1956 *Present :* **Weerasooriya, J., and Sansoni, J.**

SABARATNAM *et al.*, Appellants, *and* KANDAVANAM, Respondent

S. C. 124—D. C. (Inty.) Point Pedro, 4431

Deed thirty years old—Allegation of forgery—Proof of due execution—Certified copy—Evidential value thereof—Evidence Ordinance (Cap. 11), ss. 63, 65, 90—Proof of Public Documents Ordinance (Cap. 12), s. 2.

The presumption in section 90 of the Evidence Ordinance as to the due execution of a document thirty years old does not apply to a certified copy of such document.

In proof of due execution of a deed thirty years old, the only evidence adduced by the plaintiff to disprove forgery was a certified copy of the duplicate which had been transmitted by the attesting notary to the Registrar of Lands in terms of section 30 (25) (*a*) of the Notaries Ordinance—

Held, that the certified copy was not proof of the due execution of the deed, even though it was admitted in evidence at the trial without any objection by the defendants. Although, by section 2 of the Proof of Public Documents Ordinance, the production of a certified copy is evidence of the contents of the original document, it does not amount to proof of the due execution of the original document.

APPEAL from a judgment of the District Court, Point Pedro.

C. Thiagalingam, Q.C., with *A. Nagendra*, for the defendants appellants.

S. J. V. Chelvanayakam, Q.C., with *K. Rajaratnam*, for the plaintiff respondent.

Cur. adv. vult.

April 25, 1956. WEERASOORIYA, J.—

The plaintiff-respondent filed this action for the partition of a land called Malaisanthai depicted in Plan No. 1292 and filed of record marked X. It is common ground that one Kanagasingha Mudaliyar was at one time the owner of the land and he died leaving two sons, Subramaniam and Thiagar. The contest that arose at the trial between the plaintiff and the 1st and 2nd defendants-appellants (who are husband and wife) is as regards the devolution of the land from Kanagasingha Mudaliyar. The case for the plaintiff is that both his children inherited it in equal shares and that the interests of their respective successors in title have to be determined accordingly. The 1st and 2nd defendants contend, on the other hand, that the entirety of the land was possessed by Subramaniam, to the exclusion of Thiagar, and devolved on his grand-daughter Meenachipillai (who married Sanderasegerampillai, a grand-son of Thiagar) and after her death on her son, Sathasivampillai, who by 2D1 of 1920 gifted it as dowry to his daughter the 2nd defendant on the occasion of her marriage to the 1st defendant.

On the basis of the case for the plaintiff as set out above he claimed undivided 7/32 (or 42/192) shares of the land on a series of deeds starting with Deed No. 11385 dated the 20th October, 1911, attested by R. Arumugam, Notary Public, which purports to be a transfer in favour of one Kandiah by certain persons in the line of succession to Thiagar dealing with their undivided interests in the land. It is to be noted that one of the alleged transferors is no other than Sathasivampillai, the father of the 2nd defendant, whose title is recited as by right of *mudusom* from Meenachipillai also described as the wife of Manusegera Mudaliyar. This Meenachipillai is the mother of Kanagasingha Mudaliyar and is not Sathasivampillai's mother Meenachipillai who is herself a transferor on the deed in respect of her life interest in the undivided 6/32 shares purported to have been transferred by Sathasivampillai. If this document is in fact the deed of Sathasivampillai and the other transferors, it is a circumstance which strongly supports plaintiff's case that Thiagar also, as one of the two children of Kanagasingha Mudaliyar, became entitled to an undivided half-share of the land, inasmuch as the 2nd defendant's own predecessors in title have acted on that footing.

To complete the statement of plaintiff's chain of title, Kandiah the transferee on Deed No. 11385 sold his interests to one Kanagasingham by P2 of the 14th June, 1950, who three days later transferred the same to the plaintiff on P3. The present action was filed on the 9th February, 1953.

In the answer filed by the 1st and 2nd defendants Deed No. 11385 was repudiated as being a forgery, and one of the points of contest on which the case went to trial was whether it was the act and deed of Sathasivampillai. In proof of the due execution of this deed the only evidence adduced was the certified copy P1 of the duplicate which had been transmitted by the attesting notary to the Registrar of Lands in terms of Section 30 (25) (*a*) of the Notaries Ordinance (Cap. 91). Apparently those responsible for the presentation of the plaintiff's case at the trial considered that on the production of the certified copy the plaintiff would be able to rely on the presumption contained in Section 90 of the Evidence Ordinance relating to documents purporting to be thirty years old. P1, it may be stated, was admitted in evidence without any objection by the defendants, but in the cross-examination of the plaintiff, who produced it, a point was made that it was only a copy.

