

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.511 of 2005

Kose, S/o Shri Bandhna Uraon, aged about 66 years, R/o Village Khajuri, Tahsil Samri, (Kusumi), District Surguja (C.G.)

(Plaintiff)
---- Appellant

Versus

1. Jogi, S/o Late Shri Gudil Uraon, aged about 42 years;
2. Baleshwar, S/o Late Shri Gudil Uraon, aged about 39 years;
3. Jage, S/o Late Shri Gudil Uraon, aged about 36 years;
4. Gujuwa, S/o Late Shri Gudil, aged about 32 years;

All are R/o Village Khajuri, Tahsil Samri (Kusumi), District Surguja (C.G.)

5. State of Chhattisgarh, Through the Collector, Surguja, Ambikapur (C.G.)

(Defendants)
---- Respondents

For Appellant: Mr. Bhaskar Payasi, Advocate.

For Respondents No.1 to 4: -

Mr. Sunil Tripathi, Advocate.

For Respondent No.5 / State: -

Mr. Mateen Siddiqui, Deputy Advocate General.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

23/08/2019

1. The second appeal preferred by the plaintiff was admitted for hearing by formulating the following substantial question of law: -

“Whether the transfer by valid execution of gift-deed dated 11.7.1959 has been proved in this case?”

(Parties hereinafter will be referred as per their status shown and ranking given in the suit before the trial Court.)

2. The suit property was admittedly held by one Gudil Uraon. He

executed a registered gift deed dated 11-7-1959 in favour of Kose and Kandra in respect of his 3.83 acres of land situated at Village Khajuri, Tahsil Samri, District Surguja, now District Balrampur-Ramanujganj, which they accepted and came into possession of the suit land and partitioned between themselves in the year 1964 and their names were recorded in the revenue records on 18-5-1971. It is the case of the plaintiff that the defendants being the sons of original holder Gudil Uraon got their names recorded in the revenue records and tried to interfere with his possession which necessitated Kose – plaintiff to file civil suit for declaration of title and permanent injunction which was opposed by the defendants by filing written statement disputing the execution of registered gift deed in favour of the plaintiff and his brother.

3. During the course of trial, the original gift deed could not be brought on record, therefore, by the order of the trial Court dated 8-4-1996 by granting the application under Section 65 of the Evidence Act, 1872, the plaintiff was permitted to lead secondary evidence and accordingly, certified copy of the gift deed Ex.P-1C was produced and in order to prove the said certified copy of the gift deed, Assistant Grade-II Mani Shankar (PW-1) from the Office of the Tahsildar, Kusmi was examined to prove the gift deed and it was marked as Ex.P-1C during the course of trial without any demur or objection by the defendants.
4. Upon consideration of oral and documentary evidence on record, the trial Court by its judgment & decree dated 29-10-2004, decreed the suit of the plaintiff holding that the plaintiff has proved the execution of registered gift deed dated 11-7-1959 in his favour and

in favour of his brother Kandra and on the date of mutation in their name on 18-5-1971, Gudil Uraon was present, and the defendants are interfering with the possession of the plaintiff only.

5. Feeling aggrieved and dissatisfied with the judgment & decree of the trial Court, the defendants preferred first appeal under Section 96 of the CPC in which the first appellate Court by its impugned judgment & decree set aside the judgment & decree of the trial Court dismissing the suit by granting the appeal finding inter alia that the execution of gift deed has not been proved in accordance with law, particularly there was no reason for Gudil Uraon to gift the suit land in favour of his maternal uncles in presence of his sons against which this second appeal under Section 100 of the CPC has been preferred by the plaintiff in which substantial question of law has been formulated which has been set-out in the opening paragraph of this judgment.
6. Mr. Bhaskar Payashi, learned counsel appearing for the appellant herein / plaintiff, would submit that once the plaintiff / appellant has been permitted to lead secondary evidence by the trial Court by granting application under Section 65 of the Evidence Act, 1872, the defendants now, cannot turn around and question the admissibility of the gift deed Ex.P-1C, as no objection was taken at the time of admission of the gift deed. He would further submit that the said gift deed is a registered document and was validly executed and therefore it is valid in law and as such, the presumption would be that it was validly executed which the defendants have failed to establish its falsify by demonstrating that it is not valid in law. Thirdly, he would submit that the document

Ex.P-1C dated 11-7-1959 is a 30 years old document and though the original could not be produced, but certified copy was produced after granting the application under Section 65 of the Evidence Act, 1872, therefore, presumption under Section 90 of the Evidence Act, 1872, would be available to establish its due execution. As such, the impugned judgment & decree of the first appellate Court deserve to be set aside and that the trial Court deserve to be restored.

7. Mr. Sunil Tripathi, learned counsel appearing for the defendants / respondents No.1 to 4 herein, would submit that the first appellate Court is absolutely justified in dismissing the suit by granting the appeal holding that due execution of gift in favour of the plaintiff and his brother has not been established. He would further submit that the document Ex.P-1C is admittedly not the original gift deed and even though certified copy was produced, but it nowhere bears the signature of the original holder – Gudil Uraon nor it bears the signature of witnesses to gift deed who allegedly witnessed the execution of sale deed in favour of the plaintiff and his brother and therefore it has not been proved in accordance with law. He would also submit that there is no reason to get the names recorded by the plaintiff and his brother as late as on 18-5-1971, when the gift deed was allegedly made on 11-7-1959, it is a suspicious document and it confers no title to the plaintiff and as such, the second appeal deserves to be dismissed by affirming the judgment and decree of the first appellate Court.
8. I have heard learned counsel for the parties and considered their rival submissions made herein-above and went through the record

with utmost circumspection.

9. It is not in dispute that the property is held by Gudil Uraon. The plaintiff claims that Gudil Uraon out of his free will executed a registered gift deed dated 11-7-1959 in his favour and in favour of his brother Kandra in respect of the suit property which they partitioned between them in the year 1964 and got their names mutated on 18-5-1971 and the defendants being the sons of Gudil Uraon started interfering not to the share allotted to his brother, but only to the share allotted to him which persuaded him to institute a suit for declaration of title and permanent injunction as already mentioned. Since the original gift deed was not available, secondary evidence was permitted to be led on 8-4-1996 and certified copy was produced before the trial Court. In order to prove Ex.P-1, since both the witnesses to the gift deed namely Lalluram and Pulika were not available, one Assistant Grade-II Mani Shankar (PW-1) from the Office of the Tahsildar, Kusmi, where the gift deed was registered, was examined who has proved the registration of document. On cross-examination, he has stated that in Ex.P-1, there is no signature of the author of the document as well as that of the witnesses.
10. In view of the aforesaid, in order to ascertain the factual position, this Court has directed the competent officer to produce the original record of Ex.P-1C for inspection and in that behalf, a true copy of said document has been handed-over to this Court, which has been taken on record.
11. A careful perusal of the aforesaid document would show that from the original gift deed, handwritten copy has been prepared and it

has been compared with the original copy by the competent officer in which even it has been stated that thumb mark of original holder Gudil Uraon has been taken by the competent officer and it also states that there is thumb mark of the two witnesses Lalluram and Pulika. It appears that at the time when the gift deed was registered, there was no mechanism available with the said office to have either the carbon copy or the photocopy of instrument / document executed in accordance with law, but certified copy as well as copy kept which was produced for inspection clearly records that it was signed by original holder Gudil Uraon and it was signed by the two witnesses namely, Lalluram and Pulika in the said gift deed, which the trial Court has accepted. The said document Ex.P-1C was maintained in discharge of official duty. It was a registered document and in order to prove the registration, witness Mani Shankar (PW-1) was examined and he has proved the fact of registration.

12. The Supreme Court in the matter of **Prem Singh and others v. Birbal and others**¹ has clearly held that there is a presumption that a registered document is validly executed. A registered document, therefore, *prima facie* would be valid in law. The onus of proof, thus, would be on a person who leads evidence to rebut the presumption.

