

**(2007) 04 AHC CK 0331**  
**In the Allahabad High Court**  
**Case No : Second Appeal No. 2395 of 1981**

|                                                     |            |
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| Khudawand Haiyal Qaiyoom, through Mushir Hasan Khan | APPELLANT  |
| Vs                                                  |            |
| Sabir                                               | RESPONDENT |

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**Date of Decision :** 23-04-2007

**Acts Referred:**

Evidence Act, 1872 — Section 65, 90

**Citation :** (2007) 6 AWC 5830

**Hon'ble Judges :** Dilip Gupta, J

**Bench :** Single Bench

**Advocate :** R.P. Mishra, Haji Iqbal Ahmad, Prakash Gupta and M.C. Gupta, for the Appellant; Manu Saxena and Ajit Kumar, for the Respondent

**Final Decision :** Dismissed

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## Judgement

Dilip Gupta, J.—The Plaintiff has filed this second appeal for setting aside the judgment and decree dated 28th May, 1991 passed by the learned I Ind Additional District Judge. Shahjahanpur dismissing the appeal filed by him against the judgment and decree dated 31st October, 1979 of the trial court dismissing Original Suit No. 131 of 1979.

2. The Plaintiff/Appellant filed the suit for ejectment of Defendant-Respondent from house No. 230 situated in Mohalla Baruzai, 1 Pukhta Talab in Shahjahanpur and for recovery of Rs. 740 as arrears of rent and Rs. 20 as damages for use and occupation. The suit was filed on the allegations that Khan Bahadur Mohd. Rafiullah Khan was the owner of the house in dispute alongwith his other property and on 10th February, 1941 he had executed a "waqf alalaulad" and endowed the entire property to the almighty god. He had made himself the mutawalli of the said waqf and also reserved the power to amend the terms of the waqf deed. Line of succession was mentioned in the deed and pursuant thereto after the death of Shafiullah Khan, his daughter's son, Mushir Hasan Khan became mutawalli and started looking after the waqf property. The disputed house was waqf property and it was let out to Defendant Respondent by

Shafiullah Khan on a rent of Rs. 20 per month. It was also alleged that the Defendant Respondent paid rent up to 1st December, 1973 and thereafter stopped paying rent and as the said rent was not even paid after service of notice, the aforesaid suit was filed.

3. In the written statement, the Defendant-Respondent denied the title of the Plaintiff-Appellant and specifically alleged that Khan Bahadur Mohd. Rafiullah Khan was never the owner of the house in dispute. The waqf deed was also denied. He also denied that he took the house in dispute on rent and, therefore, the suit for ejectment and recovery of arrears of rent was not maintainable. In fact, he alleged that he had acquired the house in dispute from Sri Kachcha Khan. In the alternative he pleaded that he had perfected his title by adverse possession.

4. The trial court while deciding the issue No. 1 held that the Plaintiff/Appellant failed to prove the certified copy of the waqf deed filed by him in accordance with the provisions of the Indian Evidence Act, 1872 (hereinafter referred to as the "Act"). It was also held that the Plaintiff/Appellant failed to establish that Khan Bahadur Mohd. Rafiullah Khan had made a waqf deed of the house in dispute in favour of the Plaintiff and, therefore, the Plaintiff/Appellant had no right to sue. Regarding issue No. 2 the trial court held that the Plaintiff/Appellant failed to establish his title over the house in dispute and, therefore, it cannot be held that Sunni Central Board had accorded permission for filing the suit for ejectment.

5. The appellate court examined whether the Plaintiff/Appellant had a right to sue and in this context the main issue before the appellate court was whether the waqf deed had been executed. The Plaintiff/Appellant had not filed the copy of the original waqf deed dated 10th April, 1941 or the amended deeds, though certified copies of these registered documents which had been executed more than 20 years ago had been filed. The trial court had found them to be inadmissible in evidence. The appellate court, however, in view of the Full Bench decision of this Court in Ram Jas and Ors. v. Surendra Nath and Anr. AIR 1980 All 385, reversed this finding and held that the documents could be presumed to be genuine u/s 90(2) of the Act as amended in the State of U.P. and, therefore, could be read in evidence provided the Plaintiff had laid the foundation for establishing his right to give secondary evidence. In this context the appellate court held that the Plaintiff/Appellant had not established his right to give secondary evidence u/s 65 of the Act. It, therefore, held that the certified copies could not be read in evidence for establishing the title of the Plaintiff/Appellant over the house in dispute. It, therefore, dismissed the appeal.

6. This second appeal was admitted on 26th November, 1981 and the substantial question of law that had been framed by the Court was "whether the certified copy of the document was admissible in evidence".

7. I have heard Sri Prakash Gupta, learned Counsel for the Appellant and Sri Ajit Kumar, learned Counsel appearing for the Respondent.

8. Learned Counsel for the Appellant submitted that in view of the provisions of Section 90(2) of the Act as amended in the State of U.P. by U.P. Act No. 24 of 1954, the Court could presume that the document was duly executed and in such circumstances, the court below fell in error in holding that the Plaintiff/ Appellant had still to establish that the conditions set out in Section 65 of the Act for giving secondary evidence were satisfied. In support of his contention, he placed reliance upon the Full Bench decision of this Court in *Ram Jas (supra)* and the decision of a learned Judge of this Court in *Mohd. Sadiq v. Amanatullah* 1981 (7) ALR 284.

9. Sri Ajit Kumar, learned Counsel for the Respondent, however, contended that there was no infirmity in the decision of the appellate court inasmuch as even if the conditions set out in Section 90(2) of the Act as amended in the State of U.P. were satisfied, then too it was obligatory on the part of the Plaintiff/Appellant to establish that the conditions for giving secondary evidence u/s 65 of the Act were satisfied and in support of his contention he placed reliance upon the decisions of the Supreme Court rendered in *Kalidindi Venkata Subbaraju and Others Vs. Chintalapati Subbaraju and Others*, *Sri Lakhi Baruah and others Vs. Sri Padma Kanta Kalita and others*, and of a learned Judge of this Court in *Manjoor Ali and Another Vs. Kishmat Ali and Others*,

10. I have carefully considered the submissions advanced by the learned Counsel for the parties and have examined the record.

11. In order to appreciate the contentions of the learned Counsel for the parties, it would be appropriate to refer to the provisions contained in Sections 90 and 90A of the Act as amended in the State of U.P. and Section 65 of the Act. The same are as follows:

90. Presumption as to documents twenty years old.-(1) Where any document, purporting or proved to be twenty 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.

(2) Where any such document as is referred to in Sub-section (1) was registered in accordance with the law relating to registration of documents and a duly certified copy thereof is produced, 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 person by whom it purports to have been executed or attested.

90A. (1) Where any registered document or a duly certified copy thereof or any certified copy of any document which is part of the record of a court of justice, is produced from any custody which the Court in the particular case considers

proper, the Court may presume that the original was executed by the person by whom it purports to have been executed.

(2) This presumption shall not be made in respect of any document which is the basis of a suit or of a defence or is relied upon in the plaint or written statement.

65. Secondary evidence may be given of the existence, condition or contents of a document in the following cases:

(a) When the original is shown or appears to be in the possession or power-

of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in Section 66, such person does not produce it;

(b) When the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest ;

(c) When the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time ;

(d) When the original is of such a nature as not to be easily movable ;

(e) When the original is a public document within the meaning of Section 74 ;

(f) When the original is a document of which a certified copy is permitted by this Act, or by any other law in force in (India), to be given in evidence ;

(g) When the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

In cases (a) (c) and (d), any secondary evidence of the contents of the document is admissible.

In case (b), the written admission is admissible.

In case (e) or (f), certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

12. It would be seen that both Section 65 and Section 90 of the Act are contained in Chapter v. of the Act relating to documentary evidence. Section 61 of the Act provides that the contents of documents may be proved either by production of the document which is called primary evidence, or by copies or oral accounts of the contents, which is called secondary evidence. Primary evidence is

the evidence which the law requires to be given first. Secondary evidence is the evidence which may be given in the absence of the better evidence which law requires to be given first, when a proper explanation is given of the absence of that better record. Primary evidence is defined in Section 62 of the Act while secondary evidence is defined in Section 63 of the Act. Section 65 of the Act enumerates the seven exceptional cases in which secondary evidence is admissible.

13. The object of Section 90 of the Act was spelt out by the Supreme Court in *Lakhi Baruah* (supra) and it was observed:

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 u/s 90 should not be exercised arbitrarily and not being informed by reasons.

14. The question that arises for consideration in the present second appeal is whether the presumption u/s 90 of the Act can be made only after the documents had been admitted as secondary evidence u/s 65 of the Act and not otherwise. This issue was examined by the Supreme Court in *K. B. Subbaraju* (supra) and it was observed:

As aforesaid, the Respondents did not produce the original Will but produced only its certified copy, Ex. B-9, which they obtained from the record of Suit No. 21 of 1923 wherein. Surayamma had filed the original Will alongwith her written statement..... The High Court appears to have relied upon Section 90 of the Evidence Act and to have drawn the presumption that the Will being more than 30 years old it was duly executed and attested by the persons by whom it purported to have been executed and attested. Such a presumption, however, under that Section arises in respect of an original document. (See *Munnalal v. Mt. Kashibai* AIR 1947 PC 15 ). Where a certified copy of a document is produced the correct position is as stated in AIR 1935 132 (Privy Council) where the Privy Council laid down that if the document produced is a copy admitted u/s 65 as secondary evidence and it is produced from proper custody and is over 30 years old only the signatures authenticating the copy can be presumed to be genuine. The production of a copy therefore does not warrant the presumption of due execution of the original document. The Privy Council repelled the argument that where a copy of a Will has been admitted the Court is entitled to presume the genuineness of such Will which purports to be 30 years old. Relying on the words "where any document purporting or proved to be 30 years old" in Section 90, the

Privy Council held that the production which entitles the Court to draw the presumption as to execution and attestation is of the original and not its copy and that the decisions of the High Courts of Calcutta and Allahabad on which the argument was based were not correctly decided. This view has since then been approved of by this Court in Harihar Prasad Singh and Another Vs. Must. of Munshi Nath Prasad and Others, at 309. The High Court therefore was not entitled to presume from the production of the copy either the execution or the attestation of the said Will.

15. In Lakhi Baruah (supra), the original sale-deed was not produced by the Defendants and an attempt was made to prove the execution of the sale-deed with the aid of Section 90 of the Act as the alleged sale-deed was more than 30 years old. The trial court accepted the case of the execution of the sale-deed on the basis of presumption arising from Section 90 of the Act but the learned Assistant District Judge and the High Court did not allow the claim since the original sale-deed was not placed. In this connection, the Supreme Court observed:

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 decisions of various High Courts the presumption u/s 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 u/s 90. If the document produced was a copy admitted u/s 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 of the original u/s 90. In this connection, reference may be made to the decisions in Seethayya v. Subramanya, 56 IA 146 : AIR 1929 PC 115 and AIR 1935 115 (Privy Council) In view of these Privy Council decisions, disproving the applicability of presumption u/s 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 docs not raise the presumption u/s 90.

The position since the aforesaid Privy Council decision being followed by later decisions of different High Courts is that presumption u/s 90 does not apply to a copy or a certified copy even though thirty years old ; but if a foundation is laid for the admission of secondary evidence u/s 65 of the Evidence Act by proof of loss or destruction of the original and the copy which is thirty years old is produced from proper custody, then only the signature authenticating the copy may u/s 90 be presumed to be genuine.

16. It is, therefore, more than apparent from the aforesaid decisions of the Supreme Court that before raising the presumption u/s 90 of the Act, the foundation for admission of secondary evidence u/s 65 of the Act has to be made. So far as the State of U.P. is concerned, u/s 90(2) of the Act, the presumption is made applicable to a certified copy of a document registered in accordance with law relating to registration of documents but still, in view of the aforesaid decisions of the Supreme Court, the certified copy has to be first admitted u/s 65 of the Act as secondary evidence.

17. This issue was also considered by a learned Judge of this Court in *Manjoor Ali and Anr. (supra)* and it was observed as follows:

Thus, it is clear that the mere production of a certified copy of the sale-deed is not sufficient to draw a presumption u/s 90 of the Act. The Plaintiff has to lay the foundation for admission of the secondary evidence by proof of loss or destruction of the original, etc. Only then, the presumption of the genuineness of the document can be drawn u/s 90 of the Act.

18. Learned Counsel for the Appellant has, however, placed reliance upon a decision of the Full Bench of this Court in *Ram Jas and Anr. (supra)* and *Mohd. Sadiq (supra)*. The Full Bench decision of this Court in *Ram Jas and Anr. (supra)* is not applicable to the facts of this case as it only holds that Sub-section (2) of Section 90A of the Act as amended in State of U.P. does not control the operation of Section 90 (1) and (2) of the Act as amended in U.P. In the case of *Mohd. Sadiq* only a passing observation has been made by a learned Judge of this Court that Section 90(2) of the Act is neither controlled by the provisions of Section 65 of the Act or by the provisions of Section 90(1) of the Act. There is no discussion at all as to why the provisions of Section 65 of the Act would not apply and nor have the decisions of the Supreme Court been considered. The decisions of the Supreme Court referred to above clearly hold that it is only when the certified copy of the document has been admitted as secondary evidence u/s 65 of the Act that the Court can draw a presumption u/s 90 of the Act. This is also what has been observed in the case of *Manjoor Ali (supra)* by a learned Judge of this Court after taking into consideration the decisions of the Supreme Court.

19. In view of the discussion made above, the contention of the learned Counsel for the Appellant cannot be accepted. The appeal is, therefore, liable to be dismissed and is, accordingly, dismissed.