

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

BEFORE:

**The Hon'ble Justice Soumen Sen
and
The Hon'ble Justice Uday Kumar**

FA 261 of 2010

**Mussammat Khatoon Begum (since deceased)
Muhammad Naseem Lodhi & Ors.
Versus
Raja Mohammad Amin & Ors.**

For the Appellants : Mr. Haradhan Banerjee, Sr. Adv.,
Mr. Rahul Karmakar, Adv.,
Mr. Lutful Haque, Adv.

For the Respondents : Mr. Saptangshu Basu, Sr. Adv.,
Mr. Partha Pratim Ray, Adv.,
Mr. Rajdip Bhattacharya, Adv.,
Mr. Imteyaz Aslam Lodhi, Adv.

Hearing concluded on : 17th November, 2022

Judgment on : 6th December, 2022

Soumen Sen, J: The appeal is arising out of the judgment and decree both dated 31st August, 2009 passed by the learned Judge 11th Bench, City Civil Court at Calcutta in Title Suit no. 869 of 1986.

The plaintiff filed a suit for recovery of vacant possession upon expiry of lease by efflux of time and mesne profits assessed at Rs.10912.

Briefly stated, one Motilal Boral executed a registered deed of lease dated 30th September, 1963 in favour of one Md. Allauddin Rangrez the

original defendant for a period of 21 years with effect from 21st October, 1963 at a monthly rent of Rs.250/- which was mutually increased to Rs.300/- per month payable according to the English calendar month. By virtue of the said deed the original defendant became a lessee in respect of the suit premises namely premises no. 22, Ratu Sarkar Lane, situated in the city of Calcutta. The suit property was conveyed and transferred jointly in favour of Hazi Ali Mohammad Razuka (hereinafter referred to as 'Hazi' the original plaintiff no.1 and his wife Hajaan Lachmi Bibi (hereinafter referred to as 'Lachmi') by a registered deed of conveyance dated 23rd April, 1975 executed by Motilal Boral for valuable consideration. Consequent upon the aforesaid sale Motilal served a letter of attornment to the original defendant intimating him of the change of ownership and asked him to attorn the lease in favour of the vendors. The original defendant accordingly attorned the said lease in favour of the original plaintiff no.1 and his wife and paid rent to them. The wife of the original plaintiff no.1 died on 5th February, 1979 leaving behind the original plaintiff no.1 and her two sons, the plaintiff nos. 2 and 3 sons as her legal heirs and representatives. They inherited the interest of the deceased in the property. The original defendant was informed about the death of Lachmi whereupon the rents were being paid to the original plaintiff no. 1 and his sons by the defendant. The rent receipts were being issued jointly by the plaintiffs. The original defendant became a tenant under the plaintiffs. The lease expired by efflux of time on 30th September, 1984. In spite of expiry of the said lease the original

defendant failed to deliver the vacant and peaceful possession of the suit premises to the plaintiffs. The plaintiffs alleged that the original defendant failed and neglected to pay the rent in respect of the suit premises for the period from February, 1983 to September, 1984 aggregating a sum of Rs.6000/-. On the ground of expiry of the lease and default in paying the rents the plaintiffs filed a suit for recovery of possession, mesne profits and other reliefs.

The original defendant contested the suit by filing written statements. The original defendant in his written statement has stated that upon the death of the plaintiff no.1 his legal heirs was not substituted and accordingly the suit has abated. The wife of the plaintiff no.1 has predeceased the plaintiff no.1. The plaintiff no.1 had no son or daughter and as such under the Mohammedan Law his younger brother Din Mohammad being his only heirs was required to be brought on record. In absence of Din Mohammad Razuka the suit has abated. The original defendant has also stated that Lachmi, the predeceased wife of plaintiff no.1 is survived by her younger sister Musammat Mangi Bibi has inherited her estate according to the share under the Mohamedan Law governing Sunni Sk of Muslims. It was alleged that the plaintiff no 2 and 3 was interested to disinherit Mangi Bibi by wrongly describing themselves as the sons of the plaintiff no.1. It was stated that Din Mohammad and Mangi Bibi are the only necessary parties to the suits and the plaintiffs have no cause of action to file the instant suit. The registered lease specifically states that the term lessor shall include only

his heirs, executors, administrators and representatives. It was also specifically agreed and understood that the assignee of the said lessor, if at all the suit premises is sold within the period reserved under the said lease, shall not be entitled to enforce the covenants under the said lease and as such the assignee and/or assignees were sufficiently and particularly excluded to enforce the covenants contained in the said registered lease.

The original defendant further contended that they have been holding the suit property as a monthly tenant. Rents were realised for up to the month of January, 1983 against the rent receipts. After the death of the original defendant substituted defendants filed an additional written statement. In the additional written statement it was stated that Md. Amir and Asraf both sons of Din Mohammad were born in Pakistan and citizens thereof and accordingly they are incompetent to own the suit property. The substituted defendants adopted all other statements made by the original defendant in his written statement.

On the basis of the pleadings the trial Court framed the following seven issues:

1. Is the suit maintainable?
2. Is the suit bad for nonjoinder and misjoinder of parties?
3. Has the lease granted by the deed of lease executed on 30.9.63 stood determined by efflux of time on 30.9.84?

4. Are the present plaintiffs entitled to a decree for eviction against the defendant on the ground of determination of the lease by efflux of time?
5. Are the plaintiffs entitled to get a decree for Rs.7,212/- towards arrears of rent with interest?
6. Are the plaintiffs entitled to mesne profits as claimed?
7. To what other reliefs, if any, the plaintiffs are entitled?

Before the trial court principally two issues were raised, namely, the present substituted plaintiffs are not the owners of the property and the possession of the defendant in any event is of monthly tenant upon expiry of the lease by way of holding over.

During trial the plaintiffs have produced seven documents in establishing their relationship with Hazi and ownership of the premises in question. They are:

- i) Birth certificates issued by the Kolkata Municipal Corporation
- ii) Ration cards in the name of the plaintiffs
- iii) School certificates of the plaintiffs
- iv) Passports in the name of the plaintiffs
- v) Admit cards issued by the Government of West Bengal, Bengal Madrassa Education Board. And

vi) Admit cards issued by the West Bengal Council of Higher Secondary Education

vii) Admit card issued by the Calcutta University.

In order to prove its case the plaintiff no.2 was examined as PW1. In his deposition he has stated that the plaintiff no.2 is his brother and original plaintiff no.1 was his father. His father died on 5th April, 1987 and his mother Lachmi died 5th February, 1979. The plaintiffs are the legal heirs of the original plaintiff no.1 and the original defendant was a lessor under their parents in respect of the entire premises. The deed of lease and the deed of sale were marked as Exbt. 1 and 2 without objection. The letter of attornment was also marked as Exbt. 3 however, with objection. PW 1 deposed that after purchase of the suit premises defendant paid rent up to January, 1983 and after the death of their mother the original defendant was intimated. After the death of their mother the original plaintiff no.1 and the present plaintiffs used to look after the suit premises and after the death of their parents the names of the present plaintiffs were mutated in the record of the Calcutta Municipal Corporation and they have been paying the taxes of the said premises. The tax receipts were produced and marked as Exbt.4 series. PW1 has proved birth certificate of himself and his brother that were marked as Exbt. 6 and 6(a) respectively. PW1 produced the admit card issued by the Madrassa Education Board, admit card issued by the West Bengal Council of Higher Secondary Education and admit card of Calcutta University that were marked as Exbt. 9, 10 and 11 respectively. All these

documents were produced to show that they were born at Calcutta and the original plaintiff has been shown as father of the substituted plaintiff nos. 2 and 3 in those documents.

PW1 on recall had filed two original passports which were marked as Exbt. 8 and 8(1) respectively. The said documents were produced to substantiate the claim of the plaintiffs with regard to their relationship with the original plaintiff, nationality and proof of ownership of the property in question.

In his evidence he has stated that after the expiry of the lease the original defendant had no right, title and interest to possess the suit premises and since the original defendants refused to vacate the suit premises accordingly the plaintiffs filed the suit for recovery of possession.

Defendant No.1 Khatoon Begum (hereinafter referred to as 'Khatoon') and defendant No.2, Naseem Lodhi (hereinafter referred to as 'Naseem') have deposed on behalf of the defendants.

Khatoon has stated that Lachmi died issueless in 1979 and Mangi the sister of Lachmi Bibi inherited her share. She has denied that the plaintiff nos. 2 and 3 are the sons of Hazi and Lachmi. According to her, Din Mohammad is the elder brother of plaintiff no.1 and father of plaintiff nos. 2 and 3, i.e., Raja Md. Amin and Raja Md. Ashraf. She has stated that after the death of the original plaintiff no.1, Din Mohammad inherited the share of plaintiff no.1. In her cross-examination she denied that Amin and Ashraf are the sons of Hazi and Lachmi. Khatoon has relied upon few

documents to show that both the plaintiff no. 2 and 3 are sons of Din Mohammad. In his examination-in-chief Naseem has stated that the suit property was transferred by Motilal to one Ali Mohammad Rajuka and his wife Hazan Lachmi Bibi by a registered deed of sale dated 23rd April, 1975 and thereafter they received rent from his father which was paid up to February 1983. He has produced two rent receipts that were marked as Exbt. A and A/1 respectively.

In or about 30th June, 2005 the substituted defendants filed an application for issuance of summons for production of the following documents by the Chief Municipal Health Officer Kolkata Municipal Corporation and also to examine the said officer:

- i) Birth Register relating to I. No.389, C. No. 32, Ward No. H.O./SPL, Date of Birth/In Ward No. 511.70, Date of Registration: 7280, Baby's Name: Raja Mohammad Ashrof, Male/Female: Male, Mother's Name: Lakhi Bibi, Father's Name: Hazi Ali Rajuka, place of birth, as before, Address:2, Nawab Badruddin Street, Calcutta-73

Pursuant to the said summon one Dhananjoy Mishra, Head Assistant, Health Department had appeared and produced documents relating to birth register.

Mr. Mishra in his chief has admitted that in Serial no.10 the names of Rajib Gupta and Ganga Prasad Gupta appearing in the 4th and 6th column were deleted and replaced by the name of Raja Md. Amin and Hazi

Ali Md. Razuka. Similarly, serial no. 2 and serial no. 3 were corrected by replacing 25th July, 1976 with 28th December, 1996 and the premises number. During his cross-examination he has stated that the name of Rajib Gupta along with the name of his father, address and date of birth were already recorded against serial no.5. Apparently the particulars mentioned in serial no. 10 were by mistake and subsequently the same was corrected by pen with the correct names and address. After his evidence was concluded the learned Court made a remark that the penned through portion against serial no. 10 is not initialled by any person including the head of the department.

Although in the memorandum of appeal several grounds have been taken challenging the decree for eviction, Mr. Haradhan Banerjee, the learned Senior Counsel representing the appellants in all fairness has submitted that the appeal may be heard only on the ground that the plaintiff nos. 2 and 3 are not the legal heirs of Hazi and not landlords of the appellants, meaning thereby, the appellants are questioning the title of the decree holders as their landlords.

Mr. Banerjee submits that the appellants are not disputing the title of the original plaintiff no. 1 and her wife as landlords but after the death of the original plaintiff no.1 by reason of failure to bring on record the legal heirs of the original plaintiff no.1 and her wife who predeceased the plaintiff no.1 the suit has abated. The embargo under Section 116 of the

Evidence Act would not apply as plaintiff nos. 2 and 3 are presumably not the legal heirs of the original plaintiff no.1.

Mr. Banerjee submits that in the instant case the plaintiff nos. 2 and 3 have to establish that they have inherited the said property from the original plaintiff no.1 and in absence of any such proof the plaintiffs cannot maintain the suit. It is submitted that in the suit a specific plea has been taken in the additional written statement by the substituted legal heirs of the original defendant that the plaintiff nos. 2 and 3 are the sons of Din Mohammad Razuka who is a citizen of Pakistan and the factum of such relationship is proved by Khatoon Begum, the defendant no.1 in her evidence. Our attention is drawn to Exbt. B and BI namely, the document in Urdu language purported to have been received from the office of the Directorate of Birth and Death from Pakistan that were tendered during the examination in chief of Khatoon on commission and its translated copy. It is stated that the said documents were marked as Exbt. B and BI. The existence and the contents of the said documents have been duly proved by the said witness. In view of clear evidence emanating from Exhibit B that the plaintiff nos. 2 and 3 were born in Pakistan and Din Mohammad was their father and it is being duly proved by Khatoon, the suit is not maintainable at the instance of the defendant nos. 2 and 3.

Mr. Banerjee has taken us through the deposition of Khatoon Bibi who has claimed to be related to plaintiff no.1 Din Mohammad to impress upon us that she is the only person having the special knowledge about

the relationship of the plaintiff no.1 with Din Mohammad and also the relationship of the plaintiff nos. 2 and 3 with Din Mohammad. It is submitted that she has produced the extract of the birth and death register from the Government of Pakistan which would conclusively prove that Din Mohammad was a citizen of Pakistan and brother of the original plaintiff no.1 and the father of the plaintiff nos. 2 and 3. Persuasion has been made to convince the court that the purported seal appearing in the middle portion of Exbt. B of Assistant Director, D.R.O. Hyderabad and the stamp and seal of one Deputy Director (Administration) of Chief Engineer (O & M) at the bottom of the said documents are the official seal and signatures of the persons authorised to sign the document. In fact, the signature of Din Mohammad was admitted by the plaintiff and was marked as Exbt. 7. It is submitted that although Exbt. B was marked with objection but that does not make the said document inadmissible in evidence as the said document was proved in accordance with Section 35 read with Section 77 of the Indian Evidence Act.

Mr. Banerjee submits that entries in public record are admissible in evidence under Section 35 read with Section 77 of the Indian Evidence Act, 1870. The record produced by Khatoon Bibi are public record and the entries made therein with regard to the relationship between the parties are admissible in evidence though the court has the right to examine their probative value.

It is argued that it is a public document duly certified by the competent authorities authorized to issue the said certificate and it is

immaterial how it was obtained and produced at the trial. It is submitted that Ms. Khatoon had made statements with regard to the relationship of Din Mohammad with the plaintiff nos. 2 and 3 and the said statement is relevant under Section 32 (5) of the Indian Evidence Act as she had special means of knowledge about the said relationship which otherwise is also corroborated from Exbt. B and BI. The said document cannot be considered to be inadmissible in evidence although its probative value can be assessed at the time of appreciation of the evidence while weighing one evidence against the other.

Mr. Banerjee in this regard has relied upon the passage from the privy council in ***Gopal Das & Anr. v Sri Thakurji & Ors.*** reported in **47 CWN 607** where the principles on the admissibility of the document was discussed in detail and such principle was followed by the Hon'ble Supreme Court in various decisions.

Mr. Banerjee thus makes a distinction between the admissibility of the documents and its probative value and make us to believe that the document produced by Khatoon is sacrosanct. Mr. Banerjee submits that the bar under Section 116 of the Evidence Act would not apply in the instant case as the appellants have been able to raise sufficient doubts with regard to the authority of the plaintiffs to sue the defendants for eviction.

It is submitted that the birth register produced by the Head Assistant, Health Department of Kolkata Municipal Corporation would

show that the corrections were made in the said register not in accordance with the provisions of the Registration of Births and Deaths Act, 1969 (hereinafter referred to as 'Act, 1969'). Original entries were penned through and new entries were made without authentication by the appropriate authority. The learned Counsel has referred to Section 8 of the Act, 1969 and Rule 12 of The West Bengal Registration of Births and Deaths Rules, 2000 to show that the corrections made in serial no. 10 have not been countersigned by the Chief Medical Officer of Birth and accordingly the said document cannot be considered to be reliable. The entries made in the said serial are all interpolated and should be ignored. The said document cannot form the basis of subsequent documents namely, the admit card, ration card etc., relied upon by the plaintiff nos. 2 and 3 at the trial in order to establish their relationship with the plaintiff no.1. Mr. Banerjee submits that no probative value could be attached to the said birth register as the mandatory requirement of Rule 12 was not followed and in this connection he has relied upon the decision of the Hon'ble Supreme Court in ***Birad Mal Singhvi v. Anand Purohit*** reported at **1988 (Supp) SCC 604** (paragraphs 14 and 15).

Mr. Banerjee further submits that the authenticity of the entries made in the various documents produced by the plaintiff nos. 2 and 3 would depend on whose information such entries were recorded and what was the source of information. Entries in the admit card or the ration card or any other document produced by the plaintiff nos. 2 and 3 are self-serving statements and may have been based on the entries in the

birth register. It is submitted that even if the entry was made in an official record by the official concerned in the discharge of his official duty, it may have weight but still may require corroboration by the person on whose information the entries have been made. Mr. Banerjee in this regard has relied upon the decision of the Hon'ble Supreme Court in ***Madan Mohan Singh & Ors. v. Rajni Kant & Anr.*** Reported at **2010 (9) SCC 209** (paragraph 17 to 20) and ***Sarwan Singh & Ors. v. Ashok Kumar & Ors.,*** reported at **AIR 1983 Pun & Har. 366** (paragraph 4).

Mr. Banerjee has submitted that whenever there is a requirement of an opinion as to the relationship of one person to another the evidence of a person who was the member of the family or otherwise has special means of knowledge on the particular subject of relationship is relevant and admissible in evidence. Mr. Banerjee has referred to ***Dolgobinda Paricha vs. Nimai Charan Misra & Ors.,*** reported at **AIR 1959 SC 914** to prove his point.

Mr. Banerjee concludes his submission with the decision of the Hon'ble Supreme Court in ***Muddasani Venkata Narsaiah (D) Th. Lrs. V. Muddasani Sarojana*** reported at **AIR 2016 SC 2250** and ***A.E.G. Garapiet v. A.Y. Derderian*** reported at **AIR 1961 Cal 359** in support of his submission that the plaintiffs have not put their essential and material case in cross examination to Khatoon. It is submitted that both the aforesaid decisions have clearly acknowledged that during cross examination the plaintiff "must put to each of his opponents witness in turn, so much of his own case as concerns that particular witness or in

which that witness had any share” which the plaintiffs have miserably failed to do and accordingly it has to be held that the case of the plaintiff has not been proved.

Mr. Saptangshu Basu, Sr. Advocate appearing on behalf of the plaintiffs decree holder have submitted that at the time of deletion of the name of the original plaintiff no.1 the original defendant did not raise any objection with regard to the relationship of the plaintiff no.1 with the plaintiff no.2 and 3 and did not seek any adjudication under Order 22 Rule 4 CPC. In view thereof, it is no more open for the present appellants to question such relationship at this stage. Mr. Banerjee submits that the learned trial judge has rightly rejected the evidence based on Exbt. B and B1 and decreed the suit.

We have heard the learned Counsel for the parties.

The endeavour of the defendant before the trial Court was to establish that the original plaintiff was not the father of the plaintiff nos. 2 and 3. The trial court accepted the relationship of the plaintiff no.1 with plaintiff nos. 2 and 3. The trial court has relied upon the register of birth certificate marked as Exbt. 6 and 7 respectively. The defendants in order to disprove the said two documents applied for production of the original record. Dhananjay produced the record. Undoubtedly the said record contains few corrections. However the fact remains that the said documents were produced by the competent persons and from proper custody with explanation for the correction. Dhananjay has explained the

reason for correction as the name of Rajib and his father were entered by mistake in Serial no. 10 overlooking that the same set of particulars were mentioned earlier in serial no. 5. The mistake is also otherwise obvious as the column 3 which refers to “nationality, religion, caste, if any”, the religion of Raja was mentioned as “Muslim” and there is no correction or interpolation in the said column. It also shows that the birth was registered on 14th February, 1980 much earlier to the filing of the suit or when the dispute arose. The argument that it was not being countersigned by the competent authority would not by itself make the said document inadmissible in evidence or would diminish its probative value. The entry in the Register stating a fact is made by a public servant in the discharge of his official duty has produced the Register and he has offered an explanation for the obvious mistakes would not diminish the evidentiary value of such entries merely because the authorities concerned has failed to put a counter signature after correction is made. The Register is prepared under the Act 1969 read with the West Bengal Rules of 2020. The copy of the Birth certificates and Birth Register are public documents and a presumption as to its genuineness is accepted under Section 79 of the Indian Evidence Act and heavy onus lies on those who want to displace the presumption. The relationship of the parties would also appear from the original passports exhibited at the trial without any objection. In fact, all the documents disclosed and relied upon except the letter of attornment exhibited during trial were marked exhibits without objection. The letter of attornment, however, was proved

and no argument was made by Mr. Banerjee that there was no letter of attornment as it was not acted upon.

It is significant that the suit was filed by the plaintiff no.1 along with plaintiff nos. 2 and 3. In the plaint the plaintiff no.1 has clearly stated that the plaintiff nos. 2 and 3 are his sons. Plaintiff no.1 died soon after the filing of the suit. The statement made by the plaintiff no.1 when he was alive as to the relationship of the plaintiff no.1 with the plaintiff no.2 and 3 are relevant as he is the only person having the special means of knowledge as to the relationship between the parties. Almost all the documents where the reference of the plaintiff No.1 is required would show that the original plaintiff was referred to as father of the plaintiff Nos. 2 and 3. In the original written statement, the original defendant did not take a plea that Din Mohammad was a citizen of Pakistan and that the plaintiff nos. 2 and 3 being the son of Din Mohammad is not entitled to possess any property in India.

The plaintiffs in order to prove their relationship amongst others have produced the original passports. The procedure for issuing the passport under the Passport Act, 1967 is quite rigorous. The passport authorities on receipt of an application made an elaborate enquiry and only after being satisfied that the applicant is a citizen of India would issue the passport. The enquiry under Section 5 of the Passport Act, 1967 is also an identity document. It is not done cursorily and perfunctorily. Surprisingly, the respondent authorities did not make any complaint to the passport authority about the alleged fake identity of the

plaintiff no.2 and 3 or misrepresentation of fact at the time of issuing the passport and even thereafter.

The defendants knowing the fate of trial in order to protract the proceeding devised a devious procedure to create a cloud in the mind of the court with regard to the real identity of the plaintiff nos. 2 and 3. After almost eighteen years of trial at the instance of the defendants a Commissioner was appointed to record of the evidence of Khatoon Bibi. During her deposition she produced Exbt. B and its English translation marked as Exbt. BI. These documents were immediately objected to by the plaintiff's advocate and duly recorded by the commissioner in the deposition. Khatoon Bibi made contradictory statement with regard to obtaining possession of Exbt. B. In examination in chief she has stated that the eldest brother of her husband namely 'Khawaja' sent those documents from Pakistan. In the cross examination she has stated that Khawaja and his wife whose name she could not recollect brought those documents during their visit to Kolkata. She could not recollect the year and month when such documents were delivered. It was stated that those documents were sent on demand. She has also stated during her cross examination that she was not aware of the contents of the written statement.

