MANIAPILLAI AND OTHERS v. SIVASAMY

COURT OF APPEAL
SOZA, J. & RODRIGO, J.
C.A. (S.C.) 391/70 F.D.C.. JAFFNA 2982 (L)
JULY 16, 1980

Vindicatory Action – Evidence Ordinance, sections 32 (5), 32 (6) and 50.

The plaintiff claimed the land in dispute on the footing that he was the sole successor in title of one V, who's daughter P, died issueless. It was not in dispute that V was married to one Annamuttu and P was their issue. The first and third defendants claimed the land also from V, who they said had a son K, by an earlier marriage of V to one Analetchumi and they alleged that on the death of P issueless, they became entitled to the land as heirs of K. V's marriage to Analetchumi was in dispute and no certificate of marriage was produced. The defendants relied on Deed D3 of 1907 whereby V and his father S donated a land to K who was described as a son of V and a grandson of S; and on the certificate of marriage of K D4 in which his father's name was given as V. As against these documents the certificate of marriage of V to Annamuttu P4 wherein V had declared his civil condition as bachelor representing thereby he was not married earlier was produced. It was argued for the defendants that by virtue of the provisions of sections 32(5), 32(6) and 50 of the Evidence Ordinance declarations in D3 and D4 raised a presumption that K was a legitimate child of V.

Held:

P4 is a more solemn document than D3 where the declarant was bound by statute to declare the truth. Sections 32(5), 32(6) and 50 of the Evidence Ordinance refer to relevance and admissibility and not to presumptions. But such evidence can always be countered by other evidence, as in this case, by evidence more convincing and cogent.

Cases referred to:

(1) *Wijesekera* v. *Weliwitigoda* (1958) 62 NLR 158.
(2) *Fonseka* v. *Perera* (1957) 59 NLR 364.
(3) *Cooray* v. *Wijesuriya* (1958) 62 NLR 158.
(4) *Slaney* v. *Wade* (1836) 7 Sim. 595.
(5) *Smith* v. *Tebiff* (1887) P & D (LR) Vol. 1 P364.
(6) *Chandreswar Prasad Narain Singh* v. *Bisheshwar Pratab Narain Singh* AIR 1927 Patna 61.
(7) *Kidar Math* v. *Mathu Lal* (1913) 1 LR 40 Cal 555.
(8) *Silva* v. *Silva* (1942) 43 NLR 572.
(9) *Allis* v. *Nandawathie* (1971) 75 NLR 191.

APPEAL from the order of the District Court of Jaffna.

D. R. P. Goonetilleke with *Keerthi Sri Tillekeratne and C. Catheramanpulle* for the 1st, 2nd and 3rd defendant-appellants.

C. Renganathan, Q.C. with *K. Kathiravelupillai* for the plaintiff-respondent.

Cur adv vult.

7th August, 1980.
SOZA, J.

This is a vindicatory suit instituted by the plaintiff-respondent against the three defendant-appellants claiming title to the allotment of land called Kanraithoddam and Elaiyanvadali described in the schedule B to the plaint. The plaintiff claims this land on the footing that he is the sole successor in title of one Sinnapodi Velupillai whose only daughter and heir Paripooranam died issueless. The 1st and 3rd defendants claim this land also from Sinnapodi Velupillai who they say had a son Kailasapillai by an earlier marriage. Kailasapillai succeeded to the whole land on the death of his step-sister Paripooranam, and on his death the land passed to his children and heirs the 1st and 3rd defendants. The 2nd defendant is the husband of the 3rd defendant. It must be added that during the pendency of this appeal the 1st defendant-appellant died and substitution has been duly made.

The resolution of the dispute that arises in this appeal depends on the answer to the question whether Sinnapodi Velupillai married one Annaletchumi and had a child Kailasapillai by her. There is no dispute that Velupillai married Annamuttu in 1900 and had a child Paripooranam by her. The legitimacy of Paripooranam is not in dispute. If Kailasapillai was not born of lawful wedlock then Paripooranam becomes the sole heir of Velupillai and the defendant's claim would become untenable. Neither the birth certificate of Kailasapillai nor the marriage certificate of Sinnapodi Velupillai and Annaletchumi has been produced. No serious attempt has been made to prove a marriage by habit and repute between Velupillai and Annaletchumi and, indeed, the evidence is too tenuous to warrant such a conclusion. The Court is however invited to presume a valid marriage on the strength of deed No. 3873 (marked D3) of 20th May 1907 whereby Sinnapodi Velupillai and his father Vyravi Sinnapodi donated a land to Kailasapillai who is described as the son of Velupillai and grandson of Sinnapodi. There is also the certificate of marriage (D4) of Kailasapillai where his father's name is given as Sinnapodiyar Velupillai. As against this there is the document P4 which is the certificate of marriage of Sinnapodi Velupillai when he married Annamuttu. There Velupillai declares his civil condition as bachelor, in other words representing that he was not married earlier. This marriage certificate is dated 5.8.1900. According to the marriage certificate of Kailasapillai he was 36 years old at the time he married in 1925. Therefore he would have been born in 1889; so that at the time that Velupillai married Annamuttu, Kailasapillai was a boy

of about 11 years of age. Hence the marriage of Kailasapillai's mother to Velupillai, if there was such a marriage, should have taken place before 1900. But, as I said before, the certificate of such a marriage is not before Court. The death certificate of Annaletchumi or, if she was not dead by 1900, a decree of divorce would also have been relevant material but neither has been produced.

Learned Counsel for the appellant relied strongly on the description of Kailasapillai as his son by Velupillai himself in the deed D3. In fact Velupillai's father who joined in this deed has described Kailasapillai as his grandson. The deed D3 was a donation and was accepted by S. Arumugam, plaintiff's own father. On the same date the Deed P1 had been executed by Velupillai and his father in favour of Paripooranam. This too was a donation and accepted by the plaintiff's father.

The argument advanced by learned counsel for the appellant is that by virtue of the provisions of sections 32(5) and (6) and section 50 of the Evidence Ordinance the declarations in the deed D3 and the marriage certificate D4 raise a presumption that Kailasapillai is a son, that is, a legitimate son of Velupillai. Under section 32(5) for a statement of a dead person regarding relationship by blood, marriage or adoption to be admissible two conditions must be fulfilled:

> Firstly such person should have had special means of knowledge of such relationship.
>
> Secondly such statement should have been made before the question in dispute was raised.

These safeguards are insisted on as guarantees of truth of evidence which is really hearsay, before it becomes admissible. But for this provision, matters of family history, especially of the dim past would become incapable of proof and result in injustice. Thus a husband would have special means of knowledge of his marriage and if his statement on this question was made before the dispute arose it would be admissible – *Wijesekera v. Weliwitigoda*[1]. It is important that the statement should have been made *ante litem motam*. This is because its truth cannot be tested by cross-examination. A statement made after the dispute arose in the hope of securing some advantage to the maker would be devoid of any weight and inadmissible – (*Fonseka v. Perera*[2]).

Under the provisions of section 32(6) of the Evidence Ordinance when a statement of the deceased person relates to the existence of any relationship by blood, marriage or adoption between deceased persons it will be admissible provided–

1. it is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait or other thing on which such statements are usually made, and

2. it was made before the question in dispute was raised.

Section 50 of the Evidence Ordinance makes relevant the opinion expressed by conduct, as to the existence of relationship of any person who as a member of the family or otherwise has special means of knowledge of such relationship.

It is under these provisions, to wit, section 32(5) and (6) and section 50 of the Evidence Ordinance that it is possible to admit evidence, otherwise hearsay, of deceased persons figuring in a genealogical tree such as one often comes across in a partition case. – see *Cooray v. Wijesuriya*[3]. It should be observed that these provisions deal not with presumptions but only with relevance. There is no doubt that the declarations regarding relationship found in D3 and D4 are relevant and admissible. But these declarations must be assessed and evaluated in the context of the other evidence in the case.

Learned Counsel for the appellant contended that the declarations in the documents D3 and D4 raise a presumption of legitimacy and sought to support himself with references to several cases.

The first of these was the case of *Slaney v. Wade*[4]. Here the Court held that an inscription giving an account of a family on the wall of a channel in a church in which some members of the family who had resided and held property in the parish, were buried was good evidence of the pedigree. Apart from the mural inscription the Court also held that on the question of legitimacy a recital in a deed that two parties were married was evidence from which legitimacy could be inferred though the strength of the evidence was weakened by the fact that at the baptism the name of the mother had been omitted. It must be observed that the Court was here considering uncontroverted evidence.

In the case of *Smith v. Tebiff*[5] the Court held that the statement of a deceased relative of the family is evidence of the pedigree provided it had been made *ante litem motam.* An essential prerequisite however was that it should be proved by some independent source of evidence. Further the person making the statement should have been related to the family about which he spoke. When the statement made in a deed was that another person was the maker's sister it means that person's legitimate sister. Sir J. P. Wilde who decided this case said as follows at p. 358:

> "When people speak of a man or woman as their brother or sister, son or daughter, **unless they say something to the contrary,** I think the meaning is legitimate son or daughter, brother or sister". (emphasis mine)

What the Judge says here is that when a person calls another his son, he should ordinarily be understood to mean his legitimate son unless he says something to the contrary. In the case of *Chandreswar Prasad Narain Singh v. Bisheshwar Pratab Narain Singh*[6] Das J. considered the effect of a statement by a deceased person (in an application for letters of administration with will annexed) that certain named persons were his near relations. It was not open to doubt that the applicant for letters had special means of knowledge as to the relationship and that the statement was admissible under section 32(5) of the Indian Evidence Act (identical with section 32(5) of our Evidence Ordinance). The Court however had before it as a separate question the weight that could be attached to such a statement (see pp 71 and 72). The Judge also ruled as admissible a statement in the will that a named person was the adopted son of the testator (see p 78). In *Kidar Math v. Mathu Lal*[7] the Judicial Committee of the Privy Council held that a will made by a lady to whom succession was being sought, naming certain persons as relatives on her husband's side was conclusive on the question of relationship in the light of the circumstances in the case. The deceased lady had said she had no issue or near relative. She had named Mathu Lal the respondent as related to her "as a daughter's son" and one Khairati Lal as her husband's younger brother. Their Lordships adopted a significant test. The lady had declared in the most solemn form facts which would have been within the scope of her own knowledge. If the lady, being alive, had testified in a Court of Law in the same sense so the will declared there could have been no answer. In the case of *Silva v. Silva*[8], Soertsz, J. held that statements occurring in Birth Registers kept by a public officer in compliance with a statutory requirement afford

prima facie proof of the fact of birth, the date of birth, place of birth and identity of the person registering the birth. Again, inasmuch as the declaration of parentage in that case was made by the father who had special means of knowledge it had a genealogical value under section 32(5) of the Evidence Ordinance. But of course in regard to these matters the evidence is open to challenge and rebuttal. This case was referred to with approval by Wijayatilake J. in the case of *Allis v. Nandawathie*[9].

The declaration in deed D3 would if there was no contrary declaration by its maker be sufficient to sustain a finding that Kailasapillai is the legitimate son of Velupillai. But in the instant case we have a contrary declaration by Velupillai himself when he married Annamuttu – see P4.

The principle is that the Court should as far as possible interpret the documents in a manner that will give effect to their manifest contents. The marriage certificate P4 describes Velupillai as a bachelor and the deed D3 describes Kailasapillai as Velupillai's son. Ordinarily the description in D3 would entitle the Court to hold that Kailasapillai was the legitimate son of Velupillai. But to do so in the instant case would contradict the express declaration evidenced by P4, which Velupillai made when he married Annamuttu. While Velupillai was under no compulsion to declare the truth when he executed the deed D3 he was bound to make true declaration at the time he married Annamuttu in 1900. The document P4 is a more solemn document where the declarant is bound by statute to declare the truth than the deed D3. Further one can reconcile the contents of the two documents by interpreting the statement that Kailasapillai was a son of Velupillai as meaning that he was a natural son and not a son born of lawful wedlock.

Sections 32(5) and (6) and section 50 of the Evidence Ordinance refer to relevance and admissibility and not to presumptions. No doubt the Courts would lean towards holding a person legitimate than otherwise. All that the provisions of sections 32(5) and (6) and section 50 of the Evidence Ordinance stipulate is that declarations such as are made in D3 and D4 are relevant as evidence. But such evidence can always be countered by other evidence, as in this case, by evidence more convincing and cogent.

The learned District Judge therefore rightly held that Kailasapillai was not born of lawful wedlock. Accordingly he is not entitled to any claim to succession as on intestacy to the interests of Velupillai. In

the result Paripooranam must be declared the sole heir of Velupillai and the land described in the deed P1 devolves solely on her.

It should also be added that on the very day that the deed P1 was executed there was also executed the deed D3 whereby Velupillai donated to Kailasapillai a portion of the family estate. What the defendants who are the heirs of Kailasapillai are now trying to do is to deprive Paripooranam's heirs of their legitimate interests while holding on to the interests which Kailasapillai received. The claim of the defendants is therefore neither just nor legal. In the result the plaintiffs must be declared entitled to the land in suit. We see no ground to interfere with the findings of the learned District Judge. His judgment is affirmed and this appeal is dismissed with costs.

RODRIGO, J. – I agree.

Appeal dismissed.