13. Likewise, recently, the principle of law laid down in **Prem Singh** (supra) has been followed with approval by Their Lordships of the Supreme Court in the matter of **Jamila Begum (Dead) Through Legal Representatives v. Shami Mohd. (Dead) Through Legal**

¹ (2006) 5 SCC 353

Representatives and another² in which it has been held as under:-

“16. Sale deed dated 21-12-1970 in favour of Jamila Begum is a registered document and the registration of the sale deed reinforces valid execution of the sale deed. A registered document carries with it a presumption that it was validly executed. It is for the party challenging the genuineness of the transaction to show that the transaction is not valid in law. In *Prem Singh v. Birbal*¹, it was held as under: (SCC pp. 360-61, para 27)

“27. There is a presumption that a registered document is validly executed. A registered document, therefore, *prima facie* would be valid in law. The onus of proof, thus, would be on a person who leads evidence to rebut the presumption. In the instant case, Respondent 1 has not been able to rebut the said presumption.”

The above judgment in *Prem Singh case*¹ has been referred to in *Vishwanath Bapurao Sabale v. Shalinibai Nagappa Sabale*³.

14. Not only this, the gift deed dated 11-7-1959 is a registered document and certified copy of the same has been produced and in that view of the matter, Section 90 of the Evidence Act, 1872 has been pressed into service.

15. The question would be, whether the presumption under Section 90 of the Evidence Act, 1872 would be available in case of certified copy of a thirty years old document?

16. It would be appropriate at this stage to notice Section 90 of the Evidence Act, 1872 which reads as follows: -

“90. Presumption as to documents thirty years old.
—Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was

² (2019) 2 SCC 727

³ (2009) 12 SCC 101

duly executed and attested by the persons by whom it purports to be executed and attested.

Explanation.—Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.

This *Explanation* applies also to Section 81.”

17. The object of Section 90 of the Evidence Act, 1872, is not to make it too difficult for persons relying upon ancient documents to utilise those documents in proving their case. It is intended to do away with the insuperable difficulty of proving the handwriting, execution, and attestation of documents in the ordinary way after the lapse of many years. When a document is or purports to be more than thirty years old, if it be produced from what the court considers to be proper custody, it may be presumed (a) that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and (b) that it was duly executed and attested by the person by whom it purports to be executed and attested. It is not necessary that the signatures of the attesting witnesses or of the scribe be proved, for if everything was proved there would be no need to presume anything.

18. In this regard, the decision of the Supreme Court in the matter of Lakhi Baruah and others v. Padma Kanta Kalita and others⁴ may be noticed herein profitably in which Their Lordships have held that presumption under Section 90 of the Evidence Act, 1872 does not apply to a copy or a certified copy even though thirty years old; but if a foundation is laid for the admission of secondary evidence

⁴ (1996) 8 SCC 357

under Section 63 of the Evidence Act, 1872 by proof of loss or destruction of the original and the copy which is thirty years old is produced from proper custody, then only the signature authenticating the copy may under Section 90 be presumed to be genuine. Their Lordships while highlighting the object of Section 90 of the Evidence Act, 1872, held that it is based on the principle of necessity and convenience and observed as under: -

“15. Section 90 of the Evidence Act, 1872 is founded on necessity and convenience because it is extremely difficult and sometimes not possible to lead evidence to prove handwriting, signature or execution of old documents after lapse of thirty years. In order to obviate such difficulties or improbabilities to prove execution of an old document, Section 90 has been incorporated in the Evidence Act, 1872 which does away with the strict rule of proof of private documents. Presumption of genuineness may be raised if the documents in question is produced from proper custody. It is, however, the discretion of the court to accept the presumption flowing from Section 90. There is, however, no manner of doubt that judicial discretion under Section 90 should not be exercised arbitrarily and not being informed by reasons.

16. So far as applicability of presumption arising from Section 90 of the Evidence Act, 1872 in respect of copy of the old document is concerned, the earliest decision of the Indian Court was made in 1880 in *Khetter Chunder Mookerjee v. Khetter Paul Streeterutno*⁵. Later on, in the decisions of various High Courts the presumption under Section 90 was also made applicable to the certified copy. The Privy Council, upon review of the authorities, however, did not accept the decision rendered in *Khetter* and other decisions of the High Court, where the presumption was attached also to copies, as correct. It was indicated that in view of the clear language of Section 90 the production of the particular document would be necessary for applying the statutory presumption under Section 90. If the document produced was a copy admitted under Section 65 as secondary evidence and it was produced from proper custody and was over thirty years old, then the signature authenticating the copy might be presumed to be genuine; but production of the copy was not sufficient to justify the presumption of due execution of the original under Section 90. In this connection, reference may be

5 ILR (1879-1880) 5 Cal 886 : 6 CLR 199

made to the decisions in *Seethayya v. Subramanya Somayajulu*⁶ and *Basant Singh v. Brij Raj Saran Singh*⁷. In view of these Privy Council decisions, disproving the applicability of presumption under Section 90 to the copy or the certified copy of an old document, in the subsequent decisions of the High Courts, it has been consistently held by different High Courts that production of a copy or a certified copy does not raise the presumption under Section 90.

17. The position since the aforesaid Privy Council decisions being followed by later decisions of different High Courts, is that presumption under Section 90 does not apply to a copy or a certified copy even though thirty years old; but if a foundation is laid for the admission of secondary evidence under Section 63 of the Evidence Act, 1872 by proof of loss or destruction of the original and the copy which is thirty years old is produced from proper custody, then only the signature authenticating the copy may under Section 90 be presumed to be genuine.”

19. As such, in the instant case, the certified copy was produced from proper custody and the plaintiff was permitted to lead secondary evidence by order dated 8-4-1996 by the trial Court and thereafter, the document was marked as exhibit without demur or objection and it has been proved by examining the officer from the Office of Tahsildar, Kusmi where the gift deed was registered. It is the submission of Mr. Sunil Tripathi, learned counsel appearing for the defendants / respondents No.1 to 4 herein, that such a document is not admissible in evidence and it has no evidentiary value.

20. The Supreme Court in the matter of Dayamathi Bai (Smt) v. K.M. Shaffi⁸, where the certified copy of the sale deed was admitted without any objection by the other side, Their Lordships have held that where a party gives certified copy in evidence and it was not objected by the other side to be marked as an exhibit and admitted in evidence, it cannot be questioned on the ground that the

6 LR (1928-29) 56 IA 146 : AIR 1929 PC 115

7 AIR 1935 PC 132 : 1935 All LJ 847 : 39 CWN 1057 : 62 IA 180

8 (2004) 7 SCC 107

foundation of secondary evidence has not been laid properly. It was observed as under: -

“14. To the same effect is the judgment of the Privy Council in the case of *Gopal Das v. Thakurji*⁹ in which it has been held that when the objection to the mode of proof is not taken, the party cannot lie by until the case comes before a court of appeal and then complain for the first time of the mode of proof. That when the objection to be taken is not that the document is in itself inadmissible but that the mode of proof was irregular, it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record. Similarly, in *Sarkar on Evidence*, 15th Edn., p. 1084, it has been stated that where copies of the documents are admitted without objection in the trial court, no objection to their admissibility can be taken afterwards in the court of appeal. When a party gives in evidence a certified copy, without proving the circumstances entitling him to give secondary evidence, objection must be taken at the time of admission and such objection will not be allowed at a later stage.”

21. Reverting finally to the facts of the present case, it is quite vivid that the gift deed was a registered document executed by Gudil Uraon in favour of the plaintiff and his brother way back on 11-7-1959 and secondary evidence was allowed to be led and certified copy of the said deed was produced. The defendants have failed to adduce any evidence contradicting the gift deed being a registered document and as such, in line with the decisions rendered by the Supreme Court in Prem Singh (supra) and Jamila Begum (supra), it will be presumed to be validly executed and the defendants have failed to rebut the said presumption and the said presumption would also be available under Section 90 of the Evidence Act, 1872, as certified copy was produced after granting permission to lead secondary evidence under Section 65 of the Evidence Act, 1872. Therefore, as held by the Supreme Court in Lakhi Baruah

9 AIR 1943 PC 83 : 47 CWN 607

(supra), the signature authenticating the copy may under Section 90 be presumed to be genuine, as such, the trial Court has rightly held that gift deed was duly executed by original holder in favour of plaintiff-Koshe and his brother Kandra and they are title-holder, which was disturbed by the first appellate Court by recording a finding, which is not only perverse to the record but also contrary to the record, which is liable to be set aside. The substantial question of law is answered accordingly.

22. In view of the aforesaid analysis, I am unable to uphold the judgment & decree of the first appellate Court and it is accordingly set-aside restoring the judgment & decree of the trial Court.

23. The appeal is allowed to the extent indicated herein-above. No order as cost(s).

24. A decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge