APPELLATE CIVIL.

Before Mr. Justice Mya Bu, and Mr. Justice Mosely.

HOAK SAING *v.* MAUNG E HLA AND OTHERS.*

1940
Jan. 18.

Evidence—Entry in School register—School not a Government School—Entry in public register by public servant—Entry in discharge of professional duty—Corroborative statements—Probative value of School entries as to age—Plea of minority—Burden of proof—Evidence Act, ss. 32 (2), 35, 157.

An entry in the register made by an employee of a school which is not a "Government School" is not one made in a public or official register by a public servant in the discharge of his official duty and does not come within the purview of s. 35 of the Evidence Act. It stands on the same footing as an entry made in books kept in the discharge of professional duty, or statements admissible in corroboration.

An entry as to the age of a pupil in a school register has but little probative value as a rule.

Mirza Mohammad v. *Safdar Mirza*, I.L.R. 14 Lah. 473, referred to.

The burden of proving minority is on the person who avers it in order to escape a contractual obligation.

Raja of Deo v. *Abdullah*, 45 I.A. 97, referred to.

Ba Han for the appellant.

Hay for the respondents.

MOSELY, J.—This is an appeal by one defendant (the second defendant, Hoak Saing), against a mortgage decree passed against him, his elder brother, Hoak Hlaing, and two sisters, Ma Kyin Kyo and Ma Kyin Hmi.

The suit was contested in the lower Court by the appellant on the ground of minority at the time of execution of the mortgage of the property in question, a mill. This mill had belonged to the appellant's father who died in 1934, leaving a widow, and the four children were the father's heirs and co-owners of this mill.

The trial Court found that the appellant Hoak Saing had been admitted to the benefits of the partnership; that Hoak Saing was a minor at the time of the

* Civil First Appeal No. 101 of 1939 from the judgment of the Assistant District Court of Pegu in Civil Regular No. 1 of 1939.

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execution of the mortgage,—January 13th 1937 ; that he and his brothers and sisters had taken part in the working of the mill; that the mortgage had been contracted for the purposes of that business ; and that the minor had not elected after reaching majority to give notice that he had become or had not become a partner in the firm.

This appeal may be decided on the question of minority. As to this, the trial Court at the beginning of its judgment, before discussing the evidence, said that the evidence given by the plaintiff, Maung E Hla, and his witnesses as to the age of the appellant, Hoak Saing, was not satisfactory but appeared to be fabricated with a view to meeting Hoak Saing's case. Subsequently the evidence on this point was not discussed at all, but the learned Judge relied on evidence which was ultimately derived from the admission register of the Pegu National High School at which Hoak Saing had been since 1929, as the Judge thought that there could be no presumption that a wrong age had been given with any ulterior motive.

It was sought to make the entry in the Register admissible under section 35 of the Evidence Act.

That provision of law reads as follows :

"An entry in any public or other official book, register or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record is kept, is itself a relevant fact."

As to the little probative value to be attached to such declarations of age of school pupils see *Mirza Mohammad Hassan* alias *Wazir Mirza* v. *Safdar Mirza and others* (1).

(1) (1932) I.L.R. 14 Lah. 473, 477.

The evidence as to the register was that of the present master of the School and the school clerk; who gave evidence for the plaintiff. The clerk, Maung Tun Hlaing (P.W. 14), spoke to a nomination roll for the High School Final Examination for 1933 (exhibit J), which contains many alterations; but we are really dealing with the admission register, which gave his date of birth as 5th September, 1920.

Maung Tun Hlaing in cross-examination by Hoak Saing said that Hoak Saing was brought by his father to the school, and that the date of birth in the register is as was given by the father, but he did not say that he was the person who entered it, or that he had any personal knowledge or recollection of this; and, indeed, it would have been hard for him to have remembered any more than that this sort of thing is in the usual course of events, unless, of course, he had been a friend or at least an acquaintance of the family. The master, Mr. E. G. Menon (P.W. 15), merely talked to exhibit J.

It has been overlooked, I consider, that the Pegu National High School is not a "Government School", and that any entry in its register made by an employee of the school is not one made in a public or official register by a "public servant" in the discharge of his official duty. For this purpose we may take the definition of "public servant" given in section 21, sub-section 9 of the Penal Code, "an officer in the service or pay of Government." It has been ruled several times,—what really needs no authority,—that a "school master" may be a "public servant." I need only instance *Latafat Husain* v. *Onkar Mal* (1), and *Maharaj Bhanudas Narayanboa Gozavi* v. *Krishnabai, wife of Chintaman Maharudra Deshpande and another* (2).

(1) A.I.R. (1935) Oudh 41. (2) (1926) I.L.R. 50 Bom. 716.

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But all these rulings do, and must, refer to the case of "masters" in a Government or State School.

Section 35 of the Evidence Act therefore does not cover entries in registers of this description, which stand on the same footing as any entry made in books kept in the discharge of professional duty [Section 32(2)], or statements admissible in corroboration (Section 157).

[Discussing the evidence his Lordship held that the appellant had not discharged the burden of proof as to his age and concluded as follows :]

Without laying any particular stress on the evidence for the plaintiffs, it must at least be admitted that it was as credible as the evidence for the defendant-appellant, and, as I have said, the burden of proving minority was on the defendant.

For these reasons this appeal must fail and be dismissed with *ad valorem* costs.

MYA BU, J.—I agree. The learned trial Judge appears to have overlooked the fact that the burden of proof as to the appellant's minority lay on the appellant : *Raja of Deo* v. *Abdullah and others* (1).

In the present case, as pointed out by my learned brother, there is no *prima facie* evidence of the appellant's minority and, therefore, it does not matter in the least whether the evidence adduced by the plaintiffs on the point is sufficient to show that the appellant was a major at the time of the execution of the mortgage deed.

(1) (1918) 45 I.A. 97, 101.