidence under oath in a judicial proceeding, in which the adverse litigant had the power to cross-examine, the testimony so given will if the witness himself be incapable of being called, be admitted in any subsequent suit between the same parties or those claiming under them, if such suit relate to the same subject or substantially involve the Same material questions, " The Indian Evidence Act (Sec. 1) applies to "judicial proceedings in or before any court," and accordingly Section 33 deals with the admissibility of previous depositions "in a subsequent judicial proceeding," that is, in a judicial proceeding arising subsequently to the making of the deposition. But the previous deposition need not have been made itself in a judicial proceeding.

According to the language of Section 33, it is sufficient if it was made in a judicial proceeding or in such circumstances as to make it "evidence given by a witness before any person authorized by law to take it. " Now the word evidence is defined in Section 3 as meaning and including "all statements which the Court permits or requires to be made before it by witnesses in relation to matters of fact under enquiry, " and "court " is denoted as including "all persons except arbitrators legally authorized to take evidence and the Sub-Registrar is a person authorized to take evidence within the meaning of these definitions under the provisions of the Indian Registration Act, which are referred to below, as he is a person authorized to take statements from witnesses in relation to matters of fact under enquiry before him.

2. The only remaining question is whether the provisoes to Section 33 were satisfied (1) that the former proceeding was between the same parties, or their representatives in interest, (2) that the adverse party in the first proceeding had the right and opportunity to cross-examine and (3) that the questions in issue were substantially the same in the first as in the second proceeding,

3. For the purpose of answering this question, it is necessary to examine the statutory provisions regarding the proceedings of the Sub-Registrar u/s

41(2) of the Act. That section imposes on him the duty of registering the will if he is satisfied that it was executed by the testator, that the testator is

dead, and that the person presenting it claims as executor or otherwise under the will. Section 63 gives the registering officer power to administer

oaths at his discretion to persons examined before him and to record their statements, and Section 36 provides for the summoning of witnesses at

the instance of persons presenting any document for registration or claiming under any document which is capable of being so presented, and also

provides for enforcing their attendance, etc. in the same manner as in suits before civil courts. u/s 69(j) which authorizes the making of rules

generally regulating the proceedings of the Registrars and Sub-Registrars," rules have been made as to "the enquiry contemplated by Section

41(2) of the Act. Rule 69 requires the registering officer to whom the will is presented for registration to fix a day for such enquiry and to cause

notice of the enquiry (a) to be served on persons to whom in his opinion special notice should be given and (b) to be published (1) in the District

Gazette and (2) in the villages where the testator lived, where interested parties may reside, and where the property of the deceased is situated.

Rule 70 requires him to summon witnesses, not only at the desire of the persons presenting the will--as he is required to do by Section 36 of the

Act, but also at the desire of persons who object to registration on the ground that the will was not executed by the testator or that he is not dead

or that the person presenting it is not entitled to present it u/s 40, that is to say, that he does not claim under it as executor or otherwise, Rule 168

shows that the rules contemplate that the parties may be represented by counsel, as it prohibits any but licensed practitioners from appearing at the

enquiry, and Rule 72(1) requires the registering officer to prepare and place on record a memorandum in English containing a summary of the

evidence and the reasons for registration or refusal as the case may be. There is an appeal from his order to the Registrar u/s 72(1) of the Act.

4. In construing the provisoes to Section 33 it is important to remember that Section 33 is applicable even where the earlier proceeding was not a

judicial proceeding and therefore that the section contemplates that the provisoes may be satisfied and the evidence at the earlier enquiry be

admissible even where that enquiry does not satisfy all the requisites of a judicial proceeding. We should, therefore, be on our guard against

construing the language of the the provisoes so strictly as to exclude evidence at all inquiries which are not judicial proceedings, and we have not to

consider whether the enquiry is or is not a judicial proceeding as in *Queen Empress v. Tulja* ILR (1887) Bom. 96. *Atchayya v. Gangayya* ILR

(1892) Mad. 138 or whether or not the doctrine of absolute privilege applies to statements made at it; as to which see *Krishnamal Vs.*

Krishnaiyengar and Another, ., and Co-partnership Farms (Limited) v. Harvey Smith K (1918) 34 Times L.R. 414.

5. Approaching the question in this way, I think the first and third provisoes to Section 33 are satisfied when, as in the present case, the parties to

the suit, or those whom they represent, were arrayed against each other at the enquiry before the Sub-Registrar, the one side upholding the

genuineness of the will with a view to its registration and the other side attacking it, and that the enquiry must be considered to have been between

the same parties and substantially about the same question.

6. There only remains the question whether the adverse party at the enquiry had the right and opportunity to cross-examine so as to satisfy the

second proviso. This has all along been regarded as the leading test, as stated in *Buller's Nisi Prius* 239 (1793). "A deposition cannot be given in

evidence against any person that was not a party to the suit and the reason is, because he had not liberty to cross-examine the witness; and it is

against natural justice that a man should be concluded by proofs in a cause to which he was not a party." Now it is to be observed that, while,

under the Act and the Rules made pursuant to it, the parties propounding the will for registration and opposing it both have the right to have the

witnesses summoned (Rule 69) and the registering officer is required to "prepare and place on record a memorandum in English containing a

summary of the evidence," the rules do not provide expressly either for the examination or cross examination of the witnesses summoned on either

side. But these provisions for summoning the witnesses and recording their evidence in my opinion necessarily imply that they are to be both

examined and cross-examined in the ordinary way, especially as the rules contemplate that the parties may appear by counsel. Otherwise, their

statements could scarcely be referred to as evidence in the Rule, or form the basis for the summary of the reasons for registering or refusing to

register which the registering officer is required by the rule to record. It is also the invariable practice for the witness at these enquiries to be cross

examined and, as has been said, the practice of the court is the law of the court. It would I think be very unfortunate if we had been compelled to

hold otherwise, as owing partly to the fact that moffussil wills do not require probate, suits as to wills not infrequently come on for trial when nearly all the parties acquainted with the facts are dead.

7. I have, dealt with the question at length because of its importance, but I do not think that, if the depositions made before the Sub-Registrar were excluded, it would make any difference in the present case.

[The rest of His Lordship's judgment deals with the evidence in the case and is not material to this report-Rep.]

8. The appeal is dismissed with costs.

Seshagiri Aiyar, J.

9. I agree.