

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**SA No. 476 of 2007**

1. Kalim Beg S/o Late Karim Beg Aged About 34 Years R/o Village Saraipali, Tahsil- Saraipali, District- Mahasamund, Chhattisgarh.
2. (Deleted) Phul Bai (Dead) As Per Court Order Dt. 05- 09-2017.

---- Appellants/Defendants**Versus**

1. Mehboob Hussain @ Mehboob Hussain (Dead) Throught Lrs., As Per Court Order Dt. 03-05-2019.
 - 1.1 - (A) Md. Hussain S/o Yaseen Aged About 70 Years R/o Bazarpara Saraipali Police Station And Tehsil Saraipali District Mahasamund Chhattisgarh.
 - 1.2 - (B) Mathlub Hussain S/o Yaseen Aged About 65 Years R/o Bazarpara Saraipali Police Station And Tehsil Saraipali District Mahasamund,Chhattisgarh.
 - 1.3 - (C) Musstaq Hussain S/o Yaseen Aged About 60 Years R/o Bazarpara Saraipali Police Station And Tehsil Saraipali District Mahasamund, Chhattisgarh.

--- Plaintiff

2. State Of Chattisgarh Through Collector, Mahasamund, Distt Mahasamund, Chhattisgarh.

--- Respondents

For Appellants	:	Mr. S.N. Nande, Advocate
For Respondent No. 1	:	None
For State	:	Mr. Arun Shukla, Government Advocate

Hon'ble Shri Justice Sanjay K. Agrawal**Order On Board****12.07.2019**

1. The substantial question of law involved, formulated and to be answered in this defendant's second appeal states as under:

“Whether the Courts below were justified in restraining the appellants from alienation of the land without any proof of title in favour of respondent No. 1 on the ground that originally the land was held by

predecessor-in-title of the appellants ?”

(For the sake of convenience, parties would be referred hereinafter as per their status and ranking shown in the suit before the trial Court.)

2. The plaintiff – Mehboob Hussain filed bare suit for permanent injunction stating *inter alia* that he has purchased the suit land on 06/06/1959 from the father of defendant No. 1 namely Karim Beg by way of a registered sale deed and came into possession of the suit land, but defendants No. 1 & 2 got their names mutated after the death of the original seller i.e. Karim Beg, which gave him the cause of action to file the civil suit praying that permanent injunction be granted in his favour. The defendants No. 1 & 2 filed their written statement stating that they are the owners of the suit land after the death of their father/husband and denied the plaint allegation that the said suit land was sold to the plaintiff by their deceased father/husband.
3. Learned trial Court vide its judgment dated 22/11/2003 decreed the suit in favour of the plaintiff holding that the father of defendant No. 1 i.e. Karim Beg had sold the suit property to the plaintiff, which made him the owner of the suit land and not the defendants, which was affirmed by the first appellate Court in the civil appeal preferred by the defendants No. 1 & 2, vide judgment and decree dated 28/06/2007, against which this second appeal has been preferred by them in which substantial question of law framed for determination has been set out in the opening paragraph of this judgment.
4. Mr. S.N. Nande, learned counsel for defendants No. 1 & 2 submits that both the Courts below are absolutely unjustified in granting decree for permanent injunction in favour of the plaintiff by holding that the plaintiff has proved that he has purchased the suit land from

defendant No. 1's father himself i.e. Karim Beg by way of registered sale deed dated 06/06/1959, when the suit property was not sold and the sale deed is neither original nor certified copy was produced before the trial Court, and therefore, presumption under Section 90 of the Indian Evidence Act, 1872 (hereinafter "the Act") was not available to the plaintiff and both the Courts below have committed illegality in granting decree in favour of the plaintiff.

5. None appears for the respondents/plaintiff, even though notice has been served.
6. I have heard learned counsel for the defendants, considered his submissions and went through the records with utmost circumspection.
7. It is a case of the plaintiff that he purchased the suit land from the father of defendant No. 1 i.e. Karim Beg, by way of registered sale deed dated 06/06/1959, but that sale deed was neither produced in original, nor its certified copy was produced and thus, no permission for adducing secondary evidence under Section 65 of the Act was granted to the plaintiff. Yet, the trial Court has drawn presumption under Section 90 of the Act holding that the sale deed is a 30 years old document.
8. The Supreme Court, in the matter of **Lakhi Baruah Vs. Padma Kanta Kalita**¹ has clearly held that presumption of genuineness of a 30 year old document may be raised if the document in question is produced from proper custody.

"15. Section 90 of the Evidence Act 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

¹ AIR 1996 SC 1253

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, 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.”

Thereafter, their Lordships have also held that presumption under Section 90 of the Act does not apply to the certified copy and held as under :-

“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 65 of the Evidence Act 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.”

9. Reverting back to the facts of the case in light of principle of law enunciated in the above-stated judgment, it is quite vivid that neither the original sale deed was produced from the proper custody by the plaintiff nor foundation was laid for adducing secondary evidence by submitting the certified copy of the sale deed dated 06/06/1959, therefore, any presumption of genuineness under Section 90 of the

Act could not have been drawn by the trial Court, merely on the basis that the sale deed is a thirty years old document. It is a case where Section 90 of the Act is not at all attracted in view of the non-production of the original sale deed from proper custody by the plaintiff nor foundation was laid for adducing secondary evidence under Section 65 of the Act. Apart from this, there is no other evidence on record to hold that the plaintiff has, in any way, acquired title over the suit land.

10. As such, the finding recorded by both the Courts below that the plaintiff is the title-holder of the suit land, which he purchased from father of defendant No. 1 i.e. Karim Beg, is a finding which is perverse and contrary to record. Accordingly, the judgment and decree passed by the trial Court, as affirmed by the first appellate Court, are hereby set aside and the plaintiff's suit is dismissed accordingly. The plaintiff will bear his own cost as well as the cost of defendant No. 1.

11. A decree be drawn up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge