~~Confidential.~~ ~~2nd Proof.~~

Privy Council Appeal No. 136 *of* 1915.

Mahomed Syedol Ariffin *bin* **Mahomed Ariff** - *Appellant,*

v

Yeoh Ooi Gark - - - - - - *Respondent,*

FROM

THE SUPREME COURT OF THE STRAITS SETTLEMENTS (SETTLEMENT OF PENANG).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 20TH JULY, 1916.

Present at the Hearing:

THE LORD CHANCELLOR.
EARL LOREBURN.
LORD SHAW.

[*Delivered by* LORD SHAW.]

This is an appeal from a judgment and order of the Court of Appeal of the Supreme Court of the Straits Settlements, dated the 2nd March, 1915. This judgment and order affirmed the judgment and order of the Court of First Instance, pronounced on the 19th September, 1914.

The action was brought by the respondent, who is a moneylender, against the appellant for certain sums of money, amounting in all to 29,521 dollars. To this action the appellant lodged a defence that at the time of the transactions sued upon he was an infant.

The facts briefly stated are these: On the 21st March, 1912, the appellant's father died, the appellant being his second son. On the 16th October, 1912, the 13th December, 1912, and the 17th January, 1913, respectively, he executed in favour of the respondent three mortgages over his one-twelfth share of his late father's property. The amounts in the mortgages were 6,000 dollars, 8,000 dollars, and 10,000 dollars. Interest was stipulated for at 15 per cent. per annum for the first six months, and thereafter at 18 per cent. The respondent swears that at the date of the transaction he "suspected he (the appellant) was under age." "I thought," he says, "his mother would prove his age or, perhaps, his brother. I was in doubt even after the doctor's certificate was produced. It may

be wrong. There was still his mother or brother He wanted the loan, so I did not go to see his mother or brother." Later in his evidence he stated, "I lent because of the high interest, 15 per cent., which was arranged between us."

The doctor's certificate was obtained for the following reason. The respondent swears: "I asked him" (the appellant) "if he were of age. He said, 'Yes.' I asked him for proof of majority. He said he would bring a doctor's certificate." The so-called certificate was: "This is to certify that in my opinion M. S. Ariffin is of the age of 21 years." Dr. Bright, on examination, says that he formed the opinion that the appellant was 21, judging by his teeth, his appearance, and his voice. In their Lordship's view such a certificate is worthless. It is in truth not a certificate but only an assertion of opinion. A formality of making a declaration before a magistrate was also gone through, but the declaration was merely this: "By the certificate of Dr. W. H. M. Bright, hereto annexed and marked 'A,' I believe I am over 21 years of age." Such a declaration, in their Lordships' opinion, is of no greater value than the certificate itself. Proof on the subject is not advanced by such documents.

When the evidence in the case came to be taken, the appellant's elder brother, one Che Ariffin, proved an entry relating to the appellant's birth in a book containing a record of births, deaths, and marriages in his family, kept by his late father. Entries were contained in the book of the births of three members of the family, and the entry regarding the appellant was this: "A boy by Fatima, *alias* Pusi, on Tuesday, 27th Rabi Lawal, 1313, exactly at 4 P.M. on 17th September, 1895; name, Syedol Ariffin."

The sole question in the case is whether this entry is admissible in evidence. It was not contended before their Lordships that it was not in the handwriting of the father or a genuine document. Both of the Courts below have, however, held that the entry was not admissible, and this being so, they also held that the defence of infancy has not been made out.

There is no question that the entry was made by one having special means of knowledge, and no suggestion that it was made before any question or dispute between the parties. If in itself admissible, it would go to show that at the time of the transactions in question the appellant was only seventeen or eighteen years of age.

The law of the Straits Settlements on the point of the admissibility of such a document in evidence depends upon the construction to be given to the language of section 32 of the Evidence Ordinance, 1893, which is in similar terms to the Indian Evidence Act No. 1 of 1872.

Section 32 provides that—

"statements written or verbal of relevant facts made by a person who "is dead . . . . are themselves relevant facts in the following cases "V. when the statement relates to the existences of any relation-

" ship by blood, marriage, or adoption between persons as to whose " relationship by blood, marriage, or adoption the person making the " statement had special means of knowledge, and the statement was " made before the question in dispute was raised."

To this section are appended illustrations, and illustration L. is as follows :—

" The question is, what was the date of the birth of A.? A letter " from A.'s deceased father announcing the birth of A. on a given date " is a relevant fact."

In the construction of this language in India the practice of the Indian Courts appears to have been uniform. The cases of Ram Chandra Dutt *v.* Jogeswar Nararin Deo (20 Calc. 758), Dhanmull *v.* Ram Chunder Ghose (24 Calc. 265), and Oriental Government Security Life Assurance Company (Limited) *v.* Narasinha Chari (25 Mad. 183) have been cited to establish this, and in their Lordships' opinion they do so. In the Madras case Sir Arnold White, referring to the case reported in 20 Calcutta, observes :—

" The principle of the decision in my opinion is, that the time of " one's birth relates to the commencement of one's relationship by blood " and a statement, therefore, of one's age made by a deceased person " having special means of knowledge, relates to the existence of such " relationship as that referred to in section 32, clause 5."

The Courts below have, however, declined to accept this principle. They proceed upon two grounds. In the first place they think that the rule with regard to hearsay evidence, adopted in the English case of Haines *v.* Guthrie, 13 Q.B.D., 818, should be followed in the Straits Settlements, and that that rule is not varied by the clause just cited from the Evidence Act. And in the second place they hold that the illustration, given in the statute, does not in fact illustrate the section.

On the first point, the view of their Lordships is that the rule and principle of the colony must be accepted as it is found in its own Evidence Act, and that the acceptance of a rule or principle adopted in or derived from English law is not permissible if thereby the true and actual meaning of the statute under construction be varied, or denied effect. The learned Sercombe-Smith, J., put the matter thus :—

" I think that it is safer to construe section 32, V, and the illustra- " tions on English lines than to extend the English law of evidence in " reliance upon the language of section 32, V, and the illustrations " which it appears to me are construable as enacting in changed " phraseology the principles of English adjective law."

The Board does not think that such a method of construction is safe or is warranted, and they cannot agree with the view suggested, the true principle being, in their opinion, that above stated.

The Board makes no pronouncement upon Haines *v.* Guthrie, or the limitation these affirmed—of hearsay to questions of pedigree ; but such a limitation finds no foundation in this colonial

statute, even in the words of the section, and this is made clearer by the illustration given thereto, as will be presently noted.

On the second point, their Lordships are of opinion that in the construction of the Evidence Act it is the duty of a court of law to accept—if that can be done—the illustrations given as being both of relevance and value in the construction of the text. The illustrations should in no case be rejected because they do not square with ideas possibly derived from another system of jurisprudence as to the law with which they or the sections deal. And it would require a very special case to warrant their rejection on the ground of their assumed repugnancy to the sections themselves. It would be the very last resort of construction to make any such assumption. The great usefulness of the illustrations, which have, although not part of the sections, been expressly furnished by the legislature as helpful in the working and application of the statute, should not be thus impaired.

In the present case, however, no special or exceptional case of construction arises. The section admits a statement which "relates to the existence of any relationship," when under all the other conditions as to knowledge, time when made, &c.—all of which conditions it is agreed are fulfilled. The illustration puts the question thus: "What is the date of the birth of A." And "A letter from A's deceased father to a friend announcing the birth of A on a given day is a relevant fact." Their Lordships agree with the judgments in the Indian Courts above cited, that there is no repugnance between a statement which relates to the existence of a relationship and the illustration by a statement as to when A was born, that is to say, when the relationship began.

Their Lordships, with much respect to the Judges of the Court below, think that the document in question was admissible in evidence. The question as to whether the appellant had reached majority at the date of the mortgages sued on was left most doubtful on the evidence of the respondent himself, but the statement of the appellant's father, now admitted, appears to their Lordships to set the doubt at rest, and to establish minority.

A case of fraud by the appellant on the subject of his age was set up, but it cannot be doubted that the principle recently given effect to in the case of R. Leslie (Limited) *v.* Sheill, 1914, 3 K.B.D. 607, would apply, and such a case would fail. But their Lordships think it right to add that the statement made by the minor as to his age on the declaration before the magistrate: "by the declaration of Dr. W. H. M. Bright. . . . I believe I am over twenty-one years of age," cannot be justly characterised as fraudulent: in short, a case of fraud does not appear to be established.

Their Lordships will humbly advise His Majesty that the judgments of the Court below should be recalled, and that the action should be dismissed with costs.

In the Privy Council.

MAHOMED SYEDOL ARIFFIN bin MAHOMED ARIFF

v.

YEOH OOI GARK.

DELIVERED BY LORD SHAW.

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