

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.8931 OF 2016
(Smt.Saheb Bi w/o Shaikh Jani and others Vs. Shaikh Azam s/o
Shaikh Mehmood and others)

Mr.A.D.Kasliwal, Advocate for the petitioners.
Mr.C.V.Korhalkar, Advocate for respondent No.1.
Mr.S.V.Adwant, Advocate for respondent Nos. 4 to 10.

(CORAM : Ravindra V.Ghuge, J.)

DATE : 27/02/2019

PER COURT :

1. The petitioners / plaintiffs are aggrieved by the order dated 06/08/2016 passed by the Trial Court, by which, the Trial Court has rejected their application Exh.133 in RCS No.716/2011, and has refused to refer a purported 30 years old document to a forensic laboratory to test the age of the ink.

2. This matter was heard extensively on 25/02/2019 and again today.

3. Issue is that a document dated 30/06/1984, said to be a '*hibanama kee-yadaasht*', is produced by defendant No.4 alongwith his affidavit in lieu of examination in chief. This document is

believed by defendant No.4 to be more than 30 years old. The petitioners/ plaintiffs brand the said document as being forged and fabricated. The said document was exhibited by the Trial Court by an order dated 20/07/2016 passed below Exh.124 on the basis of the presumption available u/s 90 of the Indian Evidence Act, 1872, keeping in view that it was referred to in the written statement of the said defendant and the original was produced.

4. After hearing this matter on 25/02/2019, I brought it to the notice of the plaintiffs that the onus and burden of proving the document would rest on the shoulders of defendant No.4, who has relied upon the said document and has referred to that document in his written statement. Learned Advocate for the plaintiffs requested for an adjournment and hence the matter was posted today. In the course of his submissions today, he points out that he would not have pursued this litigation, but for the fact that the Trial Court has already based the exhibiting of the said document on Section 90. He, therefore, submits that his task is rendered difficult as the Trial Court has already drawn a presumption.

5. The learned Advocates appearing on behalf of respondent No.1 and 4 to 10 have strenuously opposed this petition on the ground

that, if Exhibit 133 is a vague and ambiguous application, filed without ascertaining as to whether any facility with any forensic lab is available in India to test the age of the ink appearing on the document, the said application ought not to be entertained and has been rightly rejected.

6. Despite the vehement submissions of the said Advocates, I find that, firstly, Section 90 does not contemplate a presumption to be drawn mechanically that a document is 30 years old and therefore the handwriting, contents and the signatures appearing on the document, be deemed to be proved.

7. Section 90 reads as under :-

"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."*

8. In my view, if a document, said to be 30 years old, is produced

before the Court, it has to be proved to be of that age. The litigant who produces such a document, would have to lead evidence to firstly prove that the document is 30 years old. Secondly, granting of an exhibit number to a document would not lead to a presumption that the contents of the document have been proved.

9. In Lakhi Baruah and others Vs. Padma Kanta Kalita and others [(1996)8 SCC 357], the Hon'ble Supreme Court has concluded that a presumption as regards the age of a document u/s 90 would not apply to a copy or a certified copy, even though 30 years old. If the foundation is laid for the admission of secondary evidence u/s 63 of the Evidence Act, 1872, by proof of loss or destruction of the original and the copy which is 30 years old is produced from proper custody, then only the signature authenticating the copy may, under Section 90, be presumed to be genuine. It is the discretion of the Court to refuse to give such presumption in favour of a party, if otherwise, there is an occasion to doubt the due execution of the document in question. When the plaintiffs' defence against the certified copy produced by the defendants was that the deed of sale was a forged and fabricated document, the production of the original copy was necessary so that the question of due execution by the plaintiffs could have been contested by the parties.

10. It was held in paragraph Nos. 15 and 16 as under :-

“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 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 be exercised arbitrarily and not being informed by reasons.

16. So far as applicability of presumption arising from Section 90 of the Evidence Act in respect of copy of the old document is concerned, the earliest decision of the Indian Court was made in 1880 in Khetter v. Khetter Paul :ILR 5 Cal 886. Later on. In the decision 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 to the original under Section 90. In this connection, reference may be made to the decisions in Seetnayya v. Subramanya 56 IA 146 : AIR 1929 PC 1.15 and Basant v. Brijraj . In view of these Privy Council decision, 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.”

