

FORM NO. J (2)

**IN THE HIGH COURT AT CALCUTTA
CIRCUIT BENCH AT JALPAIGURI
CIVIL APPELLATE JURISDICTION**

Present:

**THE HON'BLE JUSTICE HARISH TANDON
AND
THE HON'BLE JUSTICE APURBA SINHA RAY**

**SAT 7 OF 2024
WITH
I.A. NO.: CAN 2 OF 2024**

**MAZIRUDDIN MIA
Vs.
JAHIRUDDIN MIAH**

FOR THE APPELLANT : **MR. SUBHAM GHOSH,
MR. KOUSHIK KUMAR KANU,
MR. MAYANK ROY**

FOR THE RESPONDENT : **MR. AJOY KUMAR SINGHANIA**

HEARD ON : MARCH 04, 2025

JUDGMENT ON : MARCH 04, 2025

THE COURT:

1. Though the instant appeal arise from a judgment of reversal passed by the First Appellate Court, yet, in order to ascertain whether it involves a substantial question of law envisaged under Section 100 of the Code of Civil Procedure, 1908, we invited the attention of the counsel appearing for the appellant in this regard.

2. The suit for declaration, confirmation of possession and permanent injunction filed by the plaintiff/appellant was founded upon a deed of sale dated 9th September, 1971 executed by one Sadhu Mia, the original owner. It is averred in the plaint that after the execution and registration of the deed of sale dated 9th September, 1971, the plaintiff/appellant was put into possession and was using, occupying and enjoying the said property until the said property was set on fire and gutted completely. Immediately, a complaint was lodged but that does not yield any fruitful result in this regard.
3. It is further averred that the defendant/respondent has disputed the title in respect of the property which comprised in the said sale deed for which the plaintiff/appellant has approached the Court for declaration of their right, title and interest in respect of the suit premise together with confirmation of possession and the permanent injunction against the defendant/respondent from creating any disturbances or interfering with the possession thereof.
4. Interestingly, the defendant/respondent denied the execution and the existence of the said sale deed and according to them, said Sadhu Mia died on 1968 and, therefore, it is improbable and inconceivable that he would execute the sale deed on 9th September, 1971. There is no dispute on the existence of the said sale deed but the dispute hinges around as to whether the said sale deed is genuine and the person who allegedly expired prior to the date of execution, in fact, executed the said deed. It is not a case that the plaintiff/appellant was put to surprise for the first time at the time of an argument but because of a specific stand having taken in the written statement, the plaintiff/appellant was well aware that such point assumes significance and the quality of evidence would decide the fate thereof.

5. On the conspectus of the aforesaid stand taken by the respective parties, the parties went in trial and adduced evidence touching upon the said issue apart from the other aspect, which in our opinion, took a back seat.
6. At the very outset, we must record that the first witness of the plaintiff in the examination-in-chief has not denied the statement of the contesting defendant/respondent taken in the written statement as it simply repleted the case made out in the plaint. However, the defendant/respondent put the questions relating to the defense taken in the written statement, more particularly, on the date of death or year of death of the said Sadhu Mia. It would be apposite to record that the first witness of the defendant is related to the said Sadhu Mia who was his father. The Trial Court evaluated the evidence of the parties and tried to interpret the same in a way which suits the plaintiff/appellant; on the other hand, the Appellate Court has taken the another view which runs counter to the view of the Trial Court.
7. As indicated hereinabove, the seminal point in the instant appeal relates to the actual date of death of Sadhu Mia; to be more precise, whether he died prior to 9th September, 1971 or at a later point of time.
8. The first witness of the plaintiff in his cross-examination deposed that the said Sadhu Mia died in the year 1976 and he was 18-20 years of age at such relevant point of time. He further volunteers that the said Sadhu Mia died in 1976 of a Bengali year.
9. The Trial Court interpreted the aforesaid depositions and put emphasis on that the moment the said witness unequivocally asserted that he was 18-20 years of age at the time of death of said Sadhu Mia, on mathematical precision, it would relate to a date after 9th September, 1971 and not before it. On the contrary, the Appellate Court stressed upon the statement made voluntarily that the said Sadhu Mia died in 1976 of Bengali year which corresponds to 1969 or 1970 of the Gregorian years and

proceeded to hold that Sadhu Mia was not alive on the date of the execution and registration of the purported deed of sale.

10. Such being the stand taken by both the Courts, the first and foremost point which needs to be considered is whether the finding made by either of the Courts is probable, reasonable and in consonance with the rule of evidence. The reliability and credibility of the witness shall also be taken into account in pursuit of ascertaining whether it involves a substantial question of law.
11. It is no gain saying that the Trial Court, which have seen the demeanor of the witness, while recording the depositions would be the best suited person to return finding on the demeanor of the witness but the moment the depositions are reduced in writing and conveys a laudable intention and the meaning to be assigned to it, it has to be considered in a more reasonable manner.
12. In the instant case, neither of the parties produced any documentary evidence, i.e., the death certificate of the said Sadhu Mia, which would speak for itself but proceeded to adduce oral evidence thereupon. It is an essential rule of evidence that the moment the depositions are orally recorded on a particular point, the reliability, the credibility, the propensity and the person who has a specific knowledge of the fact are the essential features in deciding the point. The appellant is a stranger and claimed to have known Sadhu Mia at the time of alleged purchase or at best, at the time of negotiation, execution and the alleged registration of the sale deed. The first witness of the defendant is the son of the said Sadhu Mia, who stood firm even in the cross-examination that his father died prior to 1971. The evaluation of the evidence forthcoming on oath versus oath, it is somewhat difficult on the part of the Court to decide the core issue but cannot be said to be impossible in all conceivable circumstances. Section 106 of the Indian Evidence Act, 1872 corresponding to Section 109 of the Bharatiya Sakshya Adhiniyam, 2023

postulates that when any fact which is specially within the knowledge of any person, the burden of proving that fact is upon him. The said provision does not absolve the onus on the part of the defendant/respondent to prove the factum of the death of the said Sadhu Mia as a son and, therefore, the moment the said witness took a specific stand that the said Sadhu Mia died on 1968, in absence of any cogent evidence to the contrary, such statement should be taken on its value.

13. It is not a technical rule but essentially a rule of evidence that the onus initially lies on a person who asserts the particular event and such onus becomes more important the moment such event is within the special knowledge of a person. The onus is not static but is variable in nature and it shifts upon the other side once the Court find the initial onus is discharged. No doubt the initial onus lies on the defendant/respondent to prove the date of death or year of death of the said Sadhu Mia and being a son, it is more probable that he would be the best suited person to disclose the date or the year of death of his father. The moment the statement made at the oath is pitted against the statement made on oath by both the sides, the Court has to evaluate the evidence on a well-known legal parameter, viz., the credibility, reliability, certainty, propensity and the acceptability of the statement of the said witness. The consideration in the instant case though tried to be projected as a difficult one on the basis of the evidence appears to be absolutely clear and not diluted, if the deposition of the first witness of the defendant is conjointly read with the deposition of the first witness of the plaintiff. In the cross-examination, though the first witness of the plaintiff says that the said Sadhu Mia died in 1976 and he was 18-20 years of age at the time of the death, but subsequently volunteers that actually the said Sadhu Mia died in the year 1976 of Bengali year. It is not open to the counsel at the bar to contradict the statement made by the witness as recorded by the Judge that the said Bengali year is loosely written, what is actually meant by the said witness

is the year 1976 of the English calendar. It is the rule of procedure that at the time of signing the deposition, if any discrepancy is noticed in recording the same by the learned Judge, immediately, the same should be pointed out and if the Court finds any error therein, it does not prevent the Court to correct the same. Even otherwise, if on the next date it is detected that the deposition recorded on an earlier occasion contained an error or discrepancy, the same could have been pointed out to the learned Judge and in presence of the parties, the Court is not denuded of power to correct it.

14. Admittedly, the aforesaid course has not been taken by the plaintiff/appellant and, therefore, it is not open to the counsel at bar to contradict the statement recorded on oath by the learned Judge that it was actually meant to be an English calendar and not the Bengali calendar. The Appellate Court has proceeded to interpret the voluntary statement made in the cross-examination by the first witness of the plaintiff/appellant and taking into account the statement of vital importance, arrived at the conclusion that it would correspond to 1969 or 1970 of the English calendar. The moment the date of death of the person is not certain, there is no fetter on the part of the Court to arrive at the conclusion on the statement of the witnesses of both the sides and if the close proximity of the date can be ascertained, we do not think there is any infirmity and/or illegality in this regard. It is a specific stand of the defendant/respondent that the said Sadhu Mia died in 1968 and the statement made voluntarily by the first witness of the plaintiff somewhat corroborates and the year of death can be reasonably ascertained to be 1969-1970.
15. The moment the Court has arrived at the decision that the said Sadhu Mia died either in 1968 or 1979 or 1970, the only issue which requires to be considered is the veracity, genuinity and authenticity of the sale deed purportedly executed and registered on 9th September, 1971. A dead

person cannot execute a document and the moment the Court finds that the executants of the said deed was not alive on the date, there is no incongruity in holding that the said document does not convey a valid title.

16. Interestingly, a point is taken by the counsel for the appellant that such document being more than 30 years old, raises a strong presumption of its correctness, execution and signature of the person. In support of the aforesaid contention, reliance is placed upon a judgment of the Hon'ble Apex Court rendered in ***Rattan Singh & Ors. Vs. Nirmal Gill & Ors.*** reported in ***(2021) 15 SCC 300***. In the said case, the General Power of Attorney (GPA) executed by the principal in favour of his agent was sought to be tendered in evidence and the presumption of being more 30 years old document was sought to be raised. In order to ascertain whether the said document is executed by the principal by putting his signature, the recourse to handwriting expert was taken and the report corroborates the signature of the principal. During course of the trial, the report of another handwriting expert was sought to be relied upon which runs counter to the report of the other and there appears to be a divergent opinion in this regard.
17. In backdrop of the above, the Hon'ble Apex Court held that the moment the reports of the experts are sought to be tendered in evidence, the Court should not rely upon the said document solely but must evaluate it with the surrounding circumstances and the evidence forthcoming in this regard. There is no quarrel to the proposition that the report of the expert is merely an opinion evidence and have to be proved in the same manner that of the other documentary evidence. It would not be safe for the Court to simply rely upon the said opinion evidence and based upon the same, decide the core issue. The Court must treat the said evidence along with the other evidences produced by the parties in order to decide the issues involved therein.

18. In the said judgment, a plea was taken that since the General Power of Attorney has come from the proper custody and purportedly executed more than 30 years before, raises a strong presumption under Section 90 of the Indian Evidence Act, 1872. The Hon'ble Apex Court was conscious on the concept of the presumption to be raised in this regard in view of Section 4 of the Indian Evidence Act, 1872. A distinction was drawn between the expression "may presume" and "shall presume" and in case of Section 90, the Court was considering that the moment the document is more than 30 years old, the Court may presume the genuineness of the said document. At the same time, the Court was not oblivious of the fact that such presumption is rebuttable in nature and the moment the evidence is adduced to rebut the same, it cannot be treated static in the following:

"...71. The presumption in favour of a 30year old document is, therefore, a rebuttable presumption. Nothing prevented the plaintiff to rebut the presumption by leading appropriate evidence in order to disprove the same. Since the plaintiff failed to do so, the said document would be binding on the plaintiff. As a matter of fact, the parties had acted upon the terms of the said document without any demur since 1963 and it was, therefore, not open to resile therefrom at this distance of time. Hence, the trial Court was right in holding the 1963 GPA, to be a genuine document."

19. It is no gain saying that the presumption raised under Section 90 of the Indian Evidence Act, 1872 is rebuttable in nature and the moment the Court found on the quality of the evidence and the credibility of the witness that such presumption is rebutted, it shifts upon the plaintiff to prove by other cogent evidence the existence of such fact. In the instant case, we do not find any infirmity in the judgment of the First Appellate Court in evaluating the evidence being the last Court of fact and law that vendor of the deed dated 9th September, 1971 was not alive on the said date.

20. We, thus, do not find any involvement of substantial question of law warranting admission of the instant appeal under Section 100 of the Code of Civil Procedure, 1908.
21. The Second Appeal being **SAT 7 of 2024** is **dismissed** at the admission stage.
22. Connected application being **CAN 2 of 2024** is also **disposed of**.
23. No order as to costs.
24. Urgent Photostat certified copy of the order, if applied for, be given to the parties upon compliance with all requisite formalities.

(HARISH TANDON, J)

(APURBA SINHA RAY, J.)