

Prabodh Jamnadas Kothari Vs. Vikram Jamnadas Kothari and Others

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Court : Mumbai

Decided On : Oct-14-2015

Judge : S.C. Gupte

Appeal No. : Suit No. 694 of 2012

Appellant : Prabodh Jamnadas Kothari

Respondent : Vikram Jamnadas Kothari and Others

Judgement :

P.C. :

1. Learned Counsel for the Plaintiff tenders the Plaintiff as his first witness along with a compilation of documents. The Plaintiff™s affidavit dated 18th December 2012 is taken on record as his examination “ in “ chief after the Plaintiff admits the same as a statement on oath duly signed by him and affirms its contents. The Plaintiff has duly filed his affidavit of documents, notices to admit documents and facts, respectively, under Order XII Rule 3 and 5 of the Code of Civil Procedure, notice to produce documents under Order XII Rule 8 and application for leading of secondary evidence. The same are already taken on record.

2. After hearing learned Counsel for the parties, the Plaintiff™s documents are admitted in evidence as mentioned below.

3. The documents at Sr. No. 1 of the compilation, which is a photocopy of the will dated 5 August, 1987 made by the deceased Jamnadas Khimji Kothari, is admitted in evidence and marked by consent of the parties as Exhibit ~P “ 1TM.

4. The documents at Sr. Nos. 2, 3, 4 and 5 are, respectively, the original letter dated 26 June 2003 addressed by Jamnadas Khimji Kothari to the Plaintiff, typed copy of that letter, a photocopy of the draft proposed will of Jamnadas Khimji Kothari which was an enclosure to the said letter of 26 June 2003 and the original envelope containing the original letter and its enclosure sent by Jamnadas Khimji Kothari to the Plaintiff. These documents are deposed to by the Plaintiff in para 10 of his affidavit in lieu of examination “ in “ chief. The Plaintiff has affirmed the receipt of the documents, namely, the original letter along with its enclosure and the envelope, and also the handwriting and signature of his father, Jamnadas. The documents are, thus, formally proved. Learned Counsel for the Defendants, however, object to admission of these documents in evidence, on the ground that these documents, which contain statements of the deceased Jamnadas, are not covered by Section 32 of the Evidence Act and therefore, not relevant. Learned Counsel for the Plaintiff submits that cases under Section 32 are not exhaustive and documents, which are otherwise relevant under the other provisions of the Evidence Act, can always be admitted as relevant statements. He relies on several judgments of our Court in support of his contentions.

5. Section 32 of the Evidence Act, in effect, contains exceptions to what is loosely referred to as the hearsay rule. It is a general principle of the law of evidence that Court must always have the best evidence. The hearsay rule follows from this principle. Wherever possible, evidence must be given by witnesses by telling the Court what they know at first hand, for then the veracity of what they say can be tested by cross “ examination. The central idea here is ensuring the veracity of the statement. Courts do not allow a second hand account of a fact or event through the statement of someone who cannot be produced before the Court for evidence. But what if witnesses cannot be brought before the Court to give such direct evidence and yet no better evidence can be had except their statements made earlier; can these statements then not be relied upon if conditions exist which otherwise ensure the veracity of the statements. That is precisely what Section 32

addresses itself to. It provides for the conditions which are supposed to ensure the veracity of second hand statements. A statement made by a person as to the cause of his death or a statement which is against the pecuniary or proprietary interest of the maker are some of these exceptions. These statements are admissible in evidence even if the maker of them cannot himself be produced for evidence and therefore, be subjected to cross “ examination. Because they are made in conditions which afford some guarantee of their truth, these statements are admissible on a principle that in the absence of better evidence, they may be accepted on the ground of necessity. That is often referred to as the necessity principle, an exception to the hearsay rule.

6. This was succinctly explained more than a century back by our Court in the case of **R. D. Sethna Vs. Mirza Mahomed Shirazi** (Vol.IX Bombay Law Reporter 1047). This is what Beaman J had to say in that case:

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.?

7. Now, the question is, are these eight exceptions (which are to be found in the different clauses of Section 32) the only exceptions to the hearsay rule. Are there no other exceptions to the admissibility of statements of dead persons or persons who cannot found or brought before the Court for evidence. Faucet J in a case

decided by this Court, **Emperor Vs. Manchankhan (Vol.XXXIV The Bombay Law Reporter 1087)**, answered this question in the negative. In that case, the learned Judge was concerned with admissibility of a letter which was written by a deceased person petitioning the Commissioner of Police for police protection against apprehended acts of, and on behalf of, the accused. The letter inter alia contained statements which accompanied and explained the conduct of the deceased. These statements were clearly admissible under Section 8 of the Evidence Act. They showed the conduct of a person (namely, the deceased) offence against whom was the subject of the proceeding; such conduct was influenced by a fact in issue (viz. the accused™s intention to cause the deceased™s death) and also a relevant fact (viz. the accused™s ill-will towards the deceased constituting a motive for the former committing the crime). But obviously they did not fall in any of the causes of Section 32. Yet the learned Judge held them to be admissible, holding that Section 32 was not exhaustive of exceptions to the hearsay rule. The learned Judge observed as follows:

Mr. Wadia's contention is really based on the fallacy that the Indian law is practically the same as the English law regarding the admissibility of "hearsay evidence", and that s. 32 constitutes the only case in which statements by a deceased person can be put in evidence. The Indian Evidence Act follows a different method, as is pointed out by Mahmood J. in *Queen-Empress v. Abdullah* (1885) I.L.R. 7 All 385, 408, F. B.; and ss. 13 and 18 to 21 may be cited as other cases where statements by deceased persons are admissible, apart from s. 32. These dicta were followed by a Division Bench of our Court in **Allijan Munshi Vs. State** (AIR 1960 BOMBAY 290 (V 47 C 83)(1).

8. Section 32 is, thus, clearly not exhaustive. There are other circumstances and cases where statements by deceased persons and those that cannot be found or produced before the Court are admissible. There is one important circumstance that we must note in the context of the facts of our case, where such statements are admissible, namely, where we are concerned not with the truth or falsehood of what the deceased or such other person said, but the very fact that he said it. The reason for this is not far to seek. Since the very object of Section 32 is to secure highest degree of truth possible in the circumstances for the statement, the

Section is not brought into play when the statement is tendered in evidence not in support of its truth but in support of the fact of making of the statement. If such statement is relevant and admissible under any other provision of the Evidence Act, the case is outside Section 32. This, again, is very succinctly explained by Beaman J in **R. D. Sethna™s** case, in the context of a statement otherwise relevant under Section 11 of the Evidence Act. This is what the learned Judge said:

Thus the whole scope and object of s. 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 under 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 under s. 32 is this. It is admissible under 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 under s. 11, then the case is outside s. 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 under s. 11 if the person had said "A was not mad when he made his will." Where the fact that is relevant under 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.?

9. In our case, the Plaintiff intends to use the deceased™s statement to support his case that the subject property did belong to the deceased and also to show that having regard to the deceased's statement made to him (in the letter addressed to him), he was actually under the impression at least when he

received the letter that the property did belong to the deceased. (For the present, i.e. on the issue of limitation, it is the latter purpose which is more relevant.) Now, for the former purpose, we are really concerned with the truth or falsehood of the statement, though for the latter, we are simply concerned with the fact of the statement having being made and not its truth or falsehood. Since the case is not covered by Section 32, the Plaintiff cannot rely on the statement (i.e. the statement is not admissible) for proving its truth, namely, whether or not the property belonged to the deceased, but it is certainly admissible to show that such statement was actually made to the Plaintiff and therefore, he was under the impression, when the statement was made, that the property continued to belong to the deceased. The statement, in the latter case, is relevant under Sections 8, 9, 11 and 14 of the Evidence Act and is admissible as such.

10. The documents at Sr. Nos. 2, 3, 4 and 5 are, accordingly, admitted in evidence, marked as P “ 2 to P “ 5 respectively, in proof of the fact that such letter along with its enclosure was actually addressed by the deceased to the Plaintiff and not in proof of the truth of what is stated therein. The proof of the truth of the statement must come aliunde.

11. The document at Sr. No. 6, which is the last will and testament of the deceased Jamnadas, is marked by consent as P “ 6.

12. The documents at Sr. Nos. 7, 8, 9 and 10, which are photocopy of the letter dated 7.6.2004 addressed by the deceased Jamnadas to Defendant No. 3, typed copy of the same letter, and photocopy of letter dated 21.6.2004 from the deceased to Defendant No. 3 and its typed copy, respectively, are formally proved by the Plaintiff and are accordingly, marked in evidence as Exhibit P “ 7 to P “ 10, respectively, subject to the same considerations as are noted in connection with documents marked as P “ 2 to P “ 5 above. The documents are admitted in proof of their receipt by the Plaintiff and not in proof of what they state.

13. Documents at Sr. Nos. 11 to 71 are marked by consent as P “ 11 to P “ 71, respectively.

14. It is made clear that consent recorded above for marking of documents is as against the Plaintiff and Defendant Nos. 1 to 4 and not against Defendant Nos. 5 to 10 except as regards documents at Sr. Nos. 56 to 71. Documents at Sr. Nos. 56 to 71 are marked by consent of all parties. (Documents at Sr. Nos. 1 to 55 are only between, and concern, the Plaintiff and Defendant Nos. 1 to 4.)

15. Mr.Salil Shah, Advocate, is appointed as Court Commissioner to record evidence in the suit. The parties to write to the Commissioner and fix a schedule for recording of the Plaintiff's cross-examination. The Commissioner to complete the recording of the Plaintiff's evidence and file his report latest by 30 January 2016.

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