11. In Khetter Chunder Mookerjee Vs. Khetter Paul Sreeterutno, ILR (1879-80) 5 Cal 886, a decision was delivered in 1880 concerning the applicability of presumption arising from Section 90 of the Evidence Act, 1872. The Privy Council did not accept the decision rendered in Khetter (supra) and concluded in Seethayya Vs.Subramanya Somayajulu LR (1928-29) 56 IA 146 AIR 1929 PC 115 and in Basant Singh Vs. Brij Raj Saran Singh [AIR 1935 PC 132], that the applicability of presumption u/s 90 to the certified

copy of an old document cannot be approved.

12. In Om Prakash (Dead) through his legal representatives Vs. Shanti Devi and others [(2015)5 SCC 601], the Hon'ble Apex Court (3 Judges Bench), concluded that the 30 years period is to be reckoned backwards, not from the date upon which the deed is filed in Court, but from the date on which it was tendered in evidence/exhibited, since its genuineness or otherwise becomes the province of proof for the first time. The document should be produced at the earliest so that it is not looked upon with suspicion in so far as its authenticity is concerned because even if the document is purported or is proved to be 30 years old, a person claiming benefit of Section 90 would not axiomatically receive a favourable presumption u/s 90 as this would be subject to the scheme u/s 68, 69 and 90 of the Evidence Act r/w Section 34, 17 and 47 to 50 of the Registration Act, 1908.

13. Notwithstanding the above, I find from the impugned order that the Trial Court has agreed that it would be appropriate to allow the reference of the original document to a handwriting expert or such an expert with whose assistance, the contention of forgery could be gone into. It is also observed that the plaintiffs would be entitled to a right of rebuttal to disprove the said documents. The Trial Court

took up the issue of availability of a forensic laboratory to undertake the examination of the age of the ink appearing on the said document. It then noted that if the plaintiffs had brought on record the existence of any such laboratory, the aspect of determining the age of the ink could have been gone into. It finally concluded that as there is no forensic standard method to determine the age of the ink, the application deserves to be rejected.

14. This Court dealt with a similar situation in the matter of **Vijaykumar Gulabchand Baldava Vs. Gautam Prakash Kulkarni** in WP No.10793/2015 decided on 28/11/2018. While dealing with the said case, an order passed at the Nagpur Bench on 08/02/2018 in the matter of **Vijay Achyut Ashtikar and another Vs. Vinayak s/o Achyut Ashtikar, WP No.6751/2016**, was brought to the notice of this Court. In the said order, the Nagpur Bench referred a particular document to the Neutron Activation Analysis, BABC, Mumbai for finding out the age of the ink. The judgment delivered by the Andhra Pradesh High Court in the matter of **Mr.Namineni Audi Seshiah Vs. Mr.Nuburu Mohan Rao, [2018(6) A.L.D. 751]** would also indicate that a similar order was passed referring the document to the Neutron Activation Analysis, BABC, Mumbai with a further

direction to the litigant, seeking such determination of the age of the ink, to deposit an amount of Rs.20,000/- with the said authority.

15. In view of the above, this petition is allowed. The impugned order dated 06/08/2016 is quashed and set aside. Application Exh.133 stands allowed with a further direction to the Trial Court to issue appropriate orders for referring the concerned document in a sealed envelope alongwith a copy of the order of this Court, to the Nutron Activation Analysis, BABC, Mumbai. The petitioners herein shall deposit an amount of Rs.20,000/- with the Trial Court and the said amount can be transmitted by the Trial Court to the said laboratory. Any alternative mode of making the payment by the petitioners directly to the said laboratory, would also be available. The Trial Court would indicate to the said laboratory that its' report should be delivered to the Trial Court in a sealed envelope and preferably within a period of 45 days from the date of the submission of the said document to the laboratory.

(Ravindra V.Ghuge, J.)