

V.M. MATHEW  
v.  
V.S. SHARMA AND ORS.

AUGUST 29, 1995.

[K. RAMASWAMY AND B.L. HANSARIA, JJ.]

*Evidence Act, 1872:*

*Section 33—Witness—Testimony of in previous proceedings—Relevancy and admissibility in subsequent proceedings—Conditions for applicability of Section 33—Explained—Second proviso—Interpretation of—Expression—"Adverse party in the first proceedings having the right and opportunity to cross-examine"—Effect and scope of the expression explained.*

Respondents No. 1 and 2 initiated proceedings for grant of Letters of administration in respect of a Will executed by deceased V. In these proceedings, which were dismissed by the Trial Court and the High Court, K was examined as PW-1. In subsequent proceedings initiated by the respondents the appellant wanted to bring on record the deposition of K in the earlier proceedings under section 33 of Evidence Act but the Trial Court disallowed the same. On revision the High Court affirmed the decision of the trial Court holding that under section 33 what is relevant is that the party against whom the evidence is sought to be admitted must be a party in the previous proceedings. He must have had a right and opportunity to cross-examine that witness examined in the earlier proceeding. Since the respondents had no right and opportunity to cross examine K, his evidence under Section 33 of the Act is not admissible.

In appeal to this Court on the question whether the evidence of K in previous proceedings was relevant and admissible in the present proceedings :

Allowing the appellant's appeal and reversing the judgment of the High Court, this Court

HELD : 1. The appellant is an adverse party in the first proceeding and he had the right and opportunity to cross examine K who was examined as PW-I in the previous proceeding by the respondents; and the

**A** evidence becomes admissible since K died pending proceeding. [137-H]

2. Section 33 of the Evidence Act consists of two parts, the main section, and the proviso. The main section lays down the conditions which are required to be satisfied for the previous statement of a witness in a judicial proceeding to be admitted in evidence in the later proceeding.

**B** Admittedly, since K died pending the proceeding the requirement of the main part of Section 33 stands satisfied. The only question is what would be the effect of the words "adverse party in the first proceeding having the right and opportunity to cross-examine". The question of a party having the right and opportunity to cross-examine will arise, if he is an adverse

**C** party in the first proceeding. The second proviso, which is an exception to the main part of the section, operates only if the adverse party in the first proceeding did not have the right and opportunity to cross-examine the witness examined therein. The term 'adverse party' connotes that a party which has a right and opportunity to cross examine in the first proceeding.

**D** This proviso, therefore, obviously protects the rights of the adverse party in the first proceeding and not the party who produced the witness. The party against whom the witness is produced in the previous proceeding is the adverse party and not the person who produced the witness and had the advantage of having examined the witness. [135-G-H; 136-A-C]

**E** *Poonamchand v. Motilal and Ors.*, AIR (1955) Raj. 179, approved.

*Sundara Rajali v. Gopala Thevan and Anr.*, AIR (1934) Mad. 100 and *Brajaballav Ghose and Anr. v. Akhoy Begdi and Ors.*, AIR (1926) Cal. 705, disapproved.

**F** *Dal Bahadur Singh and Ors. v. Bijai Bahadur Singh and Ors.*, AIR (1930) PC 79, distinguished.

*Makhan Khan s/o Nawazali v. Emperor*, AIR (1948) Sind 122, referred to .

**G** *Sarkar on Evidence*, 14th Edn. p.656, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7835 of 1995.

**H** From the Judgment and Order dated 16.11.94 of the Kerala High

Court in C.R.P. No. 547 of 1994 (C).

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T.L. Vishwanatha Iyer, S. Prasad, R. Shoba and Mr. M.K.D. Namboodiry Advs. with him for the Appellant.

P.S. Poti, Ms. Malini Poduval and M.T. George for the Respondent No. 1-2.

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The Judgment of the Court was delivered by

**K. RAMASWAMY, J.** Special Leave granted.

This appeal by special leave is filed against the order dated November 16, 1994 of the Division Bench of the Kerala High Court in CRP No. 547 of 1994. One V.S. Annamma, sister of the appellant was alleged to have executed a will on September 15, 1976, and said to have bequeathed her properties to respondent Nos. 1 and 2. The appellant is one of her brothers. Respondent No. 1 is the sister and the second respondent is the son of the first respondent. On sudden demise of Annamma, respondent Nos. 1 and 2 filed L.A.O.P. No. 143 of 1980 in the District Court, Ernakulam under Section 276 of the Indian Succession Act, 1925 for grant of letters of administration in respect of the estate of deceased Annamma and annexed the copy of the will thereto.

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The appellant had objected to the grant of letters of administration disputing the validity and genuineness of the will and also for failure to implead necessary and proper parties therein. One of the testators, by name Kurian, was examined as P.W.I. Though the trial Court dismissed the application on merits holding that the will was not genuine and also on the ground of non-joinder of the necessary parties, in appeal, the High Court vacated the findings of the District Judge on the first point and upheld that the petition was not maintainable for non-joinder of necessary parties. Consequently, it dismissed the appeal. Respondents thereafter filed another application being L.A.O.P. No. 149 of 1988 for grant of letters of administration which, on caveat being entered, was converted into a suit, namely O.S. No. 2 of 1990. The appellant sought to rely on the deposition of Kurian and he sought to bring on record that evidence under Section 33 of the Indian Evidence Act (for short, 'The Act'), the reception of which was objected to by respondent Nos. 1 and 2 and was upheld by the trial

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- A Judge. On revision, it was affirmed by the High Court. Hence this appeal pursuant to leave granted by us.

- B The crux of the question raised is the interpretation of the second proviso to section 33 of the Act. The learned counsel Shri T.V.L. Iyer contended that the High Court was not right in its interpretation that the "adverse party" referred to in the proviso, must be one like the respondents who had the right and opportunity to cross-examine the witness in the first proceeding. Respondents having had the right and opportunity to examine Kurian as their witness and since Kurian is dead, his evidence in the previous proceeding becomes relevant evidence and admissible under Section 33 of the Act. What is relevant is that the party against whom the evidence is sought to be used in the previous proceeding must have had the right and opportunity to cross-examine the witness. Since the appellant had that right and opportunity, the evidence of Kurian is admissible under Section 33 of the Act. The second proviso requires to be interpreted in that perspective. He has placed reliance on the judgments in *Poonamchand v. Motilal and Others*, AIR (1955) Rajasthan 179, *Makhan Khan s/o Nawazali v. Emperor*, AIR (1948) Sind 122 and also on Sarkar's commentary on the Act (14th Edn.) p. 656.

- E Shri P.S. Poti, learned senior counsel for respondents, on the other hand, contended that what is relevant is that the party against whom the evidence sought to be admitted must be a party in the previous proceeding. He must have had a right and opportunity to cross-examine that witness examined in the earlier proceeding. Since the respondents had no right and opportunity to cross-examine Kurian, his evidence under Section 33 of the Act is not admissible. In support thereof, he has placed reliance on the decisions in *Dal Bahadur Singh and Others v. Bijai Bahadur Singh and Others*, AIR (1930) PC 79. *Sundara Rajali v. Gopala Thevan and Another*, AIR (1934) Madras 100 and *Brajaballav Ghose and Another v. Akhoy Begdi and Others*, AIR (1926) Cal. 705. He also contended on merits regarding the effect of the evidence of Kurian in these proceedings.

- H We make it clear that in this appeal we are not concerned with the effect of the evidence of Kurian examined in the previous proceeding. The only question is whether the evidence of Kurian is relevant and admissible in the present proceeding and whether interpretation given by the Kerala

High Court is correct interpretation of the second proviso to Section 33 of the Act. Section 33 of the Act reads thus : A

"33 Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated : Evidence given by a witness in a judicial proceeding or before any person authorised by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial Proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which under the circumstances of the case, the Court considers unreasonable : B C

Provided -

that the proceeding was between the same parties or their representatives in interest; D

that the adverse party in the first proceeding had the right and opportunity to cross-examine; E

that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation - A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this Section." F

The section lays down as to when the evidence of a witness in a previous judicial proceeding is relevant. It consists of two parts, the main section, and the proviso. The main section lays down the conditions which are required to be satisfied for the previous statement of a witness in a judicial proceeding to be admitted in evidence in the later proceeding. Admittedly, since kurian died pending the proceeding, the requirement of the main part of Section 33 stands satisfied. The only question is what would be the effect of the words "adverse party in the first proceeding having the right and opportunity to cross-examine". The question of a party G H

- A having the right and opportunity to cross-examine will arise, if he is an adverse party in the first proceeding. The second proviso, which is an exception to the main part of the section, operates only if the adverse party in the first proceeding did not have the right and opportunity to cross-examine the witness examined therein. The term 'adverse party' connotes
- B that a party which has a right and opportunity to cross examine in the first proceeding. This proviso, therefore, obviously protects the rights of the adverse party in the first proceeding and not the party who produced the witness. The party against whom the witness is produced in the previous proceeding is the adverse party and not the person who produced the witness and had the advantage of having examined the witness. If the
- C interpretation which is sought to be put up by the learned counsel for the respondents is accepted, as has been done by the High Court, it would mean that the person producing the witness in the first proceeding will have the advantage of using the evidence of that witness in a subsequent proceeding between the same parties, while the adverse party in the first
- D proceeding will be deprived of using the same evidence if it favourable to him. That does not appear to be the intention of the proviso.

- The adverse party referred in the proviso is the party in the previous proceeding against whom the evidence adduced therein was given against
- E. his interest. He had the right and opportunity to cross-examine the witness in the previous proceeding. Take an instance where ex-parte proceedings were taken against the defendant, he had no right and opportunity to cross-examine the witness. If the same evidence is sought to be used, he is certainly an adverse party in the previous proceeding and since he had no
- F right and opportunity to cross-examine that witness, the same evidence cannot be used against the defendant in the subsequent proceeding. In other words, the proviso lays down the acid test that statement of a particular witness should have been tested by both parties by examination and cross-examination in order to make it admissible in the later proceeding. Thereby it seeks to protect the rights against whom the previous
- G proceeding might have gone ex-parte who had no right and opportunity to cross-examine the witness. For the same reason, it would also protect the co-plaintiffs and co-defendants who may have a right but no opportunity to cross-examine the witness since it was produced by one of the co-plaintiffs or co-defendants on their side but that evidence went against their
- H interest. It is, therefore, clear that a person who examined the witness

should not be permitted, in the subsequent proceeding between the same parties, to raise the objection that the statement which was recorded in the previous proceeding on his behalf should not be admissible because he had no right and opportunity to cross-examine him. It would also be unfair that the person producing a witness in the previous proceeding should be able to utilise the evidence recorded in his favour in the previous proceeding as evidence in the subsequent proceeding, while the adverse party should be denied of the same right of using the same statements favourable to him which went against the party producing the witness in the previous proceeding.

In *Dal Bahadur Singh's* case (supra), the Judicial Committee of the Privy Council, while considering the first proviso and the main part of Section 33, held that mere opportunity to cross-examine is not sufficient. There must also be right to do so. In that case, the question of the application of the second proviso was not in issue. Therefore, the ratio therein renders little assistance.

The Division Bench of the Rajasthan High Court has, according to us, rightly considered in *Poonamchand's* case (supra) the effect of the second proviso and held that the adverse party in the previous proceedings would be referable to the party against whom the evidence was adduced and had right and opportunity to cross-examine the witness, and did cross-examine the witness. The Division Bench of the Calcutta High Court and the Single Judge of the Madras High Court have not considered the effect of the second proviso in proper perspective in the above noted cases. Sarkar on Evidence (14th Edn.) at page 656 states in this behalf that "adverse party in the first proceeding is used to distinguish that party from the party who calls the witness". A party calling a witness does not become an "adverse party" because that witness's evidence is hostile to him. The proviso obviously projects the right of the "adverse party in the first proceeding" and not the right of the person who produces and examines the witness.

We, therefore, hold that the appellant is an adverse party in the first proceeding and he had the right and opportunity to cross-examine Kurian who was examined as P.W.1 in the previous proceeding by the respondents; and the evidence becomes admissible since Kurian died pending proceed-

A ing. Its acceptability is a matter to be considered by the trial court but at this stage it is not proper for us to go into that aspect of the matter.

The appeal is accordingly allowed. The Judgment of the High Court is reversed and the order of the trial Judge is set aside. The trial Judge is directed to mark the evidence of Kurian examined in the previous proceeding as P.W.1 on behalf of the appellant and proceed with the matter in accordance with law. No costs.

T.N.A.

Appeal allowed.