At the hearing of the appeal Mr. Thiagalingam on behalf of the 1st and 2nd defendants took up the position that no proof had been adduced of the due execution of the deed of which P1 is a certified copy and that the plaintiff's case must, therefore, necessarily fail *ab initio* and his action dismissed. Mr. Thiagalingam's argument was that the presumption in Section 90 of the Evidence Ordinance does not apply to a certified copy of a document purporting to be thirty years old and he relied on a decision of the Judicial Committee of the Privy Council to that effect in

Basant Singh v. Brij Raj Saran [1]. That decision was followed by this Court in the unreported case of *Kathiripillai et al. v. Government Agent, Northern Province, et al.*[2]. Mr. Chelvanayakam on behalf of the plaintiff had two submissions to make in regard to the argument of Mr. Thiagalingam. His first submission was that the fact that P1 had been received in evidence without objection by the 1st and 2nd defendants amounts to an admission by them that Deed No. 11385 had been duly executed. I am unable to agree with this submission, for it seems to me that if the failure to object to the reception in evidence of P1 constituted an admission by the 1st and 2nd defendants, the admission did not go beyond conceding that the original duplicate of Deed No. 11385, being in the custody of the Registrar of Lands, was a document of which a certified copy is permitted by law to be given in evidence on the basis that condition (6) of the conditions prescribed under Section 65 of the Evidence Ordinance for the admission of secondary evidence of the contents of an original document had been satisfied in this case. Mr. Chelvanayakam's next submission was that since Section 2 of the Proof of Public Documents Ordinance (Cap. 12) requires that, in a case to which that section applies, only a certified copy shall be produced in evidence in place of the original, the presumption in Section 90 of the Evidence Ordinance must be held to apply to the original document (if it purports to be thirty years old) on the production of the certified copy. I think that there is a fallacy in this submission too since Section 90 of the Evidence Ordinance in its terms applies only to a document which purports or is proved to be thirty years old, and not to a copy of it. In my opinion all that Section 2 of the Proof of Public Documents Ordinance means is that the production of the copy shall be evidence of the contents of the original document. But proof of the contents of a document does not amount to proof of its execution, and notwithstanding the production of P1, the burden still lay on the plaintiff to prove the due execution of the original document in terms of the relevant provisions of the Evidence Ordinance. If the plaintiff wished to discharge that burden by recourse to the presumption created in Section 90 of the Evidence Ordinance, and for that purpose it became necessary to produce the original document in Court, it was open to him to have made an application to Court in that behalf in terms of the proviso to Section 2 of the Proof of Public Documents Ordinance. In *Basant Singh v. Brij Raj Saran* (supra) a submission somewhat similar to that put forward by Mr. Chelvanayakam seems to have been rejected, for in that case too it was urged that since the copy in question had been admitted as secondary evidence of the original document under Section 65 of the Indian Evidence Act, the Court was entitled to presume the genuineness of the original document (which purported to be thirty years old) by virtue of Section 90 of that Act (these sections being identical with Sections 65 and 90 respectively of our Evidence Ordinance). In my opinion the position is in no way different in that in the present case the copy produced is a certified copy under Section 2 of the Proof of Public Documents Ordinance corresponding to which there is, as far as

[1] *(1935) A. I. R. (P. C.) 132.*
[2] *S. C. Nos. 57-58 (Inty)/D. C. Jaffna 7105 (Minutes of 21.9.54).*

I am aware, no legal provision in India. Even under Section 2 of that Ordinance the certified copy that is produced would only be secondary evidence (as defined in Section 63 of the Evidence Ordinance) of the contents of the original document.

I am constrained therefore to hold that the plaintiff has failed to prove that Deed No. 11385 was duly executed. This necessarily involves a finding that the plaintiff has not proved his title to the land sought to be partitioned, and the further question that arises is whether his action should be dismissed.

Mr. Chelvanayakam submitted that this is an appropriate case in which this Court will, in the exercise of its discretionary power and in the interests of justice, afford the plaintiff an opportunity, even on terms, of producing the original of P1 and for this purpose he requested that the case be remitted to the lower Court for further trial. He relied on the case of *Kathiripillai et al. v. Government Agent, Northern Province, et al.* (supra) where the same course was adopted by this Court. But that was adopted on the ground that no dispute had been raised in the pleadings of the opposing party, nor was there any issue or point of contest, regarding the due execution of the deed in question. Mr. Thiagalingam relied on the case of *Arulampikai v. Thambu*[1] as a precedent to be followed in refusing the application of Mr. Chelvanayakam. In that case the point raised for the first time in appeal was upheld that a person who writes out a will for a testator is incapacitated from taking any benefit under it unless the testator has added a clause in his own handwriting acknowledging its correctness or in some other manner has clearly confirmed the disposition, and the Court refused to accede to an application made on behalf of the beneficiary, who was the respondent to the appeal, that he be given an opportunity of adducing further evidence on the point. The reason for the refusal was that had such evidence been available it would undoubtedly have been put forward at the trial seeing that the will had been impugned on the ground that it was procured by undue influence and in cross-examination of the respondent attention was repeatedly called to the fact that he had himself written out the will, and that to send the case back for such evidence " might only serve to expose the parties to stronger temptation than they appear to be able to resist ". The position in the present case is, however, different in that what is sought to be done is the formal production of the duplicate which is in the custody of a public officer so as to enable the Court, if it chooses to do so, to apply the presumption in Section 90 of the Evidence Ordinance as regards its due execution.

Apart from the failure of the plaintiff to prove his title on the deeds to the land which is the subject matter of the present action, it was submitted by Mr. Thiagalingam that there was another ground for allowing this appeal. One of the points of contest at the trial was whether the 2nd defendant has acquired " a prescriptive right and title to the entirety of the land sought to be partitioned ". The 2nd defendant's

[1] *(1944) 45 N. L. R. 457*

case is that ever since the execution of the dowry deed 2D1 of 1920 in her favour she has been in possession of it as sole owner and adversely to the plaintiff and his predecessors in title and she claims the benefit of such possession. As already stated, the 2nd defendant's father Sathasivampillai executed 2D1 on the footing that he was the sole owner of the land by right of *mudusom* from his mother Meenachipillai. The learned trial Judge has held on the evidence that the land was in the possession of Sathasivampillai until his death, that after his death the 2nd defendant was in possession and that the continued and undisturbed possession of the land by Sathasivampillai and the 2nd defendant for over thirty years has been established. But he also held that in view of Deed No. 11385 of 1911 (in regard to the due execution of which he applied the presumption contained in Section 90 of the Evidence Ordinance) in which Sathasivampillai and his mother Meenachipillai, as two of the transferors, recognised the rights of Thiagar and his descendants to interests in this land, the possession of Sathasivampillai prior to and even subsequent to the execution of 2D1 of 1920 and upto the time of his death (which, on the evidence of the 1st defendant, took place in or about 1944) was that of a co-owner. When this action was filed in 1953 less than ten years had elapsed since Sathasivampillai's death. The learned trial Judge accordingly found in favour of the plaintiff on the point of contest whether the 2nd defendant had acquired a prescriptive right and title to the entirety of the land. This finding was challenged by Mr. Thiagalingam in appeal. Even in regard to the correctness of this finding much turns on the question whether Deed No. 11385 was duly executed or not.

In all the circumstances it is, in my opinion, desirable that the proceedings should be remitted to the Court below to enable the plaintiff to produce the duplicate of Deed No. 11385 which is in the custody of the Registrar of Lands. The right is also reserved to the 2nd defendant to adduce such further evidence as is available to her on the question of the due execution of that deed, and the trial Judge will, after recording such evidence, return the proceedings to this Court with his finding on that question. We have been given to understand that the Judge who delivered the judgment appealed from is still functioning at Point Pedro. We consider it desirable that the further proceedings be taken before him and that priority be given to these proceedings over other cases on the roll so that the record may be returned to this Court as early as possible for a final adjudication of the appeal. On receipt of the record the appeal will be re-listed for further hearing before the same Bench.

The question of costs is reserved for determination at the further hearing of the appeal.

SANSONI, J.—I agree.

Sent back for further evidence.