[Citation : RLW 2007(1) Raj. 434]

(Rajasthan High Court)

HON'BLE S.N. JHA, CJ.
HON'BLE MOHAMMAD RAFIQ, J.

Hazarilal & Anr.
Versus
Shyamlal & Ors.

D.B. Civil First Appeal No. 82 of 1980, Decided on 14.11.2006

Evidence Act, 1872, Sec. 90 – Appropriate stage of raising presumption as to documents 30 years old u/S. 90 of the Act – Held – Presumption u/S. 90 can be claimed and drawn at any stage including the appellate stage – Belated claim of presumption will not by itself confer any right on the other party to claim opportunity to lead evidence in rebuttal – Such opportunity shall ordinarily be refused at the stage of final arguments save in exceptional cases for cogent and sufficient reasons recorded in writing. (Para 27)

Reference answered in negative.

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D.R. Bhandari, ***for Appellants***
Himanshu Maheshwari, Rekha Borana, ***for Respondents***

Hon'ble JHA, CJ.–This appeal has come up before the Division Bench on reference by the learned Single Judge. The reference runs as under:

> ``Whether the law laid down in the judgments of Lalit Kishore vs. Laxminarayan (1968 RLW 308), Ayub & Ors. vs. Bhanwar Chand &

Ors. (ILR (1971) 21 Raj. 30) and Rao Raja Tej Singh vs. Hastimal (1972 RLW 133) is correct law and what can be the stage at which presumption can be raised under Section 90 of the Indian Evidence Act, 1872) and any matter which may be found relevant for just decision of the case relating to the raising presumption under Section 90 of the Indian Evidence Act by the appropriate Bench."

(2). The appeal is yet to be decided on merit. Also, having regard to the limited scope of reference, it is not necessary to state the facts of the case in detail except to mention that this appeal by the plaintiff arises from a suit for declaration of title and permanent injunction. The appellants claim title by adverse possession. The cause of action for filing the suit was a decree of eviction obtained by respondent No. 1 Shyamlal against respondent No. 2 Chhogalal and respondent No. 3 Chothmal. According to respondent No. 1 he is owner of the premises. He had let out the same on rent to respondent No. 2 on 29.5.1956. Respondent No. 2 inducted respondent No. 3 as sub-tenant. Shyamlal filed suit No. 136/1967 and obtained decree for eviction against them. According to Shyamlal, the appellant had been set up by Chothmal to pre-empt the eviction decree.

(3). While dismissing the appellant's suit and deciding issue No. 4 as to whether respondent No. 1 was in possession of the land on the basis of the document executed in favour of his father by Lalu Chamar of Bhilwara on migsar-sudi 15 Samwat 1987, the trial Court held, placing reliance on the document, the respondent No. 1 had proved the fact that the land was mortgaged by Lalu Chamar in favour of his father Kanakmal, and since then it was in his posssession. In recording the said finding the trial Courtinter alia drew presumption under Section 90 of the Indian Evidence Act, 1892. At the time of hearing of this appeal, submission was made on behalf of the appellant that the presumption had been drawn without giving opportunity to the appellants to lead rebuttal evidence. On behalf of the respondents reliance was placed inter alia on Lalit Kishore vs. Laxminarayan, **1968 RLW 308**, Ayub & Ors. vs. Bhanwar Chand & Ors., ILR (1971) 21 Raj. 30 and Rao Raja Tej Singh vs. Hastimal, **1972 RLW 133.** The learned Judge took the view that the judgments require reconsideration by a larger Bench. Apparently, the learned Judge was of the view that the decisions do not lay down the correct law. That is how, the appeal has come on reference.

(4). Section 90 of the Evidence Act may be quoted at the outset 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 any 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.

Explanation-

...."

(5). On a plain reading, it would appear that if the document- purported to be or proved to be 30 years old - is produced them proper custody, the Court may draw a presumption that the signature and other partsof the document are in the handwriting of the person who is shown to have signed or written the document, and in the case of a document being executed or attested, that it was duly executed and attested by the person who is shown to have executed and attested it.

(6). The only point for consideration is whether and at what stage opportunity to adduce rebuttal evidence, if any, is to be given to the other party to rebut the presumption arising under Section 90 of the Evidence Act.

(7). Before answering the question we may refer to the meaning of the expressions ``may presume'', ``shall presume'' and ``conclusive proof'' in Section 4 of the Evidence Act as under:-

> ``4. ``May presume'' - Whenever it is proved by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.
>
> ``Shall presume'' - Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.
>
> ``conclusive proof''. - When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.''

(8). It would appear these expressions ``may presume'' or ``shall presume'' law down the rules of proof andby legal fiction mandate the Court to treat a fact as proved unless and until it is disproved.

(9). Section 90 occurs in Chapter V which is part of Part II of the Evidence Act captioned ``On Proof''. Chapter III deals with facts which need not be proved. Chapter IV deals with oral evidence. Chapter V contains provisions with respect to documentary evidence. Section 61 which is the first section in Chapter V provides that the contents of documents may be proved either by primary or by secondary evidence (as defined in Sections 62 and 63 respectivley). Section 64 lays down that documents must be proved by primary evidence except in th cases mentioned thereinafter. Section 65 refers to cases in which secondary evidence relating to documents may be given. Section 67 lays down that if a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting. Section 68 lays down that if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there is an attesting witness alive and capable of giving evidence.

(10). Section 90, it would appear, is in the nature of exception to the general rule contained in Sections 67 and 68. Section 90 occurs in sub-chapter captioned ``Presumption as to Documents'' in Chapter V. There are eighteen Sections - from Section 79 to Section 90A (including those inserted by

Amendment Act 21 of 2000) - which deal with presumptions of various types. While as regards, for example, certified copies in Section 79 or documents produced as record of evidence in Section 80 or Gazettes, newspapers, private Acts of Parliament etc. in Section 81, the Court ``shall presume'' the document to be genuine, in cases of certified copies of foreign judicial records in Section 86, books, maps and charts in Section 87 and so on, the Court ``may presume'' the certified copy etc. to be genuine. Section 90 occurs in that sequence of provisions under which the Court ``may presume'' existence of a fact. For the purpose of Section 90, the presumption in cases of documents thirty years old and produced from proper custody is that the signature or handwriting, execution or attestation, as the case may be, is by the person who is shown to have signed or written or executed or attested the document.

(11). The presumption, it is pertinent to point out, does not extend to the contents of the document. In Bhagirathmal Kanodia vs. Bibhuti Bhushan Ghose, AIR 1942 Cal. 309, it was held by the Calcutta High Court that-

> ``The presumption referred to in Section 90 is of a limited character and applies to the signature or hand-writing.''

(12). In Chandulal Asharam Travadi vs. Bai Kashi, AIR 1939 Bombay 59, a Division Bench of the Bombay High Court observed-

> ``It only provides that documents more than 30 years old coming from proper custody prove themselves, but it does not involve any presumption that the contents of the documents are true.''

(13). In Ramakrushna Mohapatra vs. Gangadhar Mohapatra, AIR 1958 Orissa 26, a similar view was expressed by the Division Bench of the Orissa High Court in these words:-

> ``The principle underlying section 90 is that if a private document thirty years old or more, is produced from proper custody and is, on its face free from suspicion, the Court may presume that it has been signed or written by the person whose signature it bears or in whose handwriting it purports to be and that it has been fully attested and executed, if it purports so to be. In other words, documents thirty years old prove themselves. The age of a document, its unsuspicious character, the production from proper custody and other circumstances are the foundation for the presumption as enunciated in the above section. This rule, it is now well settled, was founded on necessity and convenience. It is extremely difficult and sometimes impossible to prove the handwriting or signature or execution of ancient documents after the lapse of many years. It is therefore presumed that all persons acquainted with execution of documents, if any, are dead, and proof of those facts are dispensed with. Thus, the presumption relates to the execution of the documents, that is, signature, attestation etc., in other words its genuiness, but not to the truth of its contents.''

(14). In Mohinuddin vs. President, Municipal Committee, Khargone, AIR 1993 Madhya Pradesh 5, it was observed as under:-

``.... if the document purported or proved to be 30 years old is produced from custody which the Court considers to be proper, the presumption 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. Assuming that the document is more than thirty years old and comes from proper custody, there would be no presumption that contents of the same are true...."

(15). Reference may also be made to Kanhiya Lal vs. Jamna Lal, AIR 1950 Rajasthan 47 in which it was held that the presumption under Section 90 can be raised only if the document shows the name of the person in whose handwriting the contents have been written. There is no such presumption in respect of anonymous documents. Hence, where an entry in ancient document is not signed by the person who wrote it and there are no materials upon which one can say that a particular person purports to have written it except a general statement that it is kept amongst the family records as a record of the family transactions, the document cannot be taken to be properly proved by virtue of the presumption under Section 90.

(16). From the above, it would be manifest that there is no presumption under Section 90 about the correctness and truth of the contents of the document. If Section 90 has limited application and presumption thereunder is limited to signature or handwriting or execution or attestation, as the case may be, any apprehension in the mind of the other party that the contents of the document in question would be accepted on its face value by virtue of presumption under Section 90, merely because it is thirty years old and produced from proper custody would appear to be unfounded. As a matter of fact in case ``may presume'' unlike ``shall presume'', the Court may call for proof of the fact as provided in Section 4. Whether the fact which is required to be proved by a party in support of its case has been proved or not is to be considered on the basis of totality of the evidence- oral and documentary. No doubt, any presumption as to the signature or handwriting or execution or attestation may be an important link in the chain of evidence led by the party to prove his case; if the document is thirty years old, or purports to be thirty years old, and is produced from proper custody, the presumption does arise that the signature or handwriting or execution or attestation is of the person who is shown to have signed or written or executed or attested the document but that is not conclusive proof of it, and the Court may seek corroboration. Needless to say that where the document appears to the Court to be suspicious, the Court is not prevented from rejecting it as not genuine.

(17). It is relevant to point out here that the presumption is to be drawn by the Court which is evident from the words ``Court may presume''. The party which has produced the document may simply point out to the Court that the document is thirty years old and has been produced from proper custody and make a request that the presumption as to signature or handwriting etc. may be drawn. It is not necessary to make a formal application. Request may be made in course of oral submissions - usually at

the time of final arguments. In other words, the party producing document may simply claim that a presumption under Section 90 does arise and if the Court is satisfied that the document is thirty years old or purports to be thirty years old and has been produced from proper custody, it may presume that the signature or handwriting is of the person who is shown to have signed or written the document or that he executed or attested it.

(18). The question as to whether opportunity to lead rebuttal evidence should be given to the other party to rebut the presumption arising under Section 90 has to be considered in the above perspective. No doubt, as mentioned above, the presumption is rebuttable unlike facts which are conclusive proof of another fact but it does not mean that where presumption is claimed at the stage of final arguments, the Court will revert to the stage of evidence and give opportunity to the other party to lead evidence in rebuttal.

(19). It is relevant to mention here that under rule 1 of order 13 of the Code of Civil Procedure as it stood at the relevant time - prior to its amendment by Act of 46 of 1999 - the parties or their pleaders were required to produce at or before the settlement of issues, all the documentary evidence of every description in their possession or power, on which they intended to rely, and which had not already been filed in Court, and all documents which the Court had ordered to be produced. Under Rule 2, no documentary evidence in possession or power of any party which should have been but has not been produced in accordance with the requirements of rule 1, could be received at any subsequent stage of the proceedings unless good cause was shown to the satisfaction of the Court for non-production thereof, and the Court receiving any such evidence recorded the reasons for so doing.

(20). The documents are thus required to be produced prior to or at the stage of settlement of issues. The parties are therefore supposed to know that in respect of any document (s) produced by the other party being thirty years old, presumption may be claimed as provided under Section 90, and therefore supposed to produce documents which could rebut such presumption. In other words, the parties are expected to exercise due diligence and show prudence. Where the document so filed is later admitted in evidence- whether without or with objection - it becomes part of the record. It is open to the party producing such document to not only rely on it but also claim presumption, and where such presumption is claimed the Court `may presume' that the signature or handwriting was of the person as shown in the document or executed or attested by him as the case may be.

(21). We are inclined to think that the Court may draw such presumption given where the party has not claimed it. In a particular case the lawyer representing the prty may due to oversight or ignorance omit to claim presumption. The Court in such a case is not estopped from drawing presumption in the interest of justice. Indeed, where it is not claimed/drawn at the trial stage, it is open to the party or his lawyer to claim such prsumption even at the appellate stage. That being so, we do not think, the other party can claim any opportunity as of right to lead evidence to rebut the presumption under Section 90 or other similar sections of the Evidence Act.

(22). The decision in Lalit Kishore vs. Laxminarayan (supra), Ayub & Ors. vs. Bhanwar Chand & Ors. (supra) and Rao Raja Tej Singh vs. Hastimal (supra), the correctness of which appears t have been doubted by the learned Judge more or less took a similar view.

(23). In Lalit Kishore vs. Laxmi Narayan (supra), it was held that if there is nothing to cast doubt about the genuineness of the document, and if it cannot be said that the belated request for raising the presumption has caused any prejudice to the defendant, there is nothing to prevent the Court from presuming the genuineness of the document under Section 90 of the Evidence Act.

(24). In Ayub vs. Bhanwar Chand (supra), it was held that the party relying upon a document which is over thirty years old should merely tender the document under Section 90 of the Evidence Act. It is then for the Court to determine- which is a matter of judicial discretion - whether it will make the presumption mentioned in the section or will call upon the party to offer proof of the document. If the Court calls for such proof, it should state the grounds upon which it refuses to exercise the discretion which is conferred upon it by this section in order that the Court of appeal may be able to judge whether the discretion has been judicially exercised. If on the other hand the document is accepted, the Court should state or indicate whether the presumption has been rebutted or has been displaced. The learned Judge further categorically observed that it has nowhere been laid down that an opportunity to lead evidence in rebuttal of the presumption must be given to the party even though he has not asked for it.

(25). In Rao Raja Tej Singh vs. Hastimal (supra), it was observed that once the party has made it known that he wants to rely on the presumption under Section 90 of the Evidence Act, and the document and the surrounding circumstances are such that a presumption under Section 90 may justifiably be raised then the mere fact that the party had attempted to prove the document by direct evidence and failed, cannot always be a sufficient reason for not drawing the presmption.

(26). We do not think, these decisions require any reconsideration in the light of the view we have taken hereinbefore.

(27). I***n the result, the reference is answered in the negative and it is held that presumption under Section 90 of the Evidence Act can be claimed and drawn at any stage including the appellate stage; belated claim of presumption will not by itself confer any right on the other party to claim opportunity to lead evidence in rebuttal. Such opportunity shall ordinarily be refused at the stage of final arguments save in exceptional cases for cogent and sufficient reasons recorded in writing.***

(28). The reference having been thus answered. The appeal may now be listed before the learned Single Judge as per roster for decision on merit.