Present : Lascelles C.J. and Middleton J.

May 30, 1911

ABDUL RAHIMAN *et al.* v. KANI UMMA *et al.*

17—*D. C. Kalutara*, 4,072.

Evidence—Proof of lost deed by a translation—Not admissible—Secondary evidence—Ordinance No. 14 of 1895, s. 63.

A translation of a deed of conveyance would not be admissible as secondary evidence to prove the contents of the original deed.

Section 63 of the Evidence Ordinance is exhaustive of the different kinds of secondary evidence that are admissible to prove the contents of a document.

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

Bawa, for the appellants.—The document OA 2 is only a translation of a document alleged to have been lost. A translation is not secondary evidence of the contents of a document. A sworn translation can only be admitted as a translation ; it is no proof of the original. Section 63 of the Evidence Ordinance is exhaustive of the different kinds of secondary evidence that are admissible to prove the contents of a document. The word " means " in section 63 shows that the section gives an exhaustive definition of what secondary evidence is. Counsel referred to *Amir Ali's Law of Evidence, p.* 372.

Pieris (with him *Fernando*), for the respondents, referred to the Evidence Ordinance, sections 32 and 35.

Bawa, in reply.

Cur. adv. vult.

May 30, 1911. LASCELLES C.J.—

This case was remitted to the District Court for any further evidence which could be adduced of the authenticity of the document OA 2, the case being returnable to this Court for judgment. The document OA 2 purports to be a translation of a deed of conveyance dated January 14, 1821, executed by Mustaffa Lebbe Cumister, from whom all the parties trace title. It is common ground between the parties that a deed of that date was executed, that the grantor conveyed to his own son, Sultan Marikar, a two-third share. But the appellants contend that the deed conveyed two-thirds of the eastern half only, whilst the case for the respondents is that the deed conveyed two-thirds of the whole property, Noorinatotam. The translation OA 2 is thus produced to determine the

May 30, 1911

LASCELLES C.J.

Abdul Rahiman v. Kani Umma

issue whether the conveyance to Sultan Marikar comprised two-thirds of the whole property or two-thirds of the eastern half only. An attempt has been made to prove that the original deed has perished from natural causes, but in my opinion the loss of the deed has not been sufficiently established to allow the contents to be proved by secondary evidence. But even if the loss of the original deed were properly proved, the document OA 2 would not, in my opinion, be admissible as secondary evidence to prove the contents of the original deed.

The different kinds of secondary evidence that are admissible to prove the contents of a document are enumerated in section 63 of the Evidence Ordinance, and the enumeration does not include translations. That section 63 is intended to be exhaustive is clear from the language of the section ; and in India the section has been so construed (*Ram Prasad v. Raghunandan Prasad*[1]). The case must therefore be determined on the footing that the translation OA 2 is not admissible in evidence.

It is of importance to consider the effect of the extract OA 1 from the register of old deeds. If the deed had been registered under the original Ordinance of 1866, it would have been the duty of the Registrar of Lands to have preserved an exact copy, which would have been admissible as secondary evidence. But the deed in question was registered after the amending Ordinance of 1867, which allowed the Governor, in proclaimed districts, to authorize the Registrar of Lands to register the substance only of the deeds in a prescribed form.

It is clear that a certified copy of the registration of the substance only of the deed is not secondary evidence within the meaning of section 63, inasmuch as it is not a copy of the original document. Although the certified copy of the entry in the register is not admissible as secondary evidence of the contents of the original, it does not follow that the entry has no probative value as regards the issue now under consideration.

Under section 35 an entry in an official register stating a fact in issue or a relevant fact, made by a public servant in the discharge of his official duty, is itself a relevant fact. The entry then, for the purpose of deciding the question at issue, is a relevant fact, which should not be excluded from consideration.

Upon the evidence in the record, much of which is not of a satisfactory character, it is by no means easy to determine whether the basis of partition set up by the plaintiffs or that put forward by the respondents is the right one. On the whole, and after giving full weight to the careful judgment of the District Judge, I have come to the conclusion that the District Judge has arrived at a correct conclusion.

I would dismiss the appeal with costs.

[1] *I. L. R. 7 All. 743.*

MIDDLETON J.—

The question in this case is involved in the first issue : Did the deed of 1821 convey to Sultan Marikar two-thirds of the entire land called Noorina totam or two-thirds of the eastern portion ?

Both sides admitted that Mustaffa Lebbe Cumister executed the deed of 1821, but the dispute is, what was conveyed by the deed ? This deed was put in evidence in District Court, Kalutara, 31,273, in a suit between parties who are not all privies to the parties in the present action. A translation of it was also used in that action, which still remains on that record, and a certified copy of that translation is on the record of this case, marked OA 2. That translation purports to be made by a sworn translator. There is besides a certified extract from the register of old deeds marked OA 1 of Kalutara, made in 1872 under the authority of Ordinance No. 15 of 1867.

It is objected for the appellants that neither OA 1 nor OA 2 are admissible in evidence under section 63 of the Evidence Ordinance to prove the contents of the deed of 1821, and this appears to be the case.

There is no strict proof that the deed of 1821 is lost or destroyed, or comes under any of the cases according to section 65, in which secondary evidence may be given of its contents.

Under section 35 I think, however, that the entry in the register as to the substance of the deed is relevant and admissible, and according to it two-thirds of the whole, and not two-thirds of a half, were conveyed.

The objection to this is that as the boundaries do not appear it may have reference to what was considered Noorina totam in 1821, and so not include what is said to be the western portion of it now. There is no evidence, however, of any alteration of the *corpus* of the land in claim. Both sides admit that before the deed of 1821 the original owner granted to Meera Lebbe Marikar, of whom the added defendants are the successors in title, a one-third share, the plaintiffs and the added defendants say of the whole, and the appellants say only of the eastern half. The appellants' deed AA1 of 1848 ignores this grant to Meera Lebbe altogether, and proceeds to donate the western half on the footing that the whole eastern half had been granted already to Sultan Marikar, thereby disclosing an inconsistency with the present position adopted by the appellants. This deed of 1848 does not conserve to the added defendants even one-third of the eastern half which the appellants now admit is theirs, and it is argued for the plaintiffs, and held by the District Judge, that this deed was executed with a fraudulent intent, for which he gives his reasons.

On a careful consideration of the points raised by Mr. Bawa, I am not disposed to interfere with the judgment of the District Judge, and would dismiss the appeal with costs.

Appeal dismissed.