

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.207 of 2002Judgment reserved on: 10-7-2019Judgment delivered on: 26-7-2019

1. Mohammad Ayyub Khan, aged about 43 years, S/o Late Shri Mohammad Ishhaque Khan, R/o Ramaiya Ward, Motitalabpara, Jagdalpur, Distt. Bastar (C.G.)
 2. Mohammad Mahboob Khan, aged about 41 years, S/o Late Shri Mohd. Ishhaque Khan, Agricultural Development Officer, Soil Testing Laboratory, Bilaspur.
 3. i. Yusuf Beg, aged about 60 years,
 ii. Ku. Rehana Begum, aged about 30 years, D/o Shri Yusuf Beg, R/o Bijapur, Tah. Bijapur, District Dantewada.
 iii. Yunus Beg, aged about 28 years, S/o Shri Yusuf Beg.
 iv. Ku. Rajiya Begum, aged about 23 years, D/o Shri Yusuf Beg.
 v. Shakir Beg, aged about 16 years, S/o Shri Yusuf Beg, through Guardian Father Shri Yusuf Beg.
- 3 (i) to (v) all R/o Ramaiya Ward, Jagdalpur, District Bastar (C.G.)
 (Defendants)
 ---- Appellants

Versus

1. Mohammad Yakub Khan, aged about 53 years, S/o Late Shri Mohammad Ishhaque Khan, Teacher, R/o Ramaiya Ward, Motitalabpara, Jagdalpur, District Bastar (C.G.)
 (Plaintiff)
2. Smt. Julekha Khatoon, aged about 45 years, W/o Shri Mohd. Yakoob, R/o Bijapur, Tah. Bijapur, Distt. Dantewada.
 (Defendant No.4)
3. State of Chhattisgarh, through Collector, Bastar, Jagdalpur.
 (Defendant No.6)
 ---- Respondents

For Appellants:	Mr. P.K.C. Tiwary, Senior Advocate with Mr. Ashutosh Trivedi, Advocate.
For Respondent No.1:	Mr. Vikas A. Shrivastava, Advocate.
For Respondent No.3 / State: -	Miss Shivali Dubey, Panel Lawyer.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Judgment

1. This appeal was admitted for hearing on the following substantial questions of law : -

“(i) Whether both the Courts below were justified in holding that gift deed Ex.P-1 executed on 14/12/1950 was valid?

(ii) Whether Courts below were justified in holding that suit was not barred by limitation?”

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

2. The suit land originally belonged to Mullaji Mulayam Khan who died in the year 1954 and before death, it is the case of the plaintiff that he had executed a registered gift deed dated 14-12-1950 (Ex.P-1) in his favour during his minority which was accepted by his father Mohd. Ishhaque Khan who died in the year 1964 and it is the further case of the plaintiff that he became major in the year 1982 and came to know about the execution of above-stated gift deed by his grand-father in his favour. It is further alleged that from the suit land shown in Schedule A of the plaint, he was dispossessed by defendants No.1 to 5 in May, 1993 and thereafter, they are in illegal possession of Khasra No.46/18, area 2.12 acres, for which he is entitled for decree of recovery of possession and in Schedule B land, he is in joint possession with defendants No.1 to 5 and entitled for decree of partition.
3. In the said suit, the defendants who are the plaintiff's father's brothers namely Mohd. Ayub & Mohd. Mahboob Khan, plaintiff's father's sisters – Hamida Begum & Julekha Khatoon set up the plea

of their title and denied the title of the plaintiff over the suit land and denied any kind of gift deed in favour of the plaintiff by Late Mullaji Mulayam Khan and set up a plea that Mullaji Mulayam Khan on the date of execution of gift deed dated 14-12-1950, was aged about 100 years and therefore physically incapable of executing a gift deed in favour of the plaintiff and also set up the plea of limitation.

4. The trial Court after appreciating oral and documentary evidence on record negatived both the pleas and held that the registered gift deed dated 14-12-1950 (Ex.P-1) was produced from proper custody of the plaintiff, its genuineness can be presumed under Section 90 of the Indian Evidence Act, 1872 and also held that the suit is apparently within the period of limitation and thereby decreed the suit to which the first appellate Court on an appeal taken by the defendants while agreeing with the findings of the trial Court dismissed the first appeal resulting into this second appeal in which two substantial questions of law have been framed and catalogued in the opening paragraph of the judgment.
5. Mr. P.K.C. Tiwary, learned Senior Counsel appearing for the appellants / defendants, would submit that both the Courts below are absolutely unjustified in holding that Late Mullaji Mulayam Khan executed gift deed dated 14-12-1950 (Ex.P-1) in favour of the plaintiff, it is a suspicious and fabricated document. He would further submit that the suit was apparently barred by limitation, as the plaintiff became major on 17-3-1967 and he ought to have filed suit within three years from that date up till 19-3-1970, as such, both the findings deserve to be set aside and the suit be dismissed.
6. On the other hand, Mr. Vikas A. Shrivastava, learned counsel

appearing for the plaintiff / respondent No.1 would support the impugned judgment & decree and would submit that both the Courts below are absolutely justified in holding the gift deed Ex.P-1 as a valid document and the suit was filed within the period of limitation, as such, the second appeal deserves to be dismissed.

7. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the records with utmost circumspection.
8. The gift deed was executed by Late Shri Mullaji Malayam Khan on 14-12-1950 (Ex.P-1) in favour of the plaintiff and it was said to have been accepted by his father Mohd. Ishhaque Khan, as on the date of executing the gift deed, the plaintiff was apparently minor and he was not competent to accept the gift deed. The trial Court and the first appellate Court principally accepted the document Ex.P-1 on the ground that the defendants have failed to plead and lead evidence that the executor of the gift – Mullaji Mulayam Khan on the date of executing the gift was mentally and physically incapable of executing the gift deed, raising presumption available under Section 90 of the Indian Evidence Act, 1872 that the document being thirty years old is produced from proper custody and therefore he is the title holder of the property shown in Schedule A of the plaint on the basis of said gift deed.
9. It would be appropriate at this stage to notice Section 90 of the Indian 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 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.”

10. The object of Section 90 of the Indian Evidence Act, 1872, is not to make it too difficult for persons relying upon ancient documents to utilize 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.

11. The Supreme Court also in the matter of Lakhi Baruah and others v. Padma Kanta Kalita and others¹ while highlighting the object of Section 90 of the Indian Evidence Act, 1872, held that it is based on the principle of necessity and convenience and observed as

¹ (1996) 8 SCC 357

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.”

12. Reverting to the facts of the present case, the two Courts have found that the document Ex.P-1 – gift deed executed by Mullaji Mulayam Khan in favour of the plaintiff is produced from proper custody in original and there is nothing on record to hold it otherwise and came to the conclusion that presumption under Section 90 of the Indian Evidence Act, 1872 can be raised. This Court is also of the opinion that where more than 30 year old document, bearing signature of the executant and not looking *ex facie* suspicious was produced by the grand-son of the executant at the first instance, the custody being proper, presumption could be drawn in favour of the document Ex.P-1. The trial Court and the first appellate Court have not committed any illegality warranting any interference in exercise of jurisdiction of this Court under Section 90 of the Indian Evidence Act, 1872, as such the document is a valid document and both the Courts have rightly held so and the finding in this regard is hereby affirmed.

13. Coming to the next question of limitation, both the Courts after

appreciating oral and documentary evidence have come to a specific conclusion that the suit filed by the plaintiff is not barred by limitation, particularly with regard to the land mentioned in Schedule B of the plaint. It is the case of the plaintiff that it is the joint family property and the plaintiff and the defendants, both, are in joint possession and as such, the plaintiff is entitled for decree of partition and possession. A co-owner is deemed to be in possession of the joint family property on behalf of all the co-owners. Both the Courts below have rightly concluded that the suit is within limitation. Even otherwise, the question of limitation is a mixed question of law and fact and the finding recorded is a pure and simple finding of fact based on the evidence available on record. I do not find any perversity or illegality in the said finding.

14. The substantial questions of law are answered accordingly.
15. As a fallout and consequence of the aforesaid discussion, the appeal deserves to be and is accordingly dismissed. The defendants will bear the cost(s) of the plaintiff also apart from bearing their own cost(s).
16. Decree be drawn up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge