APPELLATE CIVIL

Before Sir Syed Wazir Hasan, Knight, Chief Judge and Mr. Justice Muhammad Raza

1932 *March*, 2.

RAM NARESH SINGH, BABU (DEFENDANT-APPELLANT) *v.* CHIRKUT AND ANOTHER, PLAINTIFFS, AND OTHERS, DEFENDANTS (RESPONDENTS) *

Evidence Act (I of 1872), section 90—Thirty years old document—Presumption about genuineness of documents thirty years old, when to be drawn—Shankalap *deeds, produced for first time, presumption about—Literate executants not signing effect of—Civil Procedure Code (Act V of 1908), section 107, and order XLI, rule 27—Additional evidence—Appellate court's power to admit additional evidence—Discretion to be exercised sparingly—Court admitting additional evidence without recording reasons for doing so—Admissibility of.*

The wording of section 90 of the Indian Evidence Act, I of 1872, shows that it is not compulsory upon any Court before whom a document purporting to be 30 years old is produced to presume that the said document is genuine. The section only gives a discretion to the court that if under the circumstances established in a case it considers proper to raise such presumption it can do so. The court should be very careful about raising any presumption under this section in favour of old deeds of *shankalap* which are produced practically for the first time during the trial of suits in which proprietary rights are set up on the basis of those deeds.

Even if the deeds may be presumed to be genuine by a court under section 90, the question arises how far does that presumption go? If the deeds do not bear the signature of the executants who admittedly could write their names, it cannot be presumed that they were really executed by them to grant *shankalap* pattas.

The presumption that arises under section 90 of the Evidence Act only extends to the genuineness of the old documents coming from proper custody; it does not further go to the extent of holding that the document was, in fact, executed by person possessed of the requisite authority.

*Second Civil Appeal No. 34 of 1931, against the decree of M. Zia-ud-din Ahmad, Subordinate Judge of Sultanpur, dated the 29th of October, 1930, reversing the decree of Babu Kali Charan Agarwal, Munsif, Sultanpur, dated the 2nd of January, 1930.

The appellate court has discretion to admit additional evidence for substantial cause. But such power given under section 107 and order XLI, rule 27 of the Code of Civil Procedure, Act V of 1908, should be exercised very sparingly by the court and great caution should be exercised in admitting new evidence. Where there is no *lacuna* or defect to be filled up or remedied and no substantial cause for taking additional evidence, the so-called additional evidence, as it stands, is legally inadmissible and must be left out of consideration in disposing of the case. Where the additional evidence is admitted by the lower appellate court without recording reasons for doing so and it is clear that such evidence was not required by the court, the additional evidence is legally inadmissible and must be left out of consideration in disposing of the case.

Hasan, C. J.

Messrs. *Ali Zaheer*, *Ghulam Imam* and *Ganpat Sahai*, for the appellant.

Messrs. *Hyder Husain* and *Mahabir Prasad*, for the respondents.

HASAN, C. J., and RAZA, J.:—These two second appeals (Nos. 34 and 35 of 1931) arise out of two suits (Nos. 92 and 93 of 1929), brought by the plaintiffs against Babu Ram Naresh Singh, Taluqdar of Garabpur (defendant No. 1), for declaration of their under-proprietary rights in two holdings; one in village Bisuhi and the other in village Ananpur Bhikhaipur in the district of Sultanpur.

The plaintiffs' case was that they and the defendants Nos. 2 and 3 are entitled to claim under-proprietary rights in the holdings in suit, as the descendants of one Sukh Lal Misra. Sukh Lal had two sons, namely Ganga and Sarju. The plaintiffs and the defendants Nos. 2 and 3 belong to the line of Sarju. The line of Ganga became extinct when Ram Das died childless in or about 1926. The plaintiffs allege that they are the legal representatives of Ram Das, deceased. Ram Das alone was, admittedly, in possession of the holdings in suit. He was recorded as a mere tenant of the lands

1932

RAM NARESH SINGH v. CHHKUT.

Hasan, C. J. and Raza, J.

in suit in the village papers. The names of the defendants Nos. 2 and 3 alone were entered in the village papers as mere tenants of the lands in suit after the death of Ram Das. Neither Ram Das nor any other descendant of Sukh Lal was ever recorded under-proprietor of the lands in suit. The plaintiffs however, brought the present suits in 1929 challenging the entries in the village papers and alleging that they and their co-sharers, the defendants Nos. 2 and 3, are entitled to claim under-proprietary rights in the lands in suit as against the Taluqdar of Garabpur (defendant No. 1).

The plaintiffs based their title on two old *shankalap-namas* (exhibits 7 and 15) alleged to have been granted to their ancestor Sukh Lal in the Nawabi time by the then taluqdars of Garabpur. Exhibit 7 (of suit No. 92) is alleged to have been executed by Bakhtawar Singh, Taluqdar, in respect of 11 bighas 5 biswas land in village Ananpur Bhikhaipur on the 30th of July, 1835. Exhibit 15 (of suit No. 93) is alleged to have been executed by Musammat Sheo Kuar, Taluqdar, in respect of 21 bighas 5 biswas land in village Bisuhi on the 14th of July, 1829. It is a peculiar circumstance for which no explanation is forthcoming that no suit was brought at the time of the regular settlement for the purpose of obtaining decrees establishing the existence of under-proprietary rights on the basis of the *shanklap-nama* in question. It appears that the plaintiffs claimed under-proprietary rights by virtue of the *shankalap-namas* in question for the first time in the Revenue Court when they applied for correction of the entries in village papers in the year 1928. Their applications were rejected by the Revenue Court on the 3rd of March, 1928, and then they brought the present suits in May, 1929.

The plaintiffs' claim was resisted by the Taluqdar, defendant No. 1, on various grounds. The defendants

1932

RAM NARESH SINGH v. CHIRKUT.

Hasan, C. J. and Raza, J.

Nos. 2 and 3, of course, admitted the plaintiffs' claim.

Both the suits were tried together and dismissed by the learned Munsif of Sultanpur on the 2nd of January, 1930. He found that the pedigree on which the plaintiffs relied was not proved, that the pattas (*shankalap-namas*) set up by the plaintiffs were not genuine, that it was not proved that the alleged pattas were granted by competent persons and that the declaratory suits brought by the plaintiffs on the basis of the pattas in question were not maintainable.

The plaintiffs Nos. 4 and 6 alone appealed and their appeals were allowed by the learned Subordinate Judge of Sultanpur on the 29th of October, 1930. He disagreed with the findings of the learned Munsif on all the points mentioned above and decreed the plaintiffs' claim in respect of the holdings in both the villages mentioned above.

The defendant No. 1 has now come to this Court in second appeal.

In our opinion these appeals should be allowed.

The principal point for determination in these appeals is whether the *shankalap-namas* in question (exhibits 7 and 15 mentioned above) are genuine and valid. If this question is decided against the plaintiffs their suits must fail. The learned Subordinate Judge has presumed the *shankalap-namas* in question to be genuine under section 90 of the Evidence Act, disregarding all the entries in the village papers from the time of the first regular settlement up to the present time and the conduct of all the persons who held the lands in suit from time to time before the institution of the present suits. Section 90 of the Evidence Act lays down—

> "Where any document, purporting or proved to be thirty years old, is produced from any

1932

RAM NARESH SINGH v. CHIRKUT.

Hasan, C. J. and Raza, J.

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 person by whom it purports to be executed and attested."

