REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 20 OF 2015
[Arising out of SLP (C) No. 921 of 2014]

OM PRAKASH (DEAD) TH. HIS LRS. .. Appellant(s)

Vs.

SHANTI DEVI & ORS. ..Respondent(s)

J U D G M E N T

VIKRAMAJIT SEN, J.

1 Leave granted.

2 The Appellant before us was the Defendant in a suit filed by the Respondent-Plaintiff praying for a decree of mandatory injunction directing the Appellant to hand over vacant possession of the property in dispute, on the predication that the Respondent was the owner of that property. The Appellant has been successively unsuccessful in the three Courts below, viz., the Trial Court, where Respondent's suit for mandatory injunction was decreed against the Appellant; the First Appellate Court, which dismissed

Appellant's First Appeal; and the High Court of Punjab & Haryana, which dismissed the Appellant's Second Appeal.

3 Outlining the facts briefly, the Respondent-Plaintiff's case before the Trial Court was that he was the owner-allottee of the property and had parted with possession of the property to the Appellant on a nominal licence basis. The parties are closely related to each other – being brothers-in-law since the Appellant/Defendant was the husband of the Plaintiff's sister. The Plaintiff pleaded that it had been agreed between them that as and when required by the Plaintiff the Appellant would vacate the property. However, despite the Plaintiff's repeated requests the Appellant did not accede thereto; accordingly, the aforesaid suit came to be filed. Whilst admitting that he had initially been a licencee of the Respondent, the Appellant pleaded in his Written Statement that on 15.05.1970 the Respondent had executed a Gift Deed in his favour, thereby making him the owner of the property. The Appellant/Defendant also claimed that the Gift Deed had been registered in and by the Office of the Sub Registrar, Patiala, on 18.05.1970. In Replication, the Respondent-Plaintiff has denied execution of the Gift Deed saying that because of close relationship the Defendant may have obtained his signatures by misrepresentations, essentially admitting his signature on that document.

4 Concurrent findings of the Trial Court and the Appellate Court are to the effect that the Gift Deed had not been proved under Sections 68 and 69 of the Evidence Act; the evidence that had been led was found wanting as regards proof of execution of the Gift Deed. The High Court dismissed the Second Appeal finding no substantial question of law before it and no justification for interference with the findings of facts by the Courts below.

5 For facility of reference the relevant Sections of the Evidence Act are reproduced:

> **68. Proof of execution of document required by law to be attested**.—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 be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:
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> Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.
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> **69. Proof where no attesting witness found**.—If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.
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> **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 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.
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> *Explanation*.—Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable."
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> This *Explanation* applies also to section 81.

6 The due execution and attestation of this Gift Deed is the sole point in issue before us. The Appellant has rested his case on the favourable presumption contained in Section 90 of the Evidence Act i.e. that the Gift Deed being thirty years old should be taken as having been duly executed and attested. The Appellant seems to have made little or no endeavour to prove the Gift Deed without the advantage of this presumption. Under Section 90, before any question of presuming a document's valid execution can emerge, the document must purport and be proved to be thirty years old. The law surrounding the date of computation of the elapse of thirty-years stands long-settled, since the verdict of the Privy Council in Surendra Krishna Roy v. Mirza Mahammad Syed Ali Mutawali AIR 1936 PC 15, which held that the period of thirty years is to be reckoned, not from the date

upon which the Deed is filed in Court but from the date on which, it having been tendered in evidence, its genuineness or otherwise becomes the province of proof. Generally speaking, although the date on which the document has been tendered in evidence or subjected to being proved/exhibited is the relevant date from which its antiquity is to be computed, we think it necessary to underscore that it should be produced at the earliest so that it is not looked upon askance and with suspicion so far as its authenticity is concerned.

8 Section 68 prescribes 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. Section 123 of the Transfer of Property Act, 1882 mandates that a Gift Deed pertaining to immovable property must be effected by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses. Section 17 of the Registration Act, 1908 also requires that instruments of gift of immovable property "shall be registered." Section 34, thereafter, requires the executants or their authorized representatives of the document executed for registration appear before the registering officer. However, the witnesses to a document need not also be the witnesses to its registration. The pandect being Part X, comprising Sections 47 to 50 of the Registration

Act would next be required to be adverted to. Section 47 adumbrates that the registered document will take effect from the date of its execution. Section 48 is indeed significant in that it clarifies that a registered document will probatively prevail over oral agreements, except for an agreement or declaration which does not itself mandatorily require registration provided the oral agreement is accompanied by delivery of possession. The preeminent Section 49 declares that if any document despite requiring registration is not so done it shall not be received in evidence or attain any legal efficacy, except in the context of a suit for specific performance, or if it is intended to be used to prove any collateral transaction. We have ventured into this lengthy and arguably avoidable analysis to accentuate on two aspects – (a) the imperative necessity to produce in evidence a written instrument where it exists; and (b) that the registration of documents does not *per se*, *ipso facto*, render it impervious to challenge or and make its reception automatic in curial proceedings.

9 The Appellant/Defendant had led evidence of himself as DW1 as well as DW2 to DW5, none of whom were either of the attesting witnesses to the Gift Deed. It has also not been clarified whether the attesting witnesses or either of them was also witness before the Sub-Registrar when the Gift Deed was accorded registration. It should be noted that law does not mandate that

the attesting witnesses to a document must also be present at the time of its registration under the Registration Act. Reasons remain recondite as regards this remissness or even as to their not being 'found' as postulated in Section 69, although there is a vague reference to both of them having died by the time the Defendant/Appellant had started recording his evidence. Section 69 provides for "proof where no attesting witness found". It is at once apparent that this provision anticipates a reasonable anxiety emerging out of the peremptoriness of Section 68, in that it addresses, *inter alia*, a situation where none of the attesting witnesses to a document (a gift deed, in this case) are alive at the time of the curial investigation thereof. Not leaving litigants forlorn for proof under Section 68, Section 69 places emphasis on handwriting(s) of the putative deceased or the 'not found' attestator(s), along with the signatures of the executant. We must be quick to elucidate that the position is akin to the reception of secondary evidence, in that the successful passage from the rigours of Section 68 can be met contingent upon the proved non-availability of the attesting witnesses to a document. Litigants are, therefore, not faced with an evidentiary *cul-de-sac*. They can discharge their burden by proving, in the alternate mode and manners conceived by the Act, the signatures of the putative attestators along with the handwriting of the executant. The Appellant herein palpably

failed in proving the signatures of the attestators to the Gift Deed, and, therefore, has pursued his case by evoking Section 90 as the cornerstone of his pleadings.

10 The Appellant has, in his effort to succeed before us, variously and discrepantly theorised the thirty-year statutory requirement. As one ground in his Appeal, the Appellant has pleaded for a relaxation of the thirty year period, admitting the tendering in evidence of the Gift Deed on 14.10.99 in his examination-in-chief/statement by which time only 29 years 5 months had elapsed. The plea for relaxation cannot be granted as the antiquity of the document is the very *raison d'etre* for it to be bestowed with the curial presumption that the signature and every other part of such document which purports to be 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. The Court could not have relaxed or discounted the short fall of seven months. As another, the Appellant has also pleaded that the period be calculated from 21.07.2000 the date of testimony of DW5, the Registration Clerk from the Office of the Sub Registrar, Patiala, who had deposed (unsuccessfully, as concluded by the Learned Courts below) as to the execution of the Gift Deed; he produced the copy of the Gift Deed

available in the Sub Registrar's Office. On the date of the deposition of DW5, thirty years had indubitably elapsed since the execution and/or the registration of the Gift Deed. Attempting again elsewise, the Appellant has submitted the proper date of calculation as the date of judgment of the Trial Court. As far as DW5 was concerned, he could only have, and which he did, prove the date on which the Gift Deed was presented for registration, i.e. 18.5.1970, thereby proving to that extent the antiquity of that Deed. If it crossed the thirty year period the Defendant may have succeeded in claiming the advantage of the presumption contained in Section 90 unless the relevant date would be the date of the recording of his statement. If the first attempt of the Defendant/Appellant before us, to prove the Gift Deed occurred on 21.7.2000, then we think that to be the proper and appropriate date from whence the thirty year period ought to be counted backwards. It also appears to us to be facially plain that the Clerk from the Office of the Sub-Registrar could only testify as to whether the document sought to be proved is in actuality was the one which was, in fact, duly registered, by producing the original records or if permissible by Rules by tendering a certified copy thereof. This witness could not possibly have said anything more. In the event, it would have been sagacious for the Defendant to have delayed the recording of his own statement beyond 18.5.2000 so as to inter

any contention that the Gift Deed had been tendered in evidence after its attaining a thirty year vintage. Most often where the Courts countenance document which has been in existence for thirty years or more, the likelihood of either of the attestators thereof being alive is rather remote. Once it is satisfactorily proved that the document is thirty years or more in age, Section 90 thereupon dispenses with the formalities of producing the executant and or the attestators thereto.

11 It appears that the registered Gift Deed was sought to be proved/exhibited by the Defendant himself. If this occurred prior to the Gift Deed attaining the age of thirty years then Section 90 of the Evidence Act, 1872 would not be of avail to the Defendant, but if the Defendant's testimony came to be tendered and recorded thirty years subsequent to the execution of the Gift Deed, then the presumption attached to Section 90 could be taken advantage of. Lastly, it would logically follow that the contention of the Appellant/Defendant that the relevant date for computation of age in reverse should be the date of the judgment of the Trial Court is clearly incorrect.

12 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 alluded 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 document 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.

13 While clarifying law as we have striven to do above, since the Gift Deed in question was tendered in evidence five months prior to having become thirty years old, the Appeal is devoid of merits. The Appellant did not even attempt to prove the Gift Deed in any manner known in law.

14 The Interim Order is recalled. The Appeal is dismissed but we desist from imposing costs.

.....J.
[ANIL R. DAVE]

.....J.
[M.Y. EQBAL]

.....J.
[VIKRAMAJIT SEN]

New Delhi
January 05, 2015.