PETITIONER:
KALIDINDI VENKATA SUBBARAJU & ORS.

Vs.

RESPONDENT:
CHINTALAPATI SUBBARAJU & ORS.

DATE OF JUDGMENT:
21/11/1967

BENCH:
SHELAT, J.M.
BENCH:
SHELAT, J.M.
SHAH, J.C.
SIKRI, S.M.

CITATION:
1968 AIR 947 1968 SCR (2) 292
CITATOR INFO :
R 1983 SC 684 (141)

ACT:
Indian Evidence Act (1 of 1872), ss. 32(5) and (6), 65 and 90-Statement as to age in will--If relevant--Scope of the words 'Before the question in issue was raised'-Copy of will admitted as secondary evidence--Due execution of original will proved--If contents of copy could be relied on--Presumption under s. 90--If could be drawn with respect to copy.
Will-On whom burden of proving due execution lies-Discrepancy between body and schedule-Effect of.
Birth register-Original not produced Endorsement relating to absence of entries-Writer of endorsement not examined-If endorsement admissible in evidence.

HEADNOTE:
A Hindu died bequeathing all his properties to his mother absolutely by a will executed three days before his death. In the will he stated his age to he 19 years, and that he was thereby disposing of his entire properly, movable and immovable, in favour of his mother. After his death, the nearest reversioner under the law as it then stood, filed a suit for a declaration that the will was not valid because it was executed by the testator when he was a minor and when he was not in a sound disposing state of mind. The mother of the testator (legatee) contened the suit and asserted in her written statement that when he executed the will the testator was a major and was in a sound disposing state of mind. The suit was compromised By the compromise, the reversioner admitted that testator when he executed the will was a major and was in a sound disposing state of mind, that the will was valid and genuine, and the testalor's properties were divided between the reversioner and the legatee There was a decree in terms of the compromise. Thereafter, the reversioner and the legatee conducted themselves as the absolute owners of their respective shares of the property. The legatee executed settlement deeds in favour of her daughters with respect to part of the land received by her under the decree. The daughters took passion of the properties

accepting their mother as their absolute owner. After the death of the legatee, the appellants. who were the sons of those daughters obtained a deed of surrender from their mothers accepting the legatee as the absolute owner of the properties. They then filed a suit against the respondents. who were the descendants of the reversioner who filed the first suit contending that the compromise decree in the first suit was collusive. that the testator was not a major nor of sound disposing state of mind when he executed the will, that the will did not. cover all the properties of the testator and that the appellants were in any event entitled to those properties with respect to which there was an intestacy. as the sisters sons of the last male holder under the Hindu Law of Inheritance (Amendment) Act of 1929. The respondents contested the suit and case notice to the appellants to produce the original will alleging that it was in the posses-

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sion of the appellants, but the appellants denied the allegation, and the respondents, thereupon, relied upon a certified copy of the wilt produced from the records of the court filed in the first suit.

The trial court dismissed the suit and the High Court confirmed the dismissal in appeal.

In appeal to this Court, it was contended inter alia: (1) that the burden of proof that the will was validly executed by the testator and that he was a major at the time of executing it was upon the respondents ,red that they failed to discharge that burden; and (2) that there was an intestacy with respect to a portion of the land and that the appellants were entitled to it.

HELD:(1) (a) As the lower Courts held that the appellants deliberately withheld the original will, its certified copy could be admitted as secondary evidence of its contents under 8. 65 of the Evidence Act, 1872. But the High Court was not justified in presuming under s. 90 of the Evidence Act, that the will itself was duly executed and attested. merely because the copy was more than thirty years old and was produced from proper custody. Such a presumption arises only in respect of the original document and not with respect to a copy. [297 H; 298 A, C. D, F]

Harihar Prasad v. Must. of Mttnshi Nath Prasad, [1956] S.C.R.1. followed.

Munnalal v. Krishobai, A.I.R. 1947 P.C. 15 and Basant Singh v. Bnj Pad, 62 I.A. 180, referred to.

But, apart from the presumption. on the oral evidence adduced and from the conduct of the legatee, the High Court was justified, in concluding that the testator executed the will and was at that time in a sound disposing state of mind and in construing the contents of the will as disclosed by the certified copy and holding that it was natural and rational. [298 G; 299 C, F--G]

Setthava v. Somayajulu, 56 I.A. 146, applied.

(b) The respondents who relied on the will had discharged the onus which lay on them, namely, of proving that the testator was a major at the time he executed the will. [299 G--H]

The statement of the mother of the testator in the written statement of the earlier suit that the testator was a major was not relevant either under s. 32(5) or 32(6) of the Evidence Act, because, it was made post litm motam. The words in the sub-,section, namely, 'before The question in issue was raised' do not mean before it was raised in the particular litigation in which such a statement is sought to be adduced in evidence. They mean

before the existence of any actual controversy. When the legatee flied her written statement in the first suit a dispute had arisen as to the age of the testator, and the controversy having existed time when the statement was made; the statement was inadmissible. 1303 B--D, F--H]

Bahadur Singh v, Mohan Singh, 29 I.A. 1 and Kalka Prasad v. Mathura Prasad, 35 I.A. 166, referred to.

But, the statement of the testator in the will that he was a major at the time he was executing it was relevant under the sub-sections because.

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the question of age fails within the sub-sections as it indicates the commencement of relationship. [303 A]

Md. Syedol Arffin v. Yeohooi Gark, 43 I.A. 256, Rama Chandra Dutt v. Yogeshwar Narain Dec, I.L.R. 20 Cal. 758, Oriental Govt. Security Life Assurance Co. Ltd. v. Narisimha Chari, I.L.R. 25 Mad. 183, Gulab Tharkur v. Fadali (1922) 68 I.C. 566, Prolhad Chandra v. Ramsaran, A.I.R. 1924 Cal. 420, and Mst. Naima Khatun v. Basant Singh, A.I.R. 1934 All. 406 referred.

Further the conduct of the appellants and their mothers was consistent only with the fact that it was understood amongst the members of the family that the testator was a major at the time of the execution of the will and that the will was validly made. [303 H; 304 A--D]

The documents relied upon by the appellants, namely, a memorandum and an endorsement received from the Taluk Office showing that there were no entires relating to the birth of any children in the testators family in the birth register for the year in which the testator stated he was born, were not admissible in evidence as the writers of the documents were not examined to testify to the contents of those documents and to establish that notwithstanding their diligent efforts the original register was not traceable. [301 B--D]

(2) In face of the expressly declared intention in the body of the will that he was disposing of the entire property it is impossible to hold that the testator desired to hold back a portion thereof from his mother and leave it intestate. merely became, there was discrepancy between the total measurement mentioned in the body of the will and that in the schedule to the will. [304 H; 305 A]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 129 of 1965.

Appeal by special leave from the judgment and decree dated August 24, 1962 of the Andhra Pradesh High Court in Appeal No. 419 of 1958.

S.T. Desai, M.S.K. Sastri and M.S. Narasimhan, for the appellants.

H.R.Gokhale and R. Ganapathy lyer, for respondents Nos. to4.

The Judgment of the Court was delivered by

Shelat, J.This appeal by special leave is directed against the judgment and decree of the High Court of Andhra Pradesh confirming the dismissal by the trial Court of the suit filed by appellants 1 and 2.

The pedigree set out below clarifies the relationship between the parties :--

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Chintalapati Venkatapatiraju

Somaraj Sitharamaraju
(Plaintiff in O.S. 21/23)

Pullamraju (died 19-12-1913)widow Surayamma (died 22-10-50)

Daughter died in infancy) Subbay- yamma (died) Venkay-Somaraju yamma (died 29-3-21) Son (said to have been born and died' 11-8-56) in infancy). Radhyamma (died 6-4-27)

Kalidindi Subbaraju(1st Plaintiff) Venkata Kali- dindi Gopala Raju (2nd Plaintiff) Pinnamaraju Prabhakara Lakshmipatiraju 6th Defendant)

Venkatapati Raju Subbaraju- (1 st Defendant) Venkayamma Rajayamma Suryamma

Rangamma Sitaramaraju (2nd Defendant) Venkatapatiraju (3rd Defendant) Vijayasubbaraju (4th Defendant)

Pullamraju died leaving him surviving his undivided Somaraju, his widow Surayamma and three daughters. Somaraju died on March 29, 1921 whereupon the said Surayamma claimed that he had left a will dated March 26, 1921 whereunder all the properties had been bequeathed to her absolutely. Sitaramaraju the uncle of Pullamraju filed Suit No. 21 of 1923 for a declaration that Somaraju's will was not valid as he had executed it when he was a minor and was not in a sound disposing state of mind.

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Surayamma in her written statement filed in that Suit contended that Somaraju was a major having been born on January 7. 1903 and was in a sound disposing state of mind when he executed the said will. The suit ended in a compromise decree by which Sitartmaraju admitted that Somaraju was a major when he died, that he was in a sound disposing state of mind and that the will therefore was genuine and valid. Under the compromise decree he received 26 out of about 57 acres of land and the rest of the property was retained by Surayamma. Thereafter Surayamma conducted herself as the absolute owner of the properties which came to her under the said decree. By two deeds, dated March 30, 1925 she settled part of the land received by her under the said decree in favour of her two daughters the mothers of plaintiffs 1 and 2 and defendant 6 respectively. The said properties have since been possessed of and enjoyed first by the said two daughters and later by plaintiffs 1 and 2 and defendant 6. On November 3. 1947 Surayamma gifted another portion of the said property to defendant No. 6. Surayamma died on October 22, 1950. Plaintiffs and 2 and defendant 6 (the present appellants) thereafter obtained a deed of surrender from their mothers and filed the suit out of which this appeal arises, contending that they were the nearest reversioners of Somaraju, being the sons of his sisters; that the said compromise decree was collusive. that the said Somaraju did not execute the said will that even if he did he was not a major nor of sound disposing state of mind when he executed it and that therefore the said will was not valid. By a subsequent amendment of the plaint they also contended that some of/he lands left by Somaraju were not disposed of under the said will that there was consequently intestacy in respect thereof which in any event they as reversioners were entitled to claim. The respondents resisted the suit contending that the said will was valid, that the said

compromise decree was binding on the appellants and that they having accepted and enjoyed the said properties settled upon their mothers by Surayamma, they were estopped from challenging the will or the said decree. They also denied that any of the properties left by Somaraju remained undisposed of by the said will or that there resulted any intestacy regarding them or that on such intestacy the appellants became entitled thereto. The trial Court held that Somaraju did execute the will that the original will was with the appellants and was suppressed by them, that therefore its certified copy produced from the records of the court was admissible, that the' said will was valid as Somaraju was a major and in a sound disposing state of mind when he executed it, that the said decree was by way of a family arrangement in settlement of bona fide disputes. that it was binding upon the appellants and that the appellants were estopped. from disputing the will or the said decree. The trial Court also repelled the contention that Somaraju left any property undisposed of under the said will or
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that the appellants became entitled thereto upon an intestacy. In appeal against the said judgment the High Court confirmed the dismissal of the suit by the trial Court. The High Court also confirmed the trial Court's conclusion that the certified copy of the said will was admissible as secondary evidence thereof and that Somaraju was a major and in a sound disposing state of mind when he executed the said will. The High Court also confirmed the trial Court's conclusion that the said decree was binding on the appellants and that 'the appellants and their respective mothers having accepted and enjoyed the properties settled upon them by Surayamma were estopped from disputing either the will or the said decree.

Mr. S.T. Desai for the appellants raised the following contentions :--

(1) that the burden of proof that the will was validly executed by Somaraju and that he was a major at the time of executing it was upon the respondents and that they failed to discharge that burden; (2) that the conclusion of the High Court and the trial Court that he was 19 years of age at the time he executed the will was not justified; (3) that the High Court erred in holding that extracts from the birth and death Registers produced by the appellants were not public documents within the meaning of s. 35 of the Evidence Act and therefore not admissible; (4) that the High Court erred in holding that even if the will was not proved to have been validly executed, the said compromise decree was binding on the appellants and estopped them from challenging the validity of the will or the said decree; (5) that the appellants did not claim through the said Venkamma but under the Hindu Law of Inheritance (Amendment) Act 2 of 1929 and therefore there was no question of the compromise decree being binding on them or their being estopped from disputing 'the will or the said decree; and (6) that in any event, Somaraju did not dispose of land admeasuring about A 15.14. that there was therefore intestacy in regard to it and the appellants as reversioners ought to have been held entitled to it.

As aforesaid, the respondents did not produce the original will but produced only its certified copy, Ex. B. 9; which they obtained from the record of Suit No. 21 of 1923 wherein Surayamma had filed the original will along with her written statement. The respondents, however, had given notice to the appellants to produce the original will alleging that it was in their possession but the appellants

denied the allegation and failed to produce the will. Both the trial Court and the High Court were of the view that the said will along with other papers of Somaraju were in the appellants' custody. that they had deliberately withheld it as it was in their interest not to produce it. The trial Court therefore was
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in these circumstances justified in admitting the certified copy of the will as secondary evidence of the contents of the will. Since the will was executed in 1921 and the testator had died soon after its execution it was not possible to produce either its writer or the witnesses who attested it. It was undisputed that its scribe and the attesting witnesses were all dead except Dalapati Venkatapathi Raju, D.W. 4. But the appellants' contention as regards D.W.4 was that he was not the same person who attested the will. The High Court appears to have relied upon s. 90 of the Evidence Act and to have drawn the presumption that the will being more than 30 years old it was duly executed and attested by the persons by whom it purported to have been executed and attested. Such a presumption, however, under that section arises in respect of an original document. (See Munnalal v. Krishibai)(1). Where a certified copy of a document is produced the correct position is as stated in Bassant Singh v. Brij Rai(2) where the Privy Council laid down that if the document produced is a copy admitted under s. 65 as secondary evidence and it is produced from proper custody and is over 30 years old only the signatures authenticating the copy can be presumed to be genuine. The production of a copy therefore does not warrant the presumption of due execution of the original document. The Privy Council repelled the argument that where a copy of a will has been admitted the Court is entitled to presume the genuineness of such will which purports to be 30 years old. Relying on the words "where any document purporting or proved to be 30 years old" in s. 90, the Privy Council held that the production which entitles the Court to draw the presumption as to execution and attestation is of the original and not its copy and that the decisions of the High Courts of Calcutta and Allahabad on which the argument was based were not correctly decided. This view has since then been approved of by this Court in Harihar Prasad v. Must. of Munshi Nath Prasad(3). The High Court therefore was not entitled to presume from the production of the copy either the execution or the attestation of the said will.

But, apart from such presumption there was evidence from which the High Court could conclude that 'the will was duly executed by Somaraju and attested by the witnesses who appear to have affixed their signatures thereto. There was, firstly, the fact of Surayamma having produced the will soon after its execution in Suit No. 21 of 1923. Secondly, there was evidence of her having based her claim to Somaraju's property in the said suit by virtue of and under 'the said will. Thirdly, there was the evidence of conduct of Surayamma in' dealing with the property as an absolute owner basing her claim under the said wilt. Fourthly.

(1) A.I.R. 1947 P.C. 15.
(2) 62 I.A. 180.
(3) [1956] S.C.R. 1, 19.
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there were the three settlement deeds executed by her in favour of her daughters and lastly the fact of the terms of the said will being natural and rational, consistent with Somaraju's anxiety that in the absence of any male heir to

him the properties should go to his mother to enable her 'to make due provision for his three sisters instead of dying intestate and the properties thereon going to the said Sitaramaraju and his heirs under the law as it then stood. There was next the evidence of D.W. 4 testifying to the execution of the wilt by Somaraju and to his having attested the original will along with other witnesses. His evidence also was that Somaraju was then in a sound disposing state of mind. Both the trial Court and the High Court accepted the evidence of D.W. 4 as of the person who along with others had attested the will. There was thus ample evidence from which the High Court could conclude and in our view rightly that Somaraju executed the said will and was at the time in a sound disposing state of mind. The effect of the certified copy of the will having been thus rightly admitted was as if the contents of the will were before the Court and the Court could proceed to construe those contents. We are supported in this conclusion by authority. In Setthaya v. Somayalulu(1) the original grant which was 250 years old was lost but a copy of it was produced from the respondents' custody. It bore the following endorsement of the predecessors of the respondents: 'Originals have been retained by us and copies have been filed, 1858'. The Privy Council held that the copy was properly admitted under s. 65 and 90 of the Evidence Act as secondary evidence of the terms of the grant and that the statement and the said endorsement authenticating the copy were evidence as a statement by a deceased person in a document relating to a relevant fact and also as an admission of the respondents' predecessors. The Privy Council also held that the copy being admissible as secondary evidence of the terms of the original grant the Court could proceed upon the footing that the terms of the said grant were before it and could therefore consider them. The High Court was therefore quite competent in construing the contents of the said will and in holding that the terms of the said will were 'natural and rational and proved that Somaraju was fin a sound disposing state of mind.

The question, however, still remains whether Somaraju was a major at that time. The onus of proof that he was then a major and could competently execute it was on the respondents who relied on the will (See Ganaprakasam v. Paraskthy)(2). The appellants' case was that Somaraju was born in 1905 and not in 1903 as alleged by the respondents. The admitted position was that all the children of Pullamraju were born in the village Isukapalli. The parties in support of their rival contentions produced

(1) 56 1.A,146.

(2) A.I.R. 1941 Mad. 179.

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both oral and documentary evidence. Apart from the certified copy of the will and Suryamma's written statement in Suit No. 21 of 1923, 4 other documents Exs. A4, A5, A9 and B24 were filed in the trial Court. B24 produced by the respondents was an extract from the 'birth register of Isukapalli. Exs. A4 and A5 produced by the appellants were respectively an extract from the birth register of Isukapalli and an extract from the death register relating to Somaraju's death. Ex. A9 also produced by the appellants was a reply to them from the department concerned that there was no entry in regard to Somaraju's birth in the birth register of 1903 of Isukapalli. Curiously the registers of births and deaths of IsUkapalli village for 1903 and 1905 were available in 1955 but in 1957 when the trial Court called for these registers it was informed that those

registers could not be traced. The result was that the only evidence before the Court consisted of certified copies of extracts, Exs. A4 and A5, from those registers and the said letter Ex. A9. Ex. B24, it appears, was motheaten overwritten and tampered with at some places with ink different from the original ink in which the rest of the document was written. Both the trial Court and the High Court were agreed that it could not therefore be considered as furnishing evidence of Sornaraju's date of birth. Ex. A4 was an extract of birth register for the year 1905. The appellants' contention was that this extract furnished evidence that Somaraju was born in 1905. It was said to have been obtained by Surayamma in 1941 as she intended to file some suit which she ultimately did not. Assuming that Ex A. 4 was admissible under s. 35 of the Evidence Act, it could not assist the appellants as it only indicated at best that a son was born of Pullamraju in 1905. The case of the respondents. however was that another son besides Somaraju was born of Pullamraju after Somaraju's birth. In the absence of any evidence led by the appellants that A.4 related to Somaraju and no one else, the extract obviously could not establish that Somaraiu was born in 1905 and therefore was a minor in 1921. Ex.A. 5 showed that Somaraju died on March 29. 1921 but there was dispute as to the date of his death. There was no doubt reference in that extract that he died at the age of 16. But the High Court found that the figure '16' for his age was written in an ink different from that used for the others entries in the extract and that that figure was an interpolation made by someone subsequently. Both the trial Court and the High Court were in fact of the opinion that Exs. A4 and A.5 were not genuine. The High Court was further of the view that Ex.A.5 had been tampered with and therefore could not be relied upon. Exhibits B.24, A.4 and A.5 thus having been found to have been tampered with and therefore unreliable documents, it is not necessary for us to go, as the High Court did, into the question whether such extracts were admissible under s. 35 of the Evidence. Act or not.

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Besides these extracts, the appellants also produced Exs. A.8 and A.9 a memo issued by the Taluk office, Kakinada and an endorsement dated September 17, 1955 issued by the Head Clerk of the Taluk Office, Pithapuram respectively. The memo stated that there were no entries in the birth register of 1903 for Tanuwalla village relating to the birth of any of the children of Pullamraju. The endorsement stayed that an application for extract from the birth register for 1903 in respect of the birth of any of the children of Pullamraju was fried but as there were no such entries in the birth register for/sukapalli for 1903 the stamps sent by the applicants for the copy were returned. Neither the writer of Ex.A.8 nor of A.9 was examined to testify to the contents of 'the said memo and the said endorsement and to establish that notwithstanding their diligent efforts the original registers were not traceable. Exs. A.8 and A.9 could not be admitted in evidence without the formal proof of the entries and were rightly held inadmissible. We need not consider the rest of the documentary evidence viz.. Exs. A. 3 and A.7 produced by the appellants as neither of them was relied upon before us.

Both the parties, as aforesaid, led considerable oral evidence. However, except for the evidence of D.W. 4 both the trial Court as well as the High Court found that the oral evidence of these witnesses was speculative in character and therefore could not be said to have

established either of the rival contentions as to Somaraju's age. No reason has been shown that their assessment of this evidence was wrong. This being the position regarding the evidence led by the parties there remains only three pieces of evidence requiring consideration, viz., (1) the statement of Somaraju as to his age in the said will; (2) the statement of Surayamma in the said written statement and (3) the subsequent conduct of Surayamma, the mothers of the appellants and the appellants themselves.

The question canvassed both before the High Court and us was whether the statements made by Somaraju and Surayamma in the said will and in the said written statement respectively were admissible and could be used to establish that Somaraju was 19 years of age at the time when he executed the said will. Section 32(5) of the Evidence Act provides that :-

> "When the statement relates to the existence of any relationship 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"

Section 32(6) provides that

> "When the statement relates to the existence of any relationship by blood, marriage or adoption between

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> persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree or upon any tombstone, family portrait or other thing on which such statements are usually made".

Both the sub-sections require that such a statement can be admissible only if it was made before the question in dispute was raised.

It is clear from sub-s. 5 that if construed literally it is possible to contend that a statement regarding the age of the person concerned is not one relating to the existence of any relationship by blood or marriage or adoption. But such a literal construction is not a proper one as has been ruled in more than one decision. In Oriental Govt. Security Life Assurance Co. Ltd. v. Narasimha Chari(1). Bhashyam Ayyangar J. Following Rama Chandra Dutt v. Yogeshwar Narain Deo(2) held that statement as to the age of a member of a family made by his deceased sister is admissible under s. 32(5), the principle being that the time of one's birth relates to the commencement of one's relationship by blood and therefore a statement as to his age made by a person having special knowledge relates to the existence of such relationship. This observation was approved in Mohammed Syedol Ariffin v. Yeohooi Gark(3) where the Privy Council held that the question of age in such a case falls within s. 32(5) as it indicates the commencement of such relationship. In Gulab Thakur v. Fadali(4) a statement by a person made when he was 36 years of age that he was adopted when he was 4 years old was held admissible after his death prove the fact of his adoption as he possessed special knowledge about the relationship required by the section. It was also held that the fact that the person making the adoption died while 'the adopted was too young to remember him would not be material as the latter would be able to declare that he had been adopted from that acquaintance with the history of his

family which he would necessarily possess. Similarly, in Mst. Naima Khatun v. Basant Singh(5) the High Court of Allahabad following the decision in Ariffin v. Yeohooi Gatk(3) held that a statement as regards age is tantamount to a statement as to the existence of relationship. Therefore a statement by an adoptive mother as regards the age of the adopted boy, although it would not show her own relationship with him was admissible. In Pralhad Chandra v. Ramsaran(6), the Calcutta High Court held that a statement in the Guardianship application as to the date of birth is admissible if the person who had made it is dead and had special means of knowledge of the relationship. This being the position

(1) I.L.R. 25 Mad. 183. (2) I.L.R. 20 Cal. 758.
(3) 43 I.A. 256 (4) (1922) 68 I.C. 566.
(5) A.I.R. 1934 All. 496. (6) A.I.R. 1924 Cal. 420, 422.

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under s. 32(5) the statement made by Somaraju in his will that he was 19 years of age at the time of its execution was admissible and was rightly relied upon by both the trial Court and the High Court as establishing that Somaraju was a major and was competent to make the said will.

As regards the written statement of Surayamma the position of her declaration therein is somewhat different. Both sub-ss. 5 and 6 of s. 32, as aforesaid, declare that in order to be admissible the statement relied on must be made ante litem motam by persons who are dead, i.e., before the commencement of any controversy actual or legal upon the same point. The words "before the question in issue was raised" do not necessarily mean before it was raised in the particular litigation in which such a statement is sought to be adduced in evidence. The principle on which this restriction is based is succinctly stated in Halsbury's Laws of England, 3rd Ed. Vol. 15, p. 308 in these words:

> "To obviate bias the declarations are required to have been made ante litem motam which means not merely before the commencement of legal proceedings but before even the existence of any actual controversy concerning the subject matter of the declarations".

In Kalka Prasad v. Mathura Prasad(1) a dispute arose in 1896 on the death of one Parbati. In 1898 in a suit brought by one Sheo Sahai a pedigree was filed. After this, the suit from which the appeal went up to the Privy Council was instituted in 1901. It was held there that the pedigree filed in 1898 was not admissible having been made post litem motam. As a contrast there is the decision in Bahadur Singh v. Mohan Singh(2), where the Privy Council held certain statements made in 1847 to be admissible as the heirship of the then claimants was not then really in dispute. (See also Field on the Law of Evidence, 9th Ed. Vol. III, p. 1847).

There can be no controversy that when Surayamma filed her written statement a dispute had arisen as to the age of Somaraju inasmuch as Sitaramaraju the plaintiff in the said suit had alleged that Somaraju was a minor at the time he executed his will and Surayamma had in denial of that averment asserted that Somaraju was a major at the relevant time. The controversy therefore having existed at the time when the said statement was made it was inadmissible both under sub-section 5 and sub-section 6 and could not be availed of by the respondents.

As regards the subsequent conduct of the parties it is clear that both Sitaramaraju who was then the only

reversioner under the law as it stood prior to 1929 and the said Surayamma
(1) 35 I.A.166. (2) 29 I.A.1.
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conducted themselves on the footing that the said will was competently made and by virtue of that will Surayamma had become the absolute owner of the properties left by him. Similarly, the three daughters of Surayamma, the mothers of the appellants, and the appellants themselves accepted the statements made by Surayamma in favour of her daughters and took possession of and enjoyed the lands in suit. Neither the said daughters nor the appellants until the present suit was filed ever raised any contention regarding the validity of the said will. The authority of Surayamma to settle the said properties treating herself as the absolute owner of those properties was never challenged by the appellants. Such a conduct iS only consistent with the fact that it was understood amongst the members of the family that Somaraju was a major at the time of the execution of the will and the will was validly made. In our view there being the statement of Somaraju admissible under s. 32(5) coupled with 'the evidence of D.W. 4 as also the evidence as to the conduct of the parties before the Court there was ample evidence on which the trial Court and the High Court could rightly found their conclusion that the will was made at the time when Somaraju was a major. Such a conclusion was obviously fatal to the appellants' claim in the suit.

In view of our conclusion that the said will was competently made it is not necessary to go into Mr. Desai's contentions. Nos. 4 and 5. There remains therefore his contention No. 6 only for consideration.

The argument that Somaraju did not dispose of land admeasuring about 15 acres 14 cents by the said will and that there was a resultant intestacy is rounded upon the fact that in the Schedule to the said will out of Survey No. 5/1 which measured 18 acres 67 cents a portion only is set out and the Schedule does not set out Survey Nos. 5/5 and 5/12. The said will, however, in para 1 expressly states that the testator thereby was disposing of his entire property, movable and immovable, in favour of his mother. It also states that the total area of land possessed of by him was 60 acres 9 cents and that he was bequeathing to his mother the said entire area. The fact that the total area comprised of the several survey numbers mentioned in the Schedule do not aggregate 60 acres 9 cents appears to be the result of some mistake. It appears from the record that the survey numbers in vogue in 1902 were altered in/912. It is not possible to say what record was with Somaraju when he described the said land by its survey numbers in the said Schedule and whether he had at that time the old or the ,new record of the revised survey numbers. It is possible that if the revised record was not before him at that time a mistake in describing the land by its survey numbers might occur and that would explain the discrepancy between the total measurement mentioned in the body of the will and that in the Schedule.
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In face, however, of the expressly declared intention in the body of the will that he was disposing of the entire property including the land measuring 60 acres 9 cents it is impossible to hold that he desired to hold back a portion thereof from his mother and intended to leave it intestate. We do not therefore find any justification for interfering with the conclusion of the trial Court and the High Court that Somaraju disposed of the entire property. Consequently

we must reject Mr. Desai's contention.
The appeal is dismissed with costs.
V.P.S. Appeal dismissed.
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