Mr. Banerjee during his argument has drawn our attention to question no.14 of cross examination of Khatoon to argue that Khatoon not only identified the signature of Din Mohammad but the said document was also marked as Exbt. 7 at the instance of the plaintiffs. We have seen

commissioner's report and the original Exbt. B. Although it is mentioned that it was also marked as Exbt. 7 the list of Exhibits would show that the signature of Din Mohammad was not marked as Exbt. 7 at the instance of the plaintiffs. We do not find from the cross examination of the plaintiffs that the said signature was shown to any of them or any question was put to the plaintiffs regarding the said signature. Moreover, Exbt. 7 is a petition in connection with the suit no.42 of 1946 and there was nothing on record to show that the plaintiff has agreed to mark the signature as Exbt. 7. In fact, the signature was identified by Khatoon not by the plaintiffs.

Moreover, admissibility of a document or contents thereof does not necessarily lead to drawing any inference unless the contents thereof have some probative value. If we treat Exbt.B to be a secondary evidence, it must be authenticated by foundational evidence that the alleged copy is, in fact, true copy of the original. Mere admission of a signature in a document does not amount to proof of the contents of the document. The documentary evidence is required to be proved in accordance with law.

In any event we need to find out if the said document crosses the threshold admissibility test, let in and received in evidence, before we decide on the probative value of Exbt. B. Mere production of the document does not mean that the said document is admissible in evidence. When a document is marked as exhibit with objection it does not mean that the court cannot decide the admissibility of the said document and only the probative value has to be assessed. The marking

of Exbt. B with no objection does not mean that the document is admissible but its probative value is to be assessed later. The evidence was recorded before the commissioner. The commissioner could not have decided the admissibility of the said documents when produced. In ***H. Siddiqui (Dead) by L.Rs. Vs. A. Ramalingam*** reported at **2011(4) SCC 240** the Apex court observed the court as an obligation to decide the question of admissibility of document in secondary evidence before making endorsement therein. In the instant case, the commissioner ought to have left the matter to the court instead of marking the said document as exhibit with objection. However, the said procedure of marking by the commissioner does not mean that the said document is admissible in evidence and the contents are required to be proved separately. Mr. Banerjee has placed reliance on Sec. 35 and Sec. 77 of the Indian Evidence Act.

Section 35 refers to relevancy of entry in public record or an electronic record made in performance of duty. Before a document can be admissible under Section 35 the following conditions must be fulfilled:-

1) The document must be in the nature of an entry in any public or other official book, register or record;

2) It must state a fact in issue or a relevant fact;

3) The entry must be made by a public servant in the discharge of his official duties or in performance of his duties especially enjoyed by the law of the country in which the relevant entry is kept; and

4) *All persons concerned indisputably must have an access to it, (See: **State of Bihar v. Radha Krishna Singh; 1983 (3) SCC 118, Ravinder Singh Gorkhi v. State Of U.P; 2006 (5) SCC 584 and Babloo Pasi v. State of Jharkhand; 2008 (13) SCC 133.**)*

Section 77 deals with proof of documents by production of certified copies. The appellants/defendants first has to prove that Exbt. B is a public document and entries therein are made by a public servant at Pakistan in discharge of his official duty. The document sought to be relied upon is a document purported to have been issued by a competent authority from Pakistan. It is in the category of “other official documents” within the meaning of Section 78 of the Indian Evidence Act. Since it is a foreign document it has to be proved in accordance with Section 78 (6) of the Indian Evidence Act, 1872. The said Section reads:

“78(6). Public documents of any other class in a foreign country,-

by the original, or by a copy certified by the legal keeper thereof, with a certificate under the seal of a Notary Public, or of (an Indian Consul) or diplomatic agent, that the copy is duly certified by the officer having the legal custody of the original and upon proof of the character of the document according to the law of the foreign country.”

The proof required under this clause is for the purpose of the Court being in a position to decide whether a document is a document which falls within the definition “public document” in Section 74 because, unless the character of the document is that it is an act of a public officer, legislative, judicial or executive, it would not be public document. (See.

East India Trading Co. V. Badat and Co., AIR 1959 Bom 414: 61 Bom LR 333: ILR (1959) Bom 1004).

In the context of admissibility of birth record from Pakistan the Punjab High Court in ***Union of India v. Amrik Singh, AIR 1963 Punj 104: ILR (1962) 2 Punj 597*** has held that a copy of the birth entry from the birth record of the Town Committee of a town in Pakistan is not admissible in evidence in the absence of attestation by the High Commissioner for India in Pakistan under this Clause.

Sub-section (6) makes it clear that apart from the two certificates one by the legal keeper of the original documents, and the other by the Counsel General there shall also be proof of the character of the document according to the law of the foreign country before the document is admitted. It is a condition precedent, per Subho Rao J, in ***Badat and Co. v East India Trading Co., AIR 1964 SC 538).***

The document namely Exbt. B produced does not fulfil any of the aforesaid requirements and accordingly could not have been marked at all, or taken on record. Only upon fulfilment of the conditions clearly mandated in the said Section the said document could be marked as an Exhibit.

In the instant case, the evidence was on commission and the commissioner has taken the said document on record with objection. Before a document could be admissible in evidence its existence and authenticity needs to be verified. If a document is produced from the

proper custody by a competent person or it is a public document and carries a presumptive value recognized under the Indian Evidence Act, 1872 such document may be taken on record and admitted to evidence and marked as exhibit.

The claim of the defendants against the plaintiff is primarily based on Exbt. B. The said document bears a seal at the middle and a stamp with a signature at the bottom purportedly by officials at Pakistan. The authenticity of the said document is not proved in the manner required by law to be proved and necessarily does not carry any presumptive value. The defendants could not satisfy the court with regard to the genuineness and authenticity of the said document. The alleged certificates are not sufficient to prove the documents as evidently there is no proof of the character of the document according to the law of Pakistan. It does not bear any attestation by the High Commission for India in Pakistan or any other appropriate authority in law authorized to attest two documents. There must be a procedure for authentication of the said document and a certificate that may be attached to such documents in order to give an impression of the said document as genuine.

Section 76 of the Indian Evidence Act enacts that the custody of a public document, which any person has right to inspect, shall give a certified copy on demand. Section 77 says that such certified copies may be produced in proof of the contents of the public documents or their parts. The certified copies are of statutes deemed to be originals (***Controller of Gorakhpur; AIR 1934 PC 57***). The certified copy of public

document can be produced as secondary evidence of public document. There is no proof that Exbt. B is a copy certified by the legal keeper at Pakistan with a certificate under the seal of a notary public or of an Indian Counsel. It does not appear that the said document has been duly certified by the officer having the legal custody of the original. The defendant if they are seriously interested to discredit the plaintiff nos. 2 and 3 about their real identity could have followed the procedure under Section 78(6) of the Indian Evidence Act, 1870. The person who claimed to have obtained Exbt.B did not come and depose.

Din Mohammad has not come and depose. Khatoon Bibi could not say that if Din Mohammad is alive or dead. She did not produce any document to show that 'Khawaja' is not alive. Mr. Banerjee has fairly submitted that no rent was tendered to Din Mohammad or Mangi Bibi who according to the defendants became the owners and landlords of the property in question after the death of Lachmi and Hazi respectively. The question of probative value of the said documents would arise provided the defendants are first able to persuade the court to accept the authenticity and existence of the said document. The plaintiffs have never accepted the said documents to be genuine.

The concept of admissibility and probative value has been discussed in **Madan Mohan** (*supra*). In the said decision the Hon'ble Supreme Court has referred to its earlier decision and held as under (Para 17 to 21):

"17. In State of