

1957 Present : H. N. G. Fernando, J., and Sinnetaimby, J.

V. SUBRAMANIAM, Appellant, and P. THANARASE *et al.*, Respondents

S. C. (Inty.) 63—D. C. Jaffna 8847 (Partition)

Evidence—Capacity of party to a contract—Deed executed by a deaf and dumb person—Validity—Burden of proof.

The 2nd defendant was apparently a deaf and dumb woman. She had by deed conveyed certain immovable property to the 1st defendant. There was clear evidence to show that the 2nd defendant did in fact execute the deed. The notary who attested the deed was proved to be dead, and his declaration in the attestation clause that he read over and explained the instructions to the 2nd defendant was produced as *prima facie* evidence that the 2nd defendant was aware of the purport of the document.

Held, that in the circumstances the 2nd defendant had a heavy burden to discharge when she challenged the validity of the deed on the ground that she was not aware of the purport of the deed when it was executed.

APPPEAL from a judgment of the District Court, Jaffna.

C. Ranganathan, with *V. K. Palasunderam* and *S. C. Crossette-Thambiah*, for the 1st Defendant-Appellant.

C. Chellappah, for the 2nd Defendant-Respondent.

A. Nagendra, for the 3rd to 6th Defendants-Respondents.

S. Sharvananda, for the Plaintiff-Respondent.

Cur. adv. vult.

February 13, 1957. H. N. G. FERNANDO, J.—

The only dispute in this action for partition concerns the claim of the 1st defendant to a $\frac{3}{8}$ share of the land which had admittedly belonged at one time to the 2nd defendant, a woman called Nachchipillai, the widow of one Kandiah. The 1st defendant's claim to the $\frac{3}{8}$ share is based on a deed 1 DI of 1940 which purports to have been executed by Nachchipillai; but the learned District Judge has held that that deed was not the act and deed of Nachchipillai.

Nachchipillai is apparently a deaf and dumb woman. She entered the witness-box at the trial and the Judge has noted that she did not understand the interpreter when he asked her for her age; when asked for her name, however, she had replied "Nach" and pointed to her tongue to indicate her inability to speak. The Judge decided that she was unable to affirm to the truth of her evidence and to answer questions and held that she was not a competent witness. In addition her demeanour in

the examination which preceded that decision of the Judge was taken into consideration by the Judge when he stated in his judgment that Nachchipillai does not understand normal speech and is unable to make herself understood. This impression the Judge has utilised in deciding the main question as to the validity of the deed D1 and in our opinion he erred in so doing.

The evidence of the Village Headman was that Nachchipillai follows conversations from the movements of the mouths of people, but she cannot understand if she does not follow such movements, that the Headman himself used to speak to her and that she voted at the Parliamentary Elections. This evidence was not substantially different from that of the witness Varithamby, the brother of Nachchipillai and the father of the 1st defendant. He too stated that although his sister cannot speak like ordinary people, she can understand if one faces her. As to the execution of the deed itself Varithamby said that the notary was seated in front of Nachchipillai and that as soon as the notary explained to her the instructions which he had been given by another of her brothers, one Visuvanathar, she gave to the notary the deed, meaning obviously the deed under which she herself had title to the 3/8 share.

The notary who attested the impugned deed was proved to be dead and in these circumstances his declaration in the attestation clause that he read over and explained the instructions to Nachchipillai would be *prima facie* evidence of the truth of that declaration, (*de Silva v. Sinnemtamby et al.*¹), but the learned Judge disregards this point, again for the reason that Nachchipillai is deaf and dumb. If, as stated by Varithamby, the notary told Nachchipillai that the deed was to be executed for the sale of her land and if she responded by handing her own title deed to the notary, the fact that she was deaf and dumb does not negative her consent to the transfer of the land. The same inference has to be drawn from the notary's declaration that the consideration for 1 D1, which was Rs. 700, was paid in his presence.

The case was an unusual one in that the defence did not call any evidence to disprove the execution of the deed but relied only on somewhat vague allegations made in the course of the cross-examination of witnesses. It was admitted that Nachchipillai's husband Kandiah had been convicted on a charge of stabbing Nachchipillai's brother Visuvanathar, and that Kandiah died while serving a sentence of imprisonment. The Judge has treated these facts as showing ill-feeling between Nachchipillai and her brother. The Vidane and the Village Headman did state that there had been ill-feeling in consequence of the stabbing incident, but such ill-feeling does not in our view provide evidence of a strength necessary to establish that Nachchipillai was fraudulently induced by her brothers to divest herself of her property. According to the evidence it was the brother Visuvanathar who gave instructions to the notary for the execution of 1 D1, and, however strained feelings may have been at the time of the execution of the deed, it was established that Nachchipillai was living with Visuvanathar at the time of the trial. A retired Vidane who

¹ (1932) 1 C. L. W. 350.

was called on behalf of Nachchipillai admitted that after having lived on the land in dispute Nachchipillai has now moved to another land. This supports the evidence that she gave up possession of the land after the execution of 1 D1.

To put the matter at the lowest, there was clear evidence to show that Nachchipillai did in fact execute 1 D1 and the notary's attestation clauses *prima facie* established that she was aware of the purport of the document when executed; in these circumstances, the 2nd defendant had a heavy burden to discharge when she challenged the validity of the deed. The matters which appear to have weighed with the trial Judge fall far short of being sufficient to discharge that burden. For these reasons we would hold that 1 D1 was effective to pass title to the 3/8 share of Nachchipillai.

The appeal is allowed with costs and the decree appealed from will be varied as follows :—

- (a) a 3/64 share will be allotted to the 2nd defendant in lieu of the 27/64 share allotted to her by the trial Judge;
- (b) a 3/8 share will be allotted to the 1st defendant;
- (c) the 2nd defendant will pay to the 1st defendant the costs of the contest in the District Court.

Subject to these variations the original decree will stand.

SINNETAMBY, J.—I agree.

Appeal allowed.
