

183 of 28
13-11-03 ✓
27-4-05 ✓
8-2-24-06 ✓

Judicial (1895) Department.

ORDINARY MS.

G.O., No. 995

Dated 13th May 1895

INDEXED.

[Despatch Abstract.]

REGISTRATION.

Communicating to the Inspector-General of Registration the Advocate-General's opinion on certain points relating to the examination of gosha ladies in connection with documents executed by them.

BACK PAPERS.

G.O.	No.	Department.	Date.	G.O.	No.	Department.	Date.

FURTHER PAPERS.

G.O.	No.	Department.	Date.	G.O.	No.	Department.	Date.
	1968		96				

In the Court of the Subordinate Judge of South Malabar at Calicut

Friday, the third day of February one thousand eight hundred and eighty eight.

Present E. K. Krishnan Esqre B.L. Sub Judge
Appeal Suits Nos 767 and 768 of 1887.

In N. 767

Davidimakkana Kath Mami
Kutti Musaliar —

} Appellants
(Plaintiff)

Kasali Musaliarakam alias
Palakath Umaya Umah and
another —

} Respts
(1st and 2nd
Depts)

In N. 768.

Kasali Musaliarakam alias
Palakath Umaya Umah —

} Appellant
(1st Dept)

Davidimakkana Kath Mami Kutti
Musaliar and 2 others —

} Respts
Plff and
2nd and 3rd Depts

Appeals against the Decree of the Court of the District Munsif of Kuttanad in Original Suit N. 1 of 1887.

These appeals coming on for hearing the Court delivered the following:—

judgment. The Plaintiff alleged that his wife, Palayadath Mami Kath of Ponany, died in ^{Sept/Oct 1886} 1062, leaving behind her as heirs himself, her second husband, the 1st Defendant, daughter by a previous husband, 2. Defendant

mother, and the 3^d Defendant, a minor son
by himself (Plaintiff) and possessed of
6 items of real property described in A Schedule
and 16 items of moveables described in B
Schedule and valued at Rs 377-4-4. He
stated that the value of items 1, 2 and 3
described in C Schedule would cover his
1/4 share and he accordingly sought to
recover them in right of that share with
mesne profits at 34 varahs of haddy and
8 Rupees a year. The Plaintiff also prayed
that a deed of sale purporting to have been
executed by the deceased to the 1st Defendant
might be set aside, as it was not really
executed by her, she having been in an
unconscious state at its date.

2. The 1st Defendant contended that
the deceased left only moveables of the
value of 52 Rs; that they were in Plaintiff's
possession, and that deceased sold her
interest in the plaint real property
to her for 1000 Rupees under a deed dated
12 October 1886.

The 2^d Defendant supported
the 1st Defendant and stated that she
was not in possession of any property.

The 3^d Defendant by a guardian
appointed by court supported the
plaint.

The Munsif held that the
Plaintiff failed to prove moveables
of the value as claimed by the Plaintiff,
but found that the moveables
existed only of the value asserted by
the 1st Defendant and that she was
in possession of them and that she should

pay Plaintiff Rupees 13 as her share of
them. As regards the real property in suit
he held that the sale set up by the 1st Defen-
dant was only supported by considera-
tion, to the extent of Rupees 432-1-2. He
accordingly decreed that the Plaintiff
do recover his share on payment of
Rupees 108-3-0 due to the 1st Defendant
as her share of the lien. He awarded
mesne profit as claimed in the plaint.

6. The Plaintiff has appealed under
N^o 767 of 1887 urging that he was entitled
to recover a share in moveables as prayed
for in the plaint and that the alleged
sale to the 1st Defendant was false and
not supported by any consideration.

7. The 1st Defendant has appealed
under N^o 768 of 1887 urging that the sale
was valid as a whole, that no moveables
existed and that the mesne profit
claimed was excessive.

8. The points for determination are

- (1) How much moveables did deceased leave?
- (2) Who is in possession of them?
- (3) Is the sale deed void in part or whole?

9. The deceased belonged to a respect-
able Mohan family at Ponam. She
was the daughter of a wealthy man.
Plaintiff's witness, P. Kumbhamod
Kutti, swears that she had the following
jewels and utensils - a gold hair
ornament, another hair ornament
known as 'Puramam' a pair of gold
bangles, a gold neck ornament
accompanying a large earthen vessel.

and spittoons, kindi and a lamp and that there were of the value of between 200 and 300 Rupees. I do not see why the evidence of this witness should not be believed. The Plaintiff examined as 2^d Defendant's 2^d witness, also swears that his wife did own moveables of the value of 200 Rupees. That the deceased owned moveables of some value may be inferred from the Defendant's plea that all that she owned were taken by the Plaintiff. That this statement was improbable, because the Plaintiff was only visiting the deceased at her house and did not take her to his own house. The evidence of the defence, 4th witness, and of the 1st Defendant herself, that on the very day the deceased died, her jewels were handed to the Plaintiff was discredited, as it deserved to be, by the lower court. My finding on the 1st and 2^d issues accordingly is that the deceased did own moveables of the value of 200 Rupees and that they are with the 1st and 2^d Defendants.

10. Exhibit I purports to have been executed on the 12th October 1886. It was undoubtedly registered on that day by the Sub. Registrar going to the house. That officer was examined as Plaintiff's 1st witness. He says he never knew the executant, that it was presented for registration at her house that he cannot say to which house he was taken, - document was produced

3
to him at 5 1/2 P.M. that he did not remember seeing Plaintiff there, that he never saw Mami Kutti Umah (executant) that she was a Gosha woman, that another woman presented the document for him that he afterwards heard that Mami Kutti Umah was ill and died 3 or 4 days afterwards that Mami Kutti Umah never spoke to him face to face that she spoke from inside the house that he made enquiry about her of witness Kumbi Seedi and others, that he did not remember whether he heard of her illness the same day or afterwards and that there was a protest afterwards by the Plaintiff. I find that the Sub. Registrar, Kulu Kair, has not strictly complied with the provisions of section 38 of Act III of 1877, which provides that if the executant is a person exempt from personal appearance (which was Mami Kutti's privilege, if she was a Gosha woman) he shall examine the person at her house or issue a commission for examination. Here admittedly there was no face to face examination, which, I believe, is meant by the law.

11. The identifying woman has not been examined by the defence. Witness Seedi Koya was examined, but he is an interested person being the brother of the 1st Defendant's husband. That the Gosha privilege was a mere pretence is also evident from the deceased having personally presented

the late Sub Registrar of Ponnany. Plaintiff's 3^d witness, Patari Patarakutti swears that the woman was delirious and unconscious six days before her death. Making some allowance for exaggeration on this witness' part, I find that there is no satisfactory evidence to prove that the document was really executed by the deceased, when she was in possession of her faculties or enough of them to know what she was doing. The validity of the sale, supposing it was really executed by the deceased is open to the greatest doubt. Malayan law which governed the parties, lays down the following rules: A person affected with mental disease cannot sell; (Mac Naughten 179) a death bed sale to an heir is not valid unless assented to by the other heirs (Mac Naughten 177)

12. Going to the consideration also, I think it cannot be supported. It sets out that the consideration mentioned viz 1000 Rupees was made up of 4 items (1) 300 Rupees due by the deceased to the 1st Defendant as her share of the Kuttathil paramba, which she had sold to a third party in 1880. (2) 300 Rupees said to have been borrowed by her from 1st Defendant. (3) 200 Rupees value of the 1st Defendant's jewels said to have been sold away by her and (4) 200 Rupees said to have been paid in ready cash by the 1st Defendant. The evidence on this point appears to me

not entitled to belief. The Kuttathil paramba was no doubt sold in portions under Exhibits II and XI dated 3^d April and 23^d November 1880 for Rupees 95 and 300 Rupees respectively. That was 7 years ago. There is not a scintilla of evidence to prove that the sales were not bona fide and not required for the maintenance of herself and her minor children who were living under her protection. The Plaintiff takes for granted that the deceased had no right to sell the property as guardian of minor children. Of course the recital in the concocted document I that there was a debt due on account of these sales is not entitled to any weight.

13. No doubt, Exhibit V shows that the property allotted to the share of the deceased Krami Kutti and ^{her} 2 daughters viz 1st Defendant and Koldija, from the deceased Shrayan Kutti, husband of the one and father of the other was made over to the former, because the daughters were minors but it is not to be assumed that she was mismanaging their interest. I think no reliance can be placed on the bare statement of defence 1st and 2^d witnesses, who speak that the account between deceased and 1st Defendant was examined and 1st Defendant was examined two months previous to her death that on such examination she was found indebted to her in a sum of 1000 Rupees.

and that a sum of 1200 Rupees thereout was relinquished to her and that for the balance 800 Rupees and 200 Rupees paid in cash, the deed I was executed.

14. I therefore set aside Exhibit I altogether and give Plaintiff a decree for his $\frac{1}{4}$ share in immovables of the value of Rupees 200 and in every item of the immovable property in suit with mesne profits at 34 parabs of paddy and Rupees 8 per annum. The Plaintiff's prayer to recover a few items as equivalent of his share in all the several items cannot be allowed. In result, appeal 767 is allowed with costs through-out and appeal 768 is dismissed with costs.

(Signed) E. K. Krishnan
Subordinate Judge.

(True copy)
(22) E. K. Krishnan
Subordinate Judge.

To The District Registrar
Madras

(True copy)

Srinivasa Raghavaiyengar
Inspector General of Regn

200-27-7-94.

REGISTRATION DEPARTMENT.

No. 882

From

THE HON'BLE S. SRINIVASA RAGHAVAIYANGAR,

DEWAN BAHADUR, C.I.E.,

INSPECTOR-GENERAL OF REGISTRATION,

Madras,

To

The Honorable J. F. Price, C. L. I

CHIEF SECRETARY TO GOVERNMENT,

Fort St. George.

Dated Pattambi, 8th April 1895.

SIR,

I have the honor to request that the opinion of the Advocate General may be obtained on the following points for the guidance of the officers of the Registration department.

2. In the case of a document executed by a gosha lady, who declines to appear at the registration office, it was the practice of the registering officer to either himself go to the house of the lady and examine her as to whether she admitted execution of the document or to issue a commission for her examination under Section 38 of the Indian Registration Act. The commission was generally issued to a clerk of the office.

3. When the gosha lady examined at her private residence declined to appear before the registering officer, or before the Commission

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The practice under A.O. dated 5 October 1865, No: 1431, judicial, was to examine the lady, who might be behind a purdah or a door or a wall or in a room, through the medium of a Hammamnee (or woman usually employed to identify such ladies) and to register the document, if the lady admitted execution. The registering officer wrote the necessary endorsement of admission of execution on the document; the Hammamnee took the endorsement to the gosha lady, who then affixed her mark or signature; and the document was returned to the registering officer through the woman. The signature of the Hammamnee was usually taken in the endorsement as an identifying witness. The registering officer did not therefore see the gosha lady, or examine her personally, or see her sign the endorsement of admission of execution on the document. The same procedure was adopted by the Commissioner sent to the gosha lady's residence to take her admission, when the registering officer did not attend personally.

4. This practice continued till 1888, when the Registrar of Calicut forwarded a judgment of the Sub. Court of Calicut in appeals Nos: 767 and 768 of 1887 (Copy enclosed), from which, it will be seen, that the sub. judge was

was of opinion that the procedure adopted in examining gosha ladies through the medium of Hammamnees was wrong and that the registering officer or the Commissioner, as the case may be, should examine these ladies personally and not through Hammamnees, and that the examination contemplated under Section 38 should be a "face to face" examination.

5. To satisfy the requirements of the law, as explained in the judgment, Mr. Hammett directed that, when gosha ladies declined to appear before the registering officer, the Commission should be issued to the Hammamnee as well as to a clerk. Under these instructions, the Hammamnee examines the lady, and the clerk acts as her amanuensis, and the endorsement made on the document under registration Rule No: 37 is signed by both the Commissioners. This practice has been in force during the past few years.

6. The Hammamnee, however, being generally illiterate and unacquainted with the registration law and rules, it is found inconvenient to treat her as a Commissioner, and it seems proper to confine her functions to identifying the gosha lady, if this can be done

done consistently with the requirements of law.

7. The points, therefore, on which the opinion of the Advocate-General is desired, are:-

(1) Is the examination referred to in Sections 33 and 38 necessarily a "face to face" examination as held by the Sub-judge? If so, should the gosha lady be required to appear before the registering officer or the Commissioner, as the case may be? If not, can the registering officer or the Commissioner take the admission of the gosha lady, when she is behind a purdah completely concealed from their view?

(2) Should the gosha lady make the admission in the hearing of the registering officer or the Commissioner, or is it sufficient, if the lady makes the admission to the Hammamnee and the latter communicates it to the officer or Commissioner above referred to?

(3) When a gosha lady attends at a registration office in a closed palkee, but declines to appear in public, can her admission be taken with the help of Hammamnee. This course seems to be permitted by the decision (Nasib Banoo v. Mahomed Hassan 18 W. R. 230.)

8. To prevent fraud it is necessary that clear instructions should be issued to registering officers on the above points, as the procedure adopted in connection with documents executed by gosha ladies is not uniform at present.

I have the honor to be,

Sir,

Your most obedient servant

Shamsher Nafis Khan
Insp. Genl. of Regn.

Sm M

Judicial (1895) Department
"Registration"

From *McNaghen's motion*

The Inspector General
of Registration,
Madras,

CHIEF SECRETARY
10 APR. 1895
GOVERNMENT OF MADRAS

To The Chief Secretary
to Government,
Fort St. George

Dated 8th April 1895
Des^d
Received 10th
J. No. 882

Enclosure - One.
No.

Requesting that the Advocate
General's opinion may be obtained
on certain points relating to
the examination of gasha
ladies in connection with
documents executed by them.

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Record office for paper
CRV
11/4

Cover

5/10/95 1895 11431

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Endorsement N^o 923.

Referred to the Advocate
General for favor of opinion.
(By order)

25/4/95
Colonel Davidson
25-4
Ag. Under Secretary
Cotacamund
27th April 1895
The Govt. Solicitor.

MR
24-4-95

TO BE RETURNED
WITH FILE.

Judicial (1895) Department

From Ernest Barclay
Government Solicitor
Madras

To The Chief Secretary
to Government
Cotacamund

CHIEF SECRETARY
-3 MAY. 1895
GOVERNMENT OF MADRAS
No 272

Dated 2nd May 1895
Rec^d 3rd
Reg^d 4th } do

Enclos^d 2
C/O 18/10/95
Sui: 24/5

Forwarded with enclosures
with reference to the Order
of Government dated 27
April 1895. N^o 923. *Indra*
Ernest Barclay
Government Solicitor

75
11/5

C/O

HKH

C/O 1870 + 2226/95

Order 13 May 1895, N^o 995.
Mis

The Advocate General's
opinion will be communicated to the
Inspector General of Registration.

11/5/95

DEPT. OF REGISTRATION
The Secy. of Regⁿ. of Govt. of Madras
A. 2226/95

MR
7-5-95
20/6/95

Re the examination of Ghosha ladies under the Indian Registration Act, 1877.

OPINION.

1. To say that Section 38 of the Registration Act requires a "face to face" examination is to introduce words not employed by the Legislature, and to frustrate the object of the Section so far as "persons exempt by law from personal appearance in Court" are concerned. The protection of the purdah is acknowledged by the Legislature in the fullest possible manner^(a) and by the Courts even when the purdah lady does not claim exemption under Section 640 of the Code of Civil Procedure^(b). It is absurd to suppose that the Legislature intended to make an exception when the registration of a document is to be effected. The Registrar, or the Commissioner appointed by him, can no more demand the withdrawal of the purdah than can the Judges of the Civil Courts, or the Commissioners appointed by them. The Judge, the Commissioner, or the Registrar, as the case may be, must be satisfied that the purdah lady whose evidence is required is the one actually examined, and must himself hear what she says. The usual course is for some one who knows the lady, to whom she is not "ghosha", to see and identify her. The purdah witness is then affirmed and must give her evidence direct and in the usual way, though concealed from view.^(c)

2. My answer to the questions put is as follows:

The examination referred to in Sections 33 and 38 of the Indian Registration Act, 1877, is not a "face to face" examination in the case of a purdah lady if by the phrase "face to face" is meant that the Registrar or Commissioner is to see the face of such lady. Her evidence or admission may be given from behind a purdah or screen or partially closed door, or from within a closed palkee, or any other form of concealment, but she must give her evidence or make her admission direct to the Registrar or Commissioner who must record what she says - not what some body else says she says - except of course in the case of a sworn Interpreter where the evidence or admission has to be recorded by [redacted] of the language spoken by [redacted] the [redacted]

(a) e.g. in the
Civil Pro Code
S. 640. Crim.
Pro. Code 548.

(b) R. v. Coroner of Calcutta
1 B.L.R.
S.N. page V-1.
See judgment
of Jackson J. in
Maharajah of
Burdwan v.
Srimati Para
Dasgupta
Dev. 1 B.L.R.
(F.B.) at p. 32
as to "appear-
ance".

(c)
Nusrat Bano
v. Mahomed
Sayed
18 W.R. 230

the purdah lady.

Madras.

1st May 1895.

(Signed) J H Spring Branson
Advocate General.

(True Copy)

Must Barclay

Government Solicitor.

When given for copying _____
When copied _____
When examined _____
When signed _____ } 189 .

READ AGAIN G.O., No. _____
189 , DATED _____

CURRENT No. _____

ENCLOSURES TO C. No. _____

ORDER OF GOVERNMENT A A A A A A A

LETTER OF GOVERNMENT.

STATEMENT WITH DITTO.

NOT FILED UP, BEING MEANT FOR DESPATCH
IN ORIGINAL.

N.B.--

A = Copy in full.
B = Not to be copied.
P = Copy abstract only.
Q = Copy heading only.