

(1957) 06 AP CK 0011

In the Andhra Pradesh High Court

Case No : Appeal No. 41 of 1952 with Memorandum of Objections and Civil Miscellaneous Petition No. 1899 of 1955

(Pathuri) Subrahmamya Sastry

APPELLANT

Vs

(Pathuri) Lakshminarasamma and others

RESPONDENT

Date of Decision : 26-06-1957

Acts Referred:

Evidence Act, 1872 — Section 33, 63(3)

Citation : AIR 1958 AP 22

Hon'ble Judges : Krishna Rao, J; Bhimasankaram, J

Bench : Division Bench

Advocate : P. Somasundaram, for the Appellant; B.V. Subrahmanyam and V.V. Krishnamurthy for No. 1 and K. Venkataramana and P. Suryanarayana for Nos. 2, 3 and 5 for Respondents, for the Respondent

Judgement

Bhimasankaram, J.—The 1st defendant is the appellant. The appeal is directed against the decree granted by the trial Court in favour of the 1st respondent, the sole plaintiff in O. S. No. 65 of 1949 on his file. The respondents 2 to 5 who were defendants 2 to 5 in the lower Court are tenants in possession of the property in dispute between the plaintiff and the 1st defendant.

2. The plaintiff is the widow of one Pathuri Bala Krishna Sastry who died on 1-3-1947. She sought in the suit possession of certain agricultural lands which had belonged to her husband, from the 1st defendant who claims to be the adopted son of the said Balakrishna Sastry. In his Written Statement, the 1st defendant averred that he was taken in adoption on 20-8-1943 by the husband of the plaintiff and that the adoption was immediately followed by the execution of a deed of adoption which was duly registered by the adoptive father himself on 27-8-1943.

It was further, stated that the plaintiff's objection to the registration of the document on the ground that her husband was of unsound mind was over-ruled by the Registrar. Accordingly, the 1st defendant claimed that he was solely

entitled to the lands. It is to be remembered that the Hindu Women's Rights to Property Act was held not to apply to agriculture lands. The State Legislation conferring rights upon widows in respect of agricultural lands similar to those they had in regard to other property has not yet been passed.

3. The learned Subordinate Judge held against the 1st defendant's case of adoption. He took the view that Balakrishna Sastry was a person of weak intellect and unsteady mind and that advantage was therefore taken of this circumstance by the father of the 1st defendant who is D.W. 1 in the case to make it appear that Balakrishna Sastry who is his first cousin on the paternal side had adopted the 1st defendant. He therefore, decreed the suit. In order to appreciate the contentions of the parties in the appeal, the following facts must be remembered.

4. Balakrishna Sastry had a daughter by the plaintiff by name Suseela by whom he had a grandson, Bhavanarayana. Bhavanarayana claiming to have been adopted by his maternal grandfather brought a suit O. S. No. 25/44 on the file of the Sub-Court, Bapatla against the present 1st defendant for a declaration that the latter (the 1st defendant) was not the adopted son of Balakrishna Sastry, who was also impleaded as the 2nd defendant in that suit. The trial Court held in that suit that Bhavanarayana was not validly adopted by Balakrishna Sastry. On appeal to the High Court of Madras, however, the learned Judges agreed with the finding that plaintiff was not validly adopted and did not consider it necessary to record any finding relating to the adoption of the present appellant. Still, they made the following observations in their judgment :

The evidence regarding the same (the adoption of the 1st defendant) is as unsatisfactory as the evidence regarding the adoption of the plaintiff, but in the view we are taking, viz., that the suit will not lie if the plaintiff's adoption is not made out, we do not think it necessary to go into the question whether the 1st defendant has been validly adopted or not.

The present plaintiff gave evidence in support of the adoption of her grandson while Balakrishna Sastry himself appeared as a witness on the side of the 1st defendant. A number of witnesses were examined in that suit in support of the 1st defendant's case. Three of those witnesses have been examined again in the present suit. They are D.W.s 1, 5 and 6; D.W. 1 as already stated, being the 1st defendant's father. D.W.s 2 and 10 are witnesses who have been examined for the first time in the suit. An attempt was made, however, by the 1st defendant to put in evidence in the present suit the depositions of three witnesses recorded in the previous suit. The lower Court refused to receive them. The appellant has, therefore, preferred before us C.M.P. No. 1899 of 1955 renewing his attempt.

5. C.M.P. No. 1899/55 seeks also the admission of the evidence of certain witnesses contained in the printed set of documents prepared for the use of the High Court of Madras in A. A. O. No. 263 of 1923 which also was tendered in the lower Court and rejected by it. This A.A.O. was against order of the District Court

of Guntur in O.P. No. 21 of 1922, adjudging Balakrishna Sastry a lunatic and appointing a manager for his estate. These proceedings were initiated by the present plaintiff. An appeal taken to the High Court of the Madras against that order by the paternal uncle of Balakrishna Sastry was successful, the learned Judges holding that certain important letters alleged to have been written by the lunatic were not put to him. They remarked that the case had been perfunctorily disposed of and that they were unable to support the order. They proceeded to say :

If it is now nearly three years since the order was passed and the state of the man's mind may have changed for better or worse since then. It is open to parties interested to file a fresh petition if circumstances justify it.

The 1st defendant would have us take into consideration some of the material available in the printed record in that appeal on the ground that it throws light upon the condition of Balakrishna Sastry's mind.

6. Before proceeding to discuss the merits of the appeal, it is desirable to dispose of the question relating to the admissibility of this evidence and indeed this question has been argued first before us.

7. The question of the admissibility of the printed record in A.A.O. No. 263 of 1923 is easily disposed of. In *Alapati Narasimham v. Ailoori Baburao*, ILR (1939) Mad 333 : *Alapati Narasimham Vs. Ailoori Babu Rao (dead) and Others*, it was pointed out by a learned Judge who had been for some time, the Registrar of the High Court that a record printed in the High Court is not a copy made from or compared with the original but only copy of a copy and in the absence of evidence that the printed copy had been compared with the original it could not be treated as secondary evidence of the original under S. 63 (3) of the Indian Evidence Act. The learned Judge pointed out that an earlier decision taking a contrary view of *Ramesam J. in K.S. Ganapathi Aiyar Vs. Sakharayappa Mudaliar and Others*,), was based upon a procedure followed in the printing of the High Court's record prior to 1922, and that since 1923, a different procedure came to be adopted.

Since 1923, the printing of the record was entrusted to the Government Press whereas before then, it was being attended to by the High Court Press. A difference in practice therefore was occasioned thereby. The printed papers now tendered in evidence were printed by the Government Press Madras and there is nothing to show that there has been any comparison of the copy with the original. The record, cannot, therefore, be treated as secondary evidence except by consent and there being no consent this record cannot be received.

8. I shall now deal with the question of the admissibility of the depositions in O. S. No. 25 of 1944. Depositions of three witnesses are now sought to be brought in. They are the depositions of Somanchi Bhagavanulu, Chavali Lakshmi Kanthayya and Avvari Subbarao who were D.W.s 4 5 and 9 respectively in the previous suit.

9. It is not disputed that if these depositions are at all admissible they could only be admissible under S. 33 of the Indian Evidence Act. Now S. 33 of the Indian Evidence Act can only apply

When the witness is dead or cannot be found or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case the Court considers unreasonable.

Now Somanchi Bhagavanulu is admittedly alive. He is stated to have officiated as the priest at the time of the adoption in dispute. No attempt has been made in the lower Court to show that any one of these conditions has been satisfied in regard to this witness. No affidavit accompanied the tender in evidence of the deposition. No witness stated that he was not available or that he was won over by the other side.

It was, however, argued at the hearing before the lower Court that the 1st defendant had taken out summons on several occasions and had even applied for the arrest of the witness but that he could not be found and the suggestion was made that the plaintiff had won him over. The lower Court refused to accept the suggestion. It pointed out that Bhagavanulu is the brother-in-law of D.W. 1's brother, that it is not shown that he is related to the plaintiff, that D.W. 1 does not say that there are any disputes between their family and Bhagavanulu and that it was therefore, difficult to believe that he was won over by the plaintiff.

It was also inclined to think that the arrest warrant taken against the witness was only "a make-believe affair" and was only a pretext for invoking S. 33. Even in the application before us, nothing is said about the ground on which S. 33 would be applicable to make the witness's deposition admissible. In these circumstances, I hold that none of the preliminary conditions laid down in S. 33 has been satisfied and decline to receive the deposition in evidence.

10. Coming to the deposition of Chavali Lakshmikanthayya, it has been brought to our notice that this individual died on 6-3-51 i.e., during the trial of the suit and after the defence evidence which started first was closed and some of the witnesses on behalf of the plaintiff were examined. It is not stated that he was summoned as a witness at any time before his death. The learned Subordinate Judge seemed to think that that was not a ground for declining to receive his deposition in evidence. But I cannot agree with him.

The deposition would not become admissible merely because of the death of the witness at any stage of the suit. If the party tendering had made no attempt before that event had happened to examine the witness in the ordinary course and if before closing his case he had not established any of the grounds other than death mentioned in S. 33 which would make it receivable in evidence, the deposition could not be taken in merely because the witness happened to die during the trial of the suit.

We do not know why he could not be examined. The mere accident of his death subsequent to the closure of the defence case cannot enable the defendant to ask for its admission. There is no proof that he was won over by the other party, or that he could not be easily found. Indeed, nothing of the sort was even stated at the time when the evidence was tendered in the lower Court. Even here, we are not told on what ground S. 33 could be made applicable at the time when it was tendered in evidence in the lower Court.

11. The third of the depositions sought to be admitted is that of Avari Subbarao. It is common ground that he died long before the suit. Prima facie, therefore, one of the preliminary conditions of S. 33 is satisfied and the question has to be considered whether the three provisions mentioned in the section are also satisfied so as to make the deposition relevant. It is manifest that the 2nd and 3rd provisos, which run as follows are satisfied :

33 X x X X X

Provided -

X X X X X

that the adverse party in the first proceeding had the right and opportunity to cross-examine; that the question in issue was substantially the same in the first as in the second proceeding.

As regards the latter proviso, it is not necessary as the Privy Council has pointed out in AIR 1933 202 (Privy Council) , that all the questions in issue in the two proceedings should be substantially the same. The principal question, therefore, is whether the first proviso to S. 33 of the Evidence Act which requires that the proceedings should have been between the same parties or their representatives in interest is satisfied in the present case. In AIR 1933 202 (Privy Council) , their Lordships of the Privy Council held that the phrase "Repre-sentatives in interest" was neither technical nor a term of art and covered.

not only cases of privity in estate and. succession of title but also cases where both the following conditions exist, viz., (1) the interest of the relevant party to the second proceeding in the subject-matter of the first proceeding is consistent with and not antagonistic to the interest therein of the relevant party to the first proceeding, and (2) the interest of both in the answer to be given to the particular question in issue in the first proceeding is identical.

There their Lordships were dealing with the admissibility against the Rajah of Pittapur in a suit brought by him of the evidence of witnesses in a prior suit which had been instituted against the Rajah by the father of the party seeking to tender the evidence in the later suit. In the earlier suit, Ramakrishna had claimed the impartible estate of Pittapur and some other property of the deceased Raja, Gangadhara Ramarao by name and the plaintiff therein and the father of the contesting defendant in the later litigation had disputed, inter alia, that the Raja of Pittapur was the aurasa son of Gangadhara Ramarao.

The same question was raised by Ramakrishna's son in the later suit which would be liable to dismissal if the Rajah of Pittapur was not the aurasa son of Gangadhara Ramarao. Both Ramakrishna and Krishna had the same interest in the answer to be given to the particular question but that was clearly not sufficient and therefore their Lordships proceeded to discuss whether the first condition above-mentioned was also satisfied. Discussing the facts before them, they observed that they were not prepared to say,

that Ramakrishna, in claiming Pittapur on the footing of the plaintiff being a suppositious child, was not a representative in interest of Krishna (the defendant in the latter suit) within the meaning of the first proviso.

But they proceeded to say

But there can be no doubt in their opinion, that in relation to the claim for self-acquired property, Ramakrishna was such a representative in interest of Krishna.

They said that it was difficult

to see how it could be said that Ramakrishna in asserting his claim to that property (i.e., self-acquired property) upon that footing was not the representative in interest of his sons born and to be born, except upon the restricted view taken by the Courts in India.

In the earlier part of the judgment, they observed, after remarking that the proviso exactly inverts the requirements of English Law, that the Legislative authority was doing so deliberately, because it was

dealing with a country in which (amongst other institutions) the Hindu joint family involved representation of interest of a land and degree and in circumstances unfamiliar to English Law.

Therefore, in considering the question as to who is "representative in interest" their Lordships dealt with the character of Ramakrishna in relation to the issue as to the respondent's status as aurasa and were of the view that

Ramakrishna represented possibly his children as reversioners to that estate which he was claiming and certainly as persons entitled to obtain a right by birth in certain property which he might succeed in obtaining as a result of the suit.

12. Now, in the present case, the position is that it is the party who is common to both the suits that proposes to use the evidence taken in the earlier suit. However, as the Privy Council remarked, the admissibility of the evidence in favour of a party must be tested by its admissibility if tendered against him. So, it really does not matter by whom the evidence is tendered : the question in each case being whether a party's opposite number in the earlier proceeding can be said to be his representative in interest. I shall therefore have to consider whether the plaintiff in the old suit was the representative-in-interest of the present plaintiff.

It is true that the present plaintiff seems to have supported Bhavanarayana, the plaintiff in the old suit by giving evidence in his favour just as Balakrishna Sastry appeared therein as a witness on behalf of the 1st defendant. But that fact cannot, of course, make the plaintiff in the previous Suit her representative-in-interest. The old suit was in nowise a representative suit and the result would bind nobody but the plaintiff in the suit and his successors and privies.

13. The present plaintiff clearly is not a successor or a privy of the plaintiff in the former suit. Further, if the plaintiff in that suit had succeeded, he would have carried away the whole of the property now claimed by the present plaintiff that is to say, her interest in the subject-matter of the first proceeding is consistent with or antagonistic to the interest therein of the plaintiff in the prior proceeding. It can hardly be said therefore that the plaintiff in the earlier suit was fighting the present plaintiff's battle as well as his own in regard to the subject-matter of that suit.

14. Our attention has been drawn to a decision of our Learned brother Umamaheswa-ram J., in Karri Venkata Narasayamma and Another Vs. Pentapati Venkata Rattamma and Another As the facts of the case before us are not ad idem, I do not feel called upon to examine the correctness of that decision.

15. In my opinion, therefore, the appeal must be considered on the evidence upon which the trial Court rested its conclusions. But I have thought it best however, to consider the appellant's case alternatively on the footing that the deposition of Avvari Subbarao is admissible in evidence. The deposition of this witness stands on a different footing from the other two depositions and can only be excluded from consideration, if I am right in my interpretation of the phrase, "representative-in-interest." I shall, in the first instance discuss the evidence adduced in the present suit and then follow it up with a consideration of the evidence of Avvari Subbarao marked as Ex. B-28 in the list filed by the appellant along with C. M. P. No. 1899 of 1955. The principal question to be determined is, in the words of issue 1, "whether the adoption of the 1st defendant by late Balkrishna Sastry is true, valid and binding on the plaintiff." Before discussing the evidence, however, it would be pertinent to make some observations of a general character bearing upon the adduction of oral evidence in the case in support of the story of adoption.

The 1st defendant himself who was about 22 years old at the time of the trial which took place in March 1951 (in fact he is described in the plaint which was presented in April 1949 as being aged 22 years) has not examined himself although he must have been in a position to tender evidence as to the adoption, because he must have been not less than 13 or 14 years old at that time and should have been able to remember the occasion. D.W. 1 his lather says in his evidence that he was studying in the III or IV Form at that time in the Board High School, Ponnur and that he was 13 or 14 years old then. His absence from the witness-box- it may very well be called avoidance of the witness-box-must surely therefore tell against his case.

16. Then again, three witnesses who were examined in the former Suit have not been examined now, though alive and no explanation is offered for their non-examination, Bhagavanulu and Lakshmi Kanthayya whose depositions have been sought to be admitted as additional evidence are two of them. Another is Rupakala Kameswara Rao, a maternal uncle of the 1st defendant. Reliance is however placed in support of the case of the adoption upon Ex. E-B (3), a post card stated to have been written by the said Kameswararao to Pathuri Balakrishna Sastry.

In it, Kameswararo is supposed to have stated that if his sister Hanumayamma and his brother-in-law Sriramulu (D.W. 1) wholeheartedly agreed to give the 1st defendant in adoption then Balakrishna Sastry's action in adopting the boy is commendable. This letter which was not filed in the earlier suit is filed for the first time in the present litigation and Kameswara Rao's hand-writing therein has not been proved either by D.W. 1 who produced it or by D.W. 5 who is the writer's brother. In spite of the fact, therefore, that Ex. B-3 was considered important as throwing contemporaneous light upon the adoption. Kameswararao, as already stated, has not been called and no explanation has been offered for his absence either by D.W. 1 or D.W. 5.

17. Further, two new witnesses who did not figure in the earlier proceeding have been brought in for the first time in the present suit. They are D.Ws. 2 and 10. D.W. 2 is the adopted son of the plaintiffs maternal grand-father and there was litigation between him and the maternal grand-mother of the plaintiff in which this adoption was disputed. Further, the witness admits that the adoptive father made a bequest favour of his wife of certain property of which the plaintiff is in possession and enjoyment after her mother's death and that he made an unsuccessful claim in regard to it. He would have it however that he has "no disputes on enmity with the plaintiff."

He admits that he filed an insolvency petition though he says it was 20 years before he gave evidence and that he obtained discharge. No satisfactory reason is given why he appears as a witness for the first time now, without having appeared in the previous litigation. It would not be unreasonable to suppose that the defence just happened upon this person with a grouse against the plaintiff, some time after the earlier litigation had terminated. The learned Subordinate Judge was not inclined to place much reliance upon this witness's testimony, and I am not prepared to take a different view of it.

18. As regards D.W. 10 the other new witness, he claims to have been invited to the adoption ceremony as he is a neighbour of D.W. 1 and to have attended it. Though he speaks of the ceremony relating to the giving and taking of the adoptee he makes no mention of datta homam. He was one of the attestors to Ex. B-1, the adoption deed. He repudiates the suggestion that he is a "private," that is a tout. He claims to be worth a Lakh of Rupees but says at the same time that because his house hold expenses are Rs. 20 per day, he is working as a clerk of one A. Subbunarayana.

19. Another very striking circumstance is that D.W. 1 and some other witnesses too, admit that the 1st defendant attended school on the date of adoption. The adoption was on a Friday - a working day for the school and the school would start working from 10-30 A.M. Ex. B-2 which is relied on as the Lagna Pathrica shows that the ceremony was fixed at 9-28 A.M. According to D.W. 2, the Datta Homam is performed for about two hours and the boy should be present all the time. The 1st defendant would have it that the adoption ceremony was over by about 10 A.M. and that they took their meals at about 12 Noon or 1 P.M., the adoptee himself presumably, going to school without taking his meal.

This admission must have been occasioned by the fact that the plaintiff would have produced the school registers to show the 1st defendant's attendance at school that day during the morning hours. This admission having become thus unavoidable some attempt was made to put the ceremony of adoption earlier in the evidence of the witnesses that followed D.W. 1. According to D.W. 2's account the ceremony commenced at 7 A.M. and the handing over was at 9 A.M. or so, while according to D.W. 1, the adoption took place at 9 A.M. that morning. If we are to place any reliance upon Ex. B-2 it is flatly contradicted by these statements of the several witnesses.

20. Above all, the very language of Ex. B-1 about which all the witnesses are unanimous that it was drawn up after the adoption ceremony took place, raises a suspicion as to whether the adoption took place that morning - a suspicion which we naturally expect the oral evidence to dispel. It is necessary to quote the exact language in Ex. B-1 for this as well as for another purpose which will appear later :

I am suffering from leprosy for the last six years approximately. I have my daughter Susila and my wife Lakshminarasamma by name As I have no male issue, as I am afraid that I will not live along on account of the disease and for the purpose of perpetuating my family and for the purpose of attaining salvation by me and by the members of my family in this world and the next, I have requested your natural father Siramulu Garu to give you in adoption to me; he thereupon consented and gave you in adoption.

Therefore I have settled you as my adopted son from this day. You yourself may, therefore, enjoy all the properties belonging to me as the Kartha under the Hindu Law. As I am suffering from disease you take possession of items 2 and 3 mentioned in the schedule hereunder for the purpose of your education, marriage, etc., and may enjoy the same with all powers.

"I shall retain item 1 mentioned in the schedule in my possession till my death and shall enjoy only the income derived therefrom. I shall not in any way alienate the properties mentioned in the schedule within my life time. If my wife Lakshminarasamma lives after my life time, you should pay to her one putty of paddy towards maintenance by the 30th Magha Bahula of every year and obtain proper receipt. I have to perform service to Swami Varu. On account of the

disease I am suffering it is not possible to enter Swami Varu's Sannidhi.

You should therefore, perform the said service yourself personally or through (other) persons. I shall not act contrary to the aforesaid arrangements in respect of the properties mentioned in the schedule. This is the deed of adoption executed and delivered with consent.

There is no recital herein as one would expect, to indicate that the adoption had already, taken place. The actual Telugu expression that occurred is one which is never used to describe something that has actually taken place. I strongly dissent from the suggestion that it is only a case of inartistic drafting.

The expression would not have been thought of, in my opinion by any scribe untutored as he may have been in the art of draftmanship if he wanted to say that the adoption had taken place. It is a circuitous expression we cannot help feeling that it was pitched upon as being equivocal possibly to induce Balakrishna Sastry to sign the document. It is to be borne in mind that the evidence is that it was executed at the house of D. W. 1 and that the plaintiff not present either at the ceremony of adoption or at the time when Ex. B-1 was prepared.

21. If I have dwelt upon these features of the case first, it is because I think that the oral evidence adduced at the trial of the suit must be appreciated in the light of the foregoing facts and circumstances. I shall now consider first the oral evidence of witnesses other than D.W. 2 and D.W. 10 which I have already discussed. (After discussing the oral evidence, his Lordship concluded).

22. Upon this evidence I find it very difficult to disagree with the conclusion reached by the learned Subordinate Judge.

23. There is nothing in the documentary evidence either to invalidate this conclusion. (After discussing the documentary evidence his Lordship concluded).

As a result of the examination of the oral and documentary evidence in the case, therefore, I must hold that the 1st defendant is not the adopted son of late Balakrishna Sastry.

24. Mr. Somasundaram has however raised a contention before us which, he frankly concedes, was not taken earlier either at the trial or even in the Memorandum of grounds of appeal. He submits that it is a pure question of law and that he is, therefore entitled to raise it even now for the first time. The contention turns upon the meaning and effect of Ex. B-1. It is argued that thereunder the 1st defendant, obtained an immediate interest in items 2 and 3 mentioned in the schedule thereto and that the plaintiffs claim at least in regard to these items must, therefore fail.

It is not disputed that the deed is not stamped as one of gift and that it goes only by the title "Deed of adoption." But this, it is said, makes little difference. Turning to the language of Ex. B-1 I find that all that it says is that the first defendant might take over possession and enjoy the items 2 and 3. The idea

seems to be not to convey title but only to give possession of these items. There is no proof that such possession was taken.

Further it reads as if it is a provision for the education etc. of the 1st defendant. Why the adoptive father should provide for the marriage of his own son it is difficult to surmise. In any case it is admitted by D.W. 1 in his chief-examination that Balakrishna Sastry was collecting the income and giving some money for the education of the 1st defendant. That would not have happened if the 1st defendant had been put in possession of the property. It does not seem that there was any such intention. The following recitals in Ex. A-7 negative may any claim to title or enjoyment in the 1st defendant.

You shall enjoy this 11 acres and the income therefrom with absolute powers during your life time and they should be conveyed to your adopted son Pathuri Subrahmanya Sastry after that If you think necessary, I shall get the deed registered.

This recital was intended to allay the fears of Balakrishna Sastry that the adopted son may claim a share in his property as a co-parcener.

25. Again, having regard to the fact that the late Balakrishna Sastry was declared a lunatic by the District Court Guntur, though the order was set aside on appeal as already mentioned, we have good reason to doubt that he was a man of sound mind. A lunatic is not a person who is continuously in a state of unsoundness of mind and once it has been established that a person is a lunatic, the burden of proof is on the party who alleges that a document he relies on as having been executed by the alleged lunatic was executed by him during a lucid interval.

See AIR 1941 251 (Nagpur) and Seshamma v. Padmanabha Rao, ILR 40 Mad 660 : (AIR 1917 Mad 265) (F). In the latter case it is pointed out that though a lunatic could write an intelligent letter which is grammatically expressed, it may still not follow that he is a man of sound mind. Their Lordships referred to a letter written by the alleged lunatic charging his own mother with misconduct and couched in terms of extraordinary violence and inferred that it showed that he was not of sound mind. Similar are the expressions used by Balakrishna Sastry in Exs. A-4 and A-5 against his wife and daughter to which I have already referred.

In all these circumstances I am not satisfied that Ex. B-1 has been proved to have been executed when Balakrishna Sastry was in a sound state of mind. Nor does the fact that it was registered, shift the burden of proof in regard to the factum of execution by Balakrishna Sastry in a sound state of mind. Under the Registration Act, the registering office is only concerned to see whether the executant appears to be a lunatic and if he does not, he is bound to register it.

It is true that he seems to have overruled the objections of the plaintiff who objected on the ground that her husband was of unsound mind and that the

document should not therefore be registered. But, the Sub-Registrar was not competent to go into any such question. For these reasons, I cannot hold that it has been established that Ex. B-1 was executed by late Balakrishna Sastry in a sound state of mind or that it is capable of the construction or effect that the learned counsel for the appellant would contend for. In the result in my opinion the appeal fails and should therefore be dismissed with costs.

26. There is a Memorandum of Cross-objections filed on behalf of the 5th defendant questioning the award of the costs of the suit against him jointly with the 1st defendant. It appears that the 5th defendant was given a lease by Balakrishna Sastry of plaintiff item 2. After the expiry of the lease, he continued to be in possession in pursuance of a fresh lease given by the 1st defendant. He filed in the suit a separate written statement saying that the lease taken by him from the 1st defendant is valid and binding on the plaintiff and sought the dismissal of the suit against him. The lower Court held under issue 3 that the plaintiff was entitled to recover Possession of the 2nd item from the 5th defendant because on its finding it followed that the 1st defendant had no title and could not grant a valid lease of that item.

27. In the circumstances, there is no reason why the order of the lower Court directing him (5th defendant) to bear the liability of the costs along with the 1st defendant should be interfered with. The Memorandum of cross-objections, therefore, fails and must be dismissed with costs. No separate orders are necessary on C. M. P. No. 1899 of 1955 for admission of the documents, as I have dealt with it in the course of my judgment in the appeal.

28. The Court fee payable to the Government will be paid by the appellant.

Krishna Rao, J.

29. I entirely agree with my learned brother that on the evidence the adoption of the appellant has not been proved, that effect cannot be given to Ex. B-1 as a deed of gift and that the appeal and the Memorandum of Cross-Objections must be dismissed with costs. But I would like to add a few words of my own with regard to the question arising under S. 33 of the Evidence Act in connection with the appellant's application, C. M. P. No. 1899 of 1955 for the admission of additional evidence. I agree with my learned brother that so far as the deposition of Somanchi Bhagavanulu and Chavali Lakshmi-kantayya are concerned, there is no foundation of facts establishing that the evidence was not available at the trial.

The preliminary conditions requisite to invoke S. 33 have not been fulfilled and it follows that the depositions of these two witnesses are inadmissible. But as regards the deposition of Avvari Subbarao who died long before the trial, its admissibility under S. 33 turns on the sole question whether the first proviso to the section has been satisfied. In other words, the only point to be considered is whether Bhavanarayana the plaintiff in the former suit O. S. No. 25 of 1944 for a declaration that the appellant's adoption was not true and valid, was a representative in interest of Lakshminarasamma, the plaintiff in the present suit.

The expression "representative in interest" ordinarily means a "privy" i.e., a person who has derived interest from the person whom he represents.

But in the context of S. 33, where the representation occurs in the earlier proceeding and the representative precedes the person whom he represents the expression has been held by the Judicial Committee to have a wider meaning and to cover cases where the interest of the relevant party in the subject-matter of the earlier proceeding is shared by a person who does not happen to be his privy. In deciding whether there was such a common interest, what has to be considered is the subject-matter of the first proceeding in relation to the question in issue which arises again in the later proceeding. This was explained by the Judicial Committee in their judgment in *Krishnayya Surya Rao v. Rajah of Pittapur*, (C). in the following passage :

Turning back to the first proviso, it requires, in their Lordships' view, that the party to the first proceeding should have represented in interest the party to the second proceeding in relation to the question in issue in the first proceeding to which "the facts which the evidence states" were relevant. It covers not only cases of privity in estate and succession of title, but also cases where both the following conditions exist,- viz., (1) the interest of the relevant party to the second proceeding in the subject-matter of the first proceeding is consistent with and not antagonistic to the interest therein of the relevant party to the first proceeding; and (2) the interest of both in the answer to be given to the particular question in issue in the first proceeding is identical. There may be other cases covered by the first proviso; but if both the above conditions are fulfilled, the relevant party to the first proceeding in fact represented in the first proceeding the relevant party to the second proceeding in regard to his interest in relation to the particular question in issue in the first proceeding, and may grammatically and truthfully be described as a representative in interest of the party to the second proceeding.

On the facts there if Balakrishna had succeeded in the earlier suit, his interest in the later suit would have been just like that of an aurasa son of the later Rajah adverse to that of Krishna-But what had to be considered was not their interest in the later suit but their interest in the earlier suits For this purpose their Lordships examined the reliefs claimed by Ramakrishna in the earlier suit and found that they would have enured to the benefit of Krishna although he was not born at the time of the earlier suit and held, therefore, that Ramakrishna was a representative in interest of Krishna in the earlier suit.

Similarly here, the relief of declaration negating the appellant's adoption, which was the only relief sought in the earlier suit O. S. No. 25 of 1944 could enure to the benefit of the plaintiff Lakshminarasamma. The common question in issue in both the suits is the truth and validity of the appellant's adoption and the relevant subject-matter of O. S. No. 25/44 was the relief in relation to that issue. Whether Bhavanarayana was entitled to that relief might well have not been questioned at all in O. S. No. 25 of 1944. Therefore the fact that

Bhavanarayana claimed relief on the footing that he was himself the adopted son, in which event the plaintiff would not be the heir of her husband is not germane to the point for consideration.

The conflict of interest between Bhavanarayana and the present plaintiff has no relation to the question at issue common to both the suits or the relief sought in the earlier suit. In fact the present plaintiff gave evidence as P.W. 10 in O.S. 25/44 completely, supporting Bhavanarayana and has file the present suit because O.S. No. 25/44 was dismissed. In my view therefore Bhavanarayana was the present plaintiff's representative in interest in O. S. No. 25/44. But I agree with my learned brother's reasons for holding that the deposition of Avvari Subbarao does not advance the appellant's case. He does not appear to have attended the adoption ceremony at all as he falsely says that D.W. 7 officiated and he does not give any details of the ceremony, I agree that the addition of Avvari Subbarao's evidence does not affect the conclusion. In spite of fully taking into consideration Avvari Subbarao's evidence. I find that the appellant's adoption is not proved.