

IN THE HIGH COURT OF JUDICATURE OF BOMBAY  
BENCH AT AURANGABAD

WRIT PETITION NO.11898 OF 2018

Vikas s/o Ramrao Natu,  
Age-53 years, Occu-Agriculture,  
R/o Subashnagar, Kinwat,  
Tq.Kinwat, Dist.Nanded

-- PETITIONER

VERSUS

1. Vikas s/o Dogla Chavan,  
Age-39 years, Occu-Agriculturist,
2. Ulhas s/o Dogla Chavan,  
Age-42 years, Occu-Agriculturist,
3. Prakash s/o Dogla Chavan,  
Age-36 years, Occu-Agriculturist,
4. Smt.Subhabai w/o Dogla Chavan,  
Age-63 years, Occu-Hosuehold,

All r/o Bendi (Tanda), Tq.Kinwat,  
District Nanded.

-- RESPONDENTS

Mr.A.A.Mukhedkar, Advocate for the petitioner.  
Mr.R.R.Shaikh, Advocate for respondent Nos. 1 to 4.

( CORAM : Ravindra V.Ghuge, J.)

DATE : 07/03/2019

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard finally by the consent of the parties.

2. The petitioner/original plaintiff in RCS No.16/2010 is aggrieved by the order dated 10/04/2018 passed by the Trial Court below Exh.127 thereby refusing to exhibit an original sale deed which is said to be registered at Entry No.898 and which is dated 15/06/1982.

3. The contention of the petitioner is that he has referred to the said document in paragraph No.2 of his affidavit in lieu of his examination in chief. The said original document was produced on record alongwith the plaint. Once an original document with specific pleadings in the plaint or the written statement, as the case may be, is placed on record, such a document needs to be exhibited and granting an exhibit number would not mean that the contents of the document are proved.

4. Learned Advocate for the defendants strenuously submits that the Trial Court was right in recording its conclusions in the impugned order that the said document was not referred to in the examination-in-chief. The recording of oral evidence in the case had concluded and it is only at the stage of advancing final arguments that application Exh.127 was filed on 04/09/2017.

5. I have perused the examination in chief cited by the plaintiff

and especially paragraph No.2. The plaintiff has only mentioned that he has purchased the suit land from Dogla P. Ramdas Chavan by a registered sale deed on 15/06/1982 with Registration No.898. Even if this is presumed to be a passing reference made to the registered sale deed, I find that the requirements of the Evidence Act for proving the contents of a document have not been fulfilled by the plaintiff.

6. Learned Advocate for the plaintiff submits at this juncture that he would make an application to the Trial Court for permission to lead additional evidence so as to prove the contents of the said registered sale deed, Learned Advocate for the defendants submits that heavy costs deserve to be imposed if this request is to be accepted as the plaintiff has reacted at a belated stage. Such costs can be donated for the treatment of poor patients.

7. I have recently delivered a judgment on 27/02/2019 in the matter of Smt.Saheb Bi w/o Shaikh Jani and others Vs. Shaikh Azam s/o Shaikh Mehmood and others, WP No.8931/2016 wherein I have dealt with the deeming effect of Section 90 of the Evidence Act, by which the contents of a document, which is 30 years old, are presumed to be proved. I have concluded in the said judgment, by relying upon a pronouncement of the Hon'ble Apex Court, that such presumption has to be proved to be genuine and is not available

mechanically. It would be apposite to reproduce paragraph Nos.7 to 12 of the said judgment hereunder :-

“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."*

8. It is settled law that the endeavour of the Court should be to do complete justice and grant reasonable opportunities to the litigating sides to put forth their best evidence. On account of a lapse on the part of the legal representative preparing the affidavit in lieu of

examination-in-chief, should not affect the valuable right of the plaintiff or of any litigant, for that reason. The present plaintiff, therefore, should not suffer for the shortcomings which could be attributed to the drafting skill of the legal representative. At the same time, costs can be imposed to soften the rigours of litigation being suffered by the defendants in these circumstances.

9. In view of the above, this petition is partly allowed. The impugned order dated 10/04/2018 is quashed and set aside and Exh.127 is allowed to the extent of granting of an exhibit number to the original sale deed No.898.

10. Since I find that the said original sale deed is not proved in accordance with the Indian Evidence Act, liberty is granted to the plaintiff to move an application before the Trial Court, within 3 weeks from today, for leading additional evidence of the plaintiff alone. Though the right of rebuttal would be available to the defendants, they would be at liberty to pray for referring the said document to the Neutron Activation Analysis, BABC, Mumbai for testing the age of the ink and for the said purpose, the plaintiff would deposit the charges of the laboratory. Since the document is produced by the plaintiff, the Trial Court would be at liberty to refer to the judgment dated 27/02/2019 delivered by this Court in Smt.Saheb Bi (supra), for

assistance.

11, In view of the above, the petitioner shall deposit costs of Rs.8,000/- (Rs.Eight thousand only) before the Trial Court, on or before 01/04/2019 and deposit Rs.2,000/- with the Government Medical College and Hospital, Aurangabad, **through Medical Officer, High Court Dispensary, Aurangabad**, either in cash or by Demand Draft (Demand Draft be drawn in the name of “**Dean, Government Medical College and Hospital, Aurangabad Dengi Samiti**”) on or before the same date.

12. The defendants are permitted to withdraw the amount deposited in the Trial Court as costs in equal proportions, since the plaintiff is being granted the liberty to adduce his further evidence. It be noted that this amount has nothing to do with the amount to be paid by the plaintiff to the Forensic Laboratory, in the event the document is to be referred for analysis.

13. Rule is made absolute in the above terms.

( Ravindra V.Ghuge, J.)