

(1907) 08 BOM CK 0025
In the Bombay High Court
Case No : O.C.J. Suit No. 92 of 1905

R.D. Sethna

APPELLANT

Vs

Mirza Mahomed Shirazi (No. 4)

RESPONDENT

Date of Decision : 19-08-1907

Acts Referred:

Evidence Act, 1872 — Section 11, 32

Citation : (1907) 9 BOMLR 1047

Hon'ble Judges : Beaman, J

Bench : Single Bench

Judgement

Beaman, J.—The question being whether a will was made in or about (say) 1880, or whether it was forged for the first time in (say) 1900, a letter which is formally proved to have been written by a person who died in (say) 1885 containing a mention of the will is tendered. It is objected to as being the statement of a person who is dead or cannot be found etc. and not fulfilling the conditions of Section 32. It is supported on the ground that it is itself a relevant fact u/s 11. While I adhere to the correctness of the opinion I expressed when the point was first argued, that as a general rule Section 11 is controlled by Section 32 where the evidence consists of statements of persons who are dead or who cannot be found, further consideration suggests exceptions. The case law on the subject is so confused that it is difficult to extract from it any consistent principle much less any simple test for ascertaining what are and what are not exceptions. There is a test, a simple and a sufficient test, which reasonably applied yields consistent and intelligible results. Section 32 imposes restrictions upon the admissibility of statements made by persons who cannot be brought before the Court to give their own evidence. The object of those restrictions and the reason for them are plain. The basic principle of legal evidence being that the Court must always have the best, it follows that where persons can be, they must be brought before the Court to tell what they know at first hand. Their veracity can then be best tested by the art of cross-examination. Where however witnesses cannot be brought before the Court, their previous statements are at

best indirect evidence of a kind that a Court would not, except under necessity, receive at all. The conditions which when compelled by necessity to take this evidence or none, are imposed upon its admissibility plainly aim at affording some guarantee of its truth. As there is to be no chance of testing the man by cross-examination his statement will not be admitted unless it has been made under conditions which, looking to the ordinary course of human affairs, raise pretty strong presumptions that it was a true statement. Thus the whole scope and object of Section 32 centre upon securing the highest degree of truth possible in the circumstances for the statement. And it follows that where the person tendering such a statement is indifferent as to its truth or falsehood there is nothing to bring that section into play. Briefly the test whether the statement of a person who is dead or who cannot be found is relevant u/s 11 and admissible under that section, (presuming of course that it is in other respects within the intention of the section) although it would not be admissible u/s 32 is this. It is admissible u/s 11 when it is altogether immaterial whether what the dead man said was true or false, but highly material that he did say it. In these circumstances no amount of cross-examination could alter the fact, if it be a fact that he did say the thing and if nothing more is needed to bring the thing said in u/s 11, then the case is outside Section 32. In such a case as this, for example, suppose that the person who died in 1885 can be proved to have said any time before he died "A was mad when he made his will" that is material to show that there was a will of some sort before 1900. And it makes not the slightest difference whether the statement that A was mad when he made it is true or false. The evidence would have the same and no more or less value u/s 11 if the person had said "A was not mad when he made his will." Where the fact that is relevant u/s 11 is not what a deceased person chose to predicate about a thing, but that he mentioned it at all, whether what he predicated of it were true or false, then and then only it is a case outside Section 32.