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*Present:* Lascelles C.J. and Middleton J.

## IBRAHIM NEINA *v.* KOSUMMA *et al.*

*122—D. C. Batticaloa, 577.*

*Last will—Execution—Witnesses standing outside the room when deceased signed will, but able to see—Presence—Ordinance No. 7 of 1840, s. 3—Appeal—Security bond not stamped fully before the time allowed—Appeal does not abate—Civil Procedure Code, s. 756.*

The witnesses to a will were not actually in the same room as the deceased and the notary when the former signed the will, but were in a verandah opening into the room, and saw and were conscious of what was taking place in the room.

*Held*, they were in the "presence" of the testator within the meaning of section 3 of Ordinance No. 7 of 1840.

MIDDLETON J.—The wording of section 3 does not seem necessarily to imply that the attestation of the notary must be made in the presence of the witnesses. They all must be present at the execution by the testator and witness the signature, and must duly attest such execution thereafter, as I read the clause.

This appeal was held not to have abated, though the appellants' security bond was not fully stamped within the time allowed.

LASCELLES C.J.—The bond was tendered and was accepted by the respondent's proctor within the appealable time, and there can be no doubt that, even if the District Judge had not allowed the deficiency to be supplied, the bond, at the expiration of the appealable time, was a valid security, which could have been enforced on payment of the deficiency and penalty under section 36 of the Stamp Ordinance of 1909.

MIDDLETON J.—I think that this security bond is not an instrument required by law to be stamped in every testamentary suit, as it is not included in Part III. of Schedule B of the Stamp Ordinance, No. 22 of 1909, and would not therefore come under the terms of section 87 of the Ordinance.

THE facts are set out in the judgment of Middleton J.

*van Langenberg* (with him *Tissaveerasinghe*) for petitioner, respondent.—The security bond furnished by the appellant for the appeal was not sufficiently stamped within the time limited for perfecting the bond. It has been held in *Kandappa v. Elliott* [1] that it was not sufficient for a party wishing to appeal from a judgment of a District Judge to tender security within twenty days, but that he must perfect the security by entering into the bond within the time limited. As the bond was not properly stamped it is invalid, and therefore the appeal has not been duly perfected. A Court has no

[1] *(1892) 2 C. L. R. 17.*

power to extend the time within which the appellant is required to tender security. *Sulama Levai v. Iburai Naina.* [1] The fact that full stamp duty was paid after the twenty days does not help the appellant. Counsel also cited *Gunatilleke v. Punchy Hamy,* [2] *Henderson v. Daniel.* [3]

*Bawa*, for the respondent and intervenient, appellants.—The provisions of the Civil Procedure Code as to security in appeal are intended for the benefit of respondent parties, who may waive such benefit at their option. *Jayasekera v. Jansz.* [4] The respondent did not object to the bond when he was noticed. The cases cited by the respondent's counsel are not on all fours with the present. The question of stamp duty did not arise in those cases. Counsel cited Stamp Ordinance, sections 87 and 36.

[Their Lordships over-ruled the objection.]

Counsel argued on the facts.

***van Langenberg***, for the respondent.—The will was not duly executed. The witnesses were not present in the same room when the will was signed by the deceased. The notary did not sign the will in the presence of the witnesses. The requirements of section 3 of Ordinance No. 7 of 1840 have not been complied with.

The burden of proving the genuineness of the will is on the party propounding the will. The petitioner has not satisfied the District Judge that the will is valid. Counsel cited *In re Last Will of Carolis Dias.* [5]

*Bawa*, in reply.—There should be strong proof before the will could be impeached for want of due execution. *Arumugam et al. v. Sanmugam.* [6] Counsel also cited *Pieris v. Pieris et al.* [7] *Sullivan v. Sullivan.* [8]

*Cur. adv. vult.*

October 13, 1911. LASCELLES C.J.—

The facts which gave rise to this appeal have been stated in the judgment of my brother Middleton, and it is unnecessary to recapitulate them in detail. With regard to the highly technical objection taken by the respondent that the appeal has abated, inasmuch as the appellants' security bond was not fully stamped within the appealable time, I am of opinion that the objection cannot be sustained. The bond was tendered and was accepted by the respondent's proctor within the appealable time, and there can be no doubt that, even if the District Judge had not allowed the deficiency to be supplied, the bond, at the expiration of the appealable time, was a

[1] *(1910) 2 Cur. L. R. 183.*
[2] *2 Leader L. R. 116.*
[3] *(1892) 2 C. L. R. 123.*
[4] *2 C. L. R. 25.*
[5] *(1895) 2 N. L. R. 66.*
[6] *(1899) 4 N. L. R. 314.*
[7] *(1905) 9 N. L. R. 17.*
[8] *L. R. 3 Tr. 299.*

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valid security, which could have been enforced on payment of the deficiency and penalty under section 36 of " The Stamp Ordinance, 1909. " The case of *Kandappa v. Elliott*[1] does not appear to me to be in point.

On another preliminary point, namely, whether the property dealt with by deed No. 5,329 was the partnership property of the deceased and the appellant, I think the District Judge was right in refusing to allow the real issue to be complicated by an inquiry at this stage into the partnership relations of the deceased and the respondent. There was practically only one issue in the case, namely, the genuineness of the document D 1, which it was admitted is a testamentary instrument, which, if genuine, ought to be admitted to probate.

The first point for consideration is the probability or otherwise that the deceased would have made the disposition effected by the document in question. At the trial no specific issue was framed as to whether the document was executed and attested in accordance with the requirement of Ordinance No. 7 of 1840, but it was contended on appeal that the deed was defective in this respect. Section 3 of the Ordinance requires a will, when notarially executed, " to be signed at the foot or end thereof by the testator . . . and such signature shall be made or acknowledged by the testator in the presence of a licensed notary public and two or more witnesses, who shall be present at the same time and duly attest such execution. "

The grounds of the objection appear to be (1) the testimony of the witness Mohamadu Pakir Meera Levvai Ahamado Levvai (page 39) that the notary did not sign in his presence, but this witness in re-examination professed himself unable to swear that the notary did not sign there; (2) the testimony of Thura Levvai Aliar Levvai that he did not see the notary sign the will; and (3) the circumstance that the witnesses were not actually in the same room as the deceased and the notary when the former signed the document. With regard to (1) and (2), the balance of evidence proves that the notary did in fact sign the will in the presence of the witnesses. With regard to (3), the witnesses, though not actually in the same room as the deceased, were in a verandah opening into the room, and saw and were conscious of what was taking place in the room. They were therefore in the " presence " of the testator in the sense in which the word has been construed in the English Wills Act (1 *Vict. c. 26*).

In *Shires v. Glasscock*[2] for example, the witnesses subscribed the will in a gallery, between which and the testator's chamber there was a lobby with glass doors, the glass of which was broken in certain places. It having been proved that the testator might have seen the table where the witnesses subscribed through the lobby, and the broken window, this was adjudged sufficient. Here it is clear that the attesting witnesses not only might have seen, but did actually

[1] *(1892) 2 C. L. R. 17.*

[2] *2 Salk. 688.*

see without any difficulty all that took place in the deceased's room. The deceased, the notary, and the subscribing witnesses were thus clearly in the " presence " of each other in the sense in which that word has been construed. The objection to the attestation of the document therefore fails.

In my judgment the order granting letters of administration to the respondent should be revoked and the document D 1 admitted to probate, the intervenient Abdul Cader being granted letters of administration *cum testamento annexo*. The appellants are entitled to have their costs of the trial in the Court below and of this appeal.

MIDDLETON J.—

This was an appeal from an order absolute granting letters of administration to the respondent of the estate of his deceased brother Mohammadu Ibrahim Saibo. The respondent and intervenient, in opposing the grant, propounded a document in the shape of a deed No. 5,329 dated December 16, 1909, and marked D 1, as the last will of the deceased, and the order appealed against also held that this document had not been proved to be genuine. A preliminary objection was taken by Mr. van Langenberg for the respondent that the security bond furnished on appeal not having been sufficiently stamped within the appealable time the appeal had abated, and he relied on the decision of this Court in *Kandappa v. Elliott*.[1] The objection had been taken in the District Court, but the learned District Judge very properly ordered the case to be sent up to this Court, holding it was a question to be decided here. It would seem from a minute in the diary that on June 10, 1911, before the appealable time had elapsed, the security bond had been duly tendered to and accepted by the proctor for the respondent. After the appealable time had elapsed the insufficiency in stamps was apparently discovered—by whom there is no record, but presumably by an officer of the Court. If the objection had been taken on June 10, 1911, as it might have been, an opportunity would have arisen to the appellants to supply the deficiency within the proper time. It has also been held that a respondent may waive the provisions altogether as to deposit of security for costs.

I think also that this security bond is not an instrument required by law to be stamped in every testamentary suit, as it is not included in Part III. of Schedule B of the Stamp Ordinance, No. 22 of 1909, and would not therefore come under the terms of section 87 of the Ordinance.

If it were sued upon by the respondent for the purpose for which it was executed, it might be admitted in evidence under section 36 of the Ordinance on payment of the deficiency and of a penalty, so that its perfection for the purpose for which it was intended might always be attained in this way.

[1] *(1892) 2 C. L. R. 17.*

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The case of *Kandappa v. Elliott* (*ubi supra*) is, I think, to be distinguished, in that there the necessary security was not tendered in time, but a mere notice of intention to tender security was given. Here the security bond was tendered, and in the first place its sufficiency was in effect waived, and in the second it could even now be rendered effective if it becomes necessary to sue on it.

In my opinion the security was tendered in time under section 756, and the appeal should be admitted, subject to the payment of the deficiency in stamps and the penalty under section 36 of the Stamp Ordinance.

The issues agreed to on the hearing of the case were:—

(1) Whether the document, deed No. 5,329 dated December 16, 1910, was signed by the deceased.

(2) If so, whether he was of sound mind and memory at the time he signed it.

(3) Whether such document was the last will and testament of the deceased Ibrahim Saibo.

A further issue as to whether the property dealt with by the deed No. 5,329 (D 1) was the partnership property of the deceased and the applicant had been held by the Acting District Judge to be premature, and the case went to trial on the three issues set out.

In my opinion there is every reason to believe that the deceased signed the impugned deed on December 16, 1909, and I feel no reason to doubt that he did so, and that his intention was to deal only with what he, the deceased, considered to be his own property. Whether it was so or not is another question, which must be decided later on.

The next question is whether the document was executed as a testamentary document according to law. The formalities required are set forth in section 3 of Ordinance No. 7 of 1840, and I have no doubt from the evidence on the record that the testator signed the deed in the presence of the notary and the two witnesses, who were all present together and conscious of the act being done in the sense required under the English Wills Act, 1837 (*Pieris v. Pieris et al.* [1]). One witness, it is true, says he did not see the notary sign there, but he cannot swear he did not sign the will there, and the notary and the police vidane witness say that the notary signed there and then. Another witness also says he did not see the notary sign, but he says he left the house before the notary left, and that he signed six documents that day.

Following the decision in *Arumugam et al. v Sanmugam*, [2] I am of opinion the notary did sign the attestation clause there and then, and that the document was duly attested as required by the first part of section 3 applying to a notarially attested will. At the same time the wording of the section does not seem necessarily to imply

[1] (1905) 9 *N. L. R.* 17.

[2] (1899) 6 *N. L. R.* 314.

that the attestation of the notary must be made in the presence of the witnesses. They all must be present at the execution by the testator and witness the signature, and must duly attest such execution thereafter, as I read the clause.

In *Sullivan v. Sullivan*[1] it was held that the attesting witnesses to a will need not subscribe their names to the instrument in the presence of each other.

In my opinion, therefore, this document was duly signed and executed by the deceased, and it is admitted that it is a testamentary document, and I think should be admitted to probate, the intervenient appellant Abdul Cader being granted letters of administration thereof as of a will annexed.

The intervenient obtains no benefit under the will, and his appointment as administrator will clearly be on a footing with the wishes of the deceased, and convenient, considering the sex and race of the two beneficiaries, one of whom is absent in India. The order granting letters of administration to the respondent must be set aside, and the appeal allowed with costs.

*Appeal allowed.*