

20.1.2023
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Ct. no. 652
sb

**CO 1060 of 2019
With
CAN 1 of 2019(Old CAN 8259 of 2019)**

**Baidyanath Santra & Ors.
Vs.
Gourhari Sanki & Ors.**

Mr. Biswaranjan Bhakat ...for the petitioners

Ms. Indrani Pal ...for the Opposite parties

Being aggrieved and dissatisfied with the order no. 272 dated 3.1.2019 and order no. 275 dated 11.2.2019 passed by the learned Civil Judge (Junior Division), 3rd Court, Tamluk, Purba Midnapore in Title suit no. 51 of 1993, the present application under Article 227 of the Constitution of India has been preferred.

The petitioner contended that petitioner had filed aforesaid suit for declaration of title and permanent injunction against the opposite parties herein. The defendant nos. 1,2 and 3 are contesting the suit by filing written statement and on behalf of the plaintiff, five witnesses were examined. On 7th July, 2018 during Examination-in-chief of DW1, on behalf of defendant no. 1, several deeds were tendered for marking exhibit after dispensing with formal proof since the documents are 30 years old. The plaintiff had raised objection against such prayer of defendant no. 1 on the ground that those deeds are not relevant to the suit in question, and that said

deeds are less than 30 years old and as such those deeds should not be marked as exhibit on tender, taking aid from Section 90 of Evidence Act. Such objections were being accepted by the court below and aforesaid deeds were not marked exhibit but marked for identification.

Subsequently, on behalf of defendant no. 1, an application was filed on December 5, 2018, stating inter alia, that on 7th July, 2018 at the time of tendering the affidavit in chief those documents were filed and those documents i.e. deeds of conveyance are dated October 5, 1998 and October 6, 1966, 4372 of 1988 and 4355 of 1988, and those deeds became thirty years old by this time, during pendency of suit and for which those documents deserve to be marked as exhibit taking aid from Section 90 of Evidence Act, which are awaiting for marking exhibit before the learned trial court. The said application dated 5.12.2018 came up for consideration on January 3, 2019 and the trial court by the impugned order was pleased to allow the said application of defendant no. 1 and thereby marked seven deeds of conveyance as exhibit M to Exhibit S, discarding the objections raised on behalf of the petitioners herein. Plaintiff/petitioner subsequently filed a petition on 10.1.2019 for modification of order and court below rejected the plaintiff's prayer for modification of order by the other impugned order dated 11.2.2019. Being aggrieved by both the orders i.e. order dated 3.1.2019 and

order dated 11.2.2019, plaintiff/petitioner has come before this court for setting aside said orders.

Learned counsel for the petitioners submits that learned trial Judge has acted with material irregularity and arrived at an erroneous decision. Learned trial judge has failed to appreciate that plaintiff had raised objection on July 7, 2018 against marking of deeds in question as exhibit dispensing formal proof and such objection was allowed. Learned trial court has failed to appreciate that 30 years are to be counted on the date when the documents are tendered in evidence for the first time to get the same marked as exhibit, and in the instant case documents were tendered before the expiry of 30 years period and as such at a subsequent period completing 30 years age, defendant cannot take advantage of Section 90 for proving the said deed. Accordingly, the order impugned is liable to be rejected.

Learned counsel for the opposite parties supports the judgment passed by the learned court below and contended that though the deeds were filed on July 7, 2018 but practically it was marked exhibit on 3.1.2019 when the court allowed the defendant's prayer for making those documents as exhibit, as by that time, 30 years have already been completed and accordingly, the trial court rightly marked those documents as exhibit, with the aid of advantage of presumption contained in Section 90.

I have considered the submissions made on behalf of both the parties.

From the copy of the examination sheet of DW 1, it appears that on July, 7, 2018 the documents were tendered by DW1. The said documents were not marked as exhibit but it was marked for identification. On 7.7.2018, when the deeds were tendered for examination for marking exhibit, the age of the deed from the date of execution was much less than thirty years and accordingly, the said deeds in question were tendered in evidence much prior to maturing 30 years age and as such the defendant is not entitled to get the benefit of presumption as laid down in Section 90 of the Indian Evidence Act, even if during pendency of suit, the documents attained age of 30 years from the date of execution.

In **Om Prakash (Dead) th. His lrs. Vs. Shanti Devi & Ors.** reported in **(2015) 4 SCC 601** in a similar context it was held by the Apex Court in paragraph 12 as follows:-

“The first and fatal stumbling block of the Appellant’s case, then, is that at the time of tendering of the Gift Deed before the Trial court, the thirty-year maturation period provided by Section 90 was not satisfied, the Gift Deed having been tendered in evidence after around 29 and one-half years, since he had admitted to it in the course of the Defendant/Appellant examining himself unlike the stage of pleadings this incontrovertibly partook the nature of tendering evidence. The time prerequisite to even essay availing of the Court’s discretionary powers under Section 90 had not been met. Being a statutory requirement, courts cannot alter the operation of the statute by reading into it as allowing a documents aged 29 and one-half years to be open to the law’s presumption. The Judgment of the High

Court below has considered the issue of this document's eligibility under Section 90, and repudiated this submission, the document not even, echoing the words of Section 90, "purporting" to be thirty years old at the time of tendering. We hasten to add that even if the document purported or proved to be thirty years old, the Appellant would not axiomatically receive a favourable presumption, the Section 90 presumption being a discretionary one."

In view of the aforesaid facts and circumstances of the case and settled position of law, since the deed which was marked as exhibit by the impugned order dated 3.1.2019 was actually tendered for evidence on 7th July, 2018 when 30 years were not completed, the court below has committed error in dispensing with the formal proof of the deeds in question and marking the said documents exhibit by taking aid of presumption under Section 90.

In view of the above, the impugned orders dated 3.1.2019 and 11.2.2019 are hereby set aside.

Accordingly, C.O. 1060 of 2019 is allowed. Pending application, if any, are also disposed of.

Interim order, if any, stands vacated.

However this order will not preclude the defendant to prove the documents/deeds formally in accordance with law, which were tendered on 7th July, 2018, when the said deeds did not attain maturity age of 30 years. It is also made clear that I had not gone into the merits of the case or merit of the deeds.

Urgent photostat certified copy of this order, duly applied for, be given to the parties upon compliance of all requisite formalities.

(Ajoy Kumar Mukherjee, J.)