The wording of the section shows that it is not compulsory upon any court before whom a document purporting or proved to be thirty years old is produced to presume that the said document is genuine. The section only gives a discretion to the court that if under the circumstances established in a case it considers proper to raise such presumption it can do so. The courts should be very careful about raising any presumption under section 90 of the Evidence Act in favour of old deeds of *shankalap* which are produced practically for the first time during the trial of suits in which under-proprietary rights are set up on the basis of those deeds. The grounds on which the learned Subordinate Judge has presumed the deeds in question to be genuine do not appear to us to be good grounds, but as he has presumed them to be genuine under section 90 of the Evidence Act, we do not think it proper to interfere with his discretion in the matter. The deeds in question, as they are, may be presumed to be genuine, but the most important question to be decided is—how far that presumption can go? We have examined the *shankalap-namas* in question very carefully. We find that the deeds in question do not purport to have been *signed* or even *marked* by the executants. There can be no question of "mark" here as it is admitted that the executants were not unable to write. "Sign" includes "mark" with reference to that person only who is unable to write his

name [*see* section 3(52) of the General Clauses Act, X of 1897]. As it is admitted that both Musammat Sheo Kuar and Bakhtawar Singh were able to write their names, the deeds in question must have borne their *signatures*, but the fact is that they do not bear their signatures. There are some Hindi writings at the top of the deeds in question, but these writings cannot be (or cannot take the place of) their signatures. We do not know in whose handwriting are the said Hindi writings. There is something at the top of exhibit 7 which is said to be a seal, but it cannot be deciphered and there is nothing to show that Bakhtawar Singh had a seal and the deed in question bears his seal. Under these circumstances it is impossible to hold that the deeds in question were really *executed* by the persons by whom they are alleged to have been executed. We are not, therefore, prepared to hold that the *shankalap* pattas in question were really granted to the plaintiffs' ancestor Sukh Lal by Bakhtawar Singh and Musammat Sheo Kuar (respectively) as alleged by them (plaintiffs).

It is admitted that the plaintiffs failed to establish in the first court that the grantors of the alleged *shankalap* pattas were competent to grant them to the plaintiffs' ancestor as alleged by them. It should be borne in mind that the question of competency was specifically raised in defence. The learned Subordinate Judge, however, admitted additional evidence (documentary), on the plaintiffs' application and held on the strength of that evidence that the grantors of the *shankalap* pattas in question had power to grant them to the plaintiffs' ancestor as alleged by them (plaintiffs). He has observed in his judgment as follows:

> "But for the evidence now produced before me the power of the grantors could not be established and no declaration could be granted."

1932

RAM NARESH SINGH v. CHIRKUT.

Hasan, C. J. and Raza, J.

The appellant contends that the learned Subordinate Judge ought not to have allowed the respondents to produce additional evidence in appeal. In our opinion this contention is well founded. As pointed out in the case of *Kazim Husain* v. *Shambhu Nath* (1), the appellate court has a discretion to admit additional evidence for substantial cause, but the power given under section 107 and order XLI, rule 27 of the Code of Civil Procedure should be exercised very sparingly by the court and grave caution should be exercised in admitting new evidence. Where there is no *lacuna* or defect to be filled up or remedied and no substantial cause for taking additional evidence, the so-called additional evidence, as it stands, is legally inadmissible and must be left out of consideration in disposing of the case. Since then, we have two decisions of their Lordships of the Judicial Committee on the point under consideration.

The following observations were made by their Lordships of the Judicial Committee in the case of *Parsotham Thakur* v. *Lal Mohar Thakur* (2):

> "In their Lordships' opinion this additional evidence ought not to have been admitted . . . The provisions of section 107 of the Code of Civil Procedure, as elucidated by order XLI, rule 27, are clearly not intended to allow a litigant who has been unsuccessful in the lower court to patch up the weak part of his case and fill up omissions in the court of appeal. Turning to the provisions of rule 27, clause 1(*a*) has no application in the present case. Under (1)(*b*) it is only where the appellate court requires it (i.e. finds it needful) that additional evidence can be admitted. It may be required to enable the court to pronounce judgment, or for any other substantial cause, but in either case it must be the court that requires it.

(1) (1931) 8 O.W.N., 627. (2) (1931) L.R., 58 I.A., 254.

1932

RAM NARESH SINGH v. CHIRKUT

Hasan, C. J. and Raza, J.

This is the plain grammatical reading of the sub-clause. The legitimate occasion for the exercise of this discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence, but 'when on examining the evidence, as it stands, some inherent *lacuna* or defect becomes apparent'. This is laid down in the most positive terms by Lord ROBERTSON in *Kessowji Issur* v. *G. I. P. Railway* (1). He was dealing with the words of section 568 of the Code of 1882, but they are substantially the same as those in order XLI, rule 27 of the present Code. It may well be that the defect may be pointed out by a party, or that a party may move the court to supply the defect, but the requirement must be the requirement of the court upon its appreciation of the evidence as it stands. Wherever the court adopts this procedure, it is bound by rule 27(2) to record its reasons for so doing, and under rule 29 must specify the points to which the evidence is to be confined and record on its proceedings the points so specified. Their Lordships regret to find that, so far as the record discloses, none of these conditions was complied with in the present case. Reference has been made in this connexion to certain observations contained in the judgment delivered by Mr. AMEER ALI in *Indarjit Pratap Sahi* v. *Amar Singh* (2). The question in that case was as to the power of the Board to admit additional documents which the High Court had rejected, and this power is not in any way restricted or governed by the provisions of the Code. If any incidental remarks appearing in this judgment have occasioned any doubt as to the meaning of the rules above referred to, or the conditions under

(1) (1907) L.R., 34 I.A., 115(122). (2) (1923) L.R., 50 I.A., 183.

1932

RAM NARESH SINGH v. CHIRKUT.

which the discretion of the appellate court is to be exercised their Lordships desire to emphasize their view that the correct practice in the matter is as they have now defined it in accordance with the plain words of the Code."

Hasan, C. J. and Raza, J.

To the same effect is the decision of their Lordships of the Judicial Committee in the case of *Manmohan Das* v. *Ram Dei* (1). In that case their Lordships had discarded entirely the oral evidence which had been taken by the appellate court in contravention of the provisions of order XLI, rules 27 and 29 of the Code of Civil Procedure.

In the cases before us the plaintiffs had applied for amendment of their plaints and for admission of additional evidence should their applications for amendment be not granted by the court. Their applications for amendment were not granted by the learned Subordinate Judge, but he admitted the additional evidence (documentary) in question. It is difficult to understand what the learned Subordinate Judge meant by noting in the proceedings that the plaintiffs had applied for permission to withdraw from their suits with liberty to bring fresh suits. We find no such applications in the records of the appellate court. It may be that he took the applications for amendment to be applications for permission to withdraw from the suits with liberty to bring fresh suits. Be it as it may, he admitted the additional evidence in question on the plaintiffs' application without recording his reasons for doing so. It appears that the applications were opposed by the contesting defendant, but they were eventually granted by the court "for the ends of justice". The defendant also was then allowed to produce some additional evidence in rebuttal. It is clear that the additional evidence in question was not required by the court. In our opinion the learned

(1) (1931) A.L.J., 550 (552) : 8 O.W.N. 936.

1932

RAM NARESH SINGH v. CHIRKUT

Hasan, C. J. and Raza, J.

Subordinate Judge was wrong in admitting the additional evidence. He ought not to have allowed the plaintiffs to produce additional evidence in appeal and the additional evidence admitted by him must be entirely discarded. The additional evidence in question is legally inadmissible and must be left out of consideration in disposing of these cases. When this evidence is discarded, nothing remains to support the finding of the learned Subordinate Judge that the grantors of the *shankalap-namas* in question had power to grant them to the plaintiffs' ancestor in respect of the holdings in suit. The presumption that arises under section 90 of the Evidence Act only extends to the genuineness of the old documents coming from proper custody; it does not further go to the extent of holding that the document was in fact executed by persons possessed of the requisite authority.

The result is that we allow these appeals and setting aside the decrees of the learned Subordinate Judge restore those of the learned Munsif. The appellant will get his costs from the respondents in all the courts.

Appeal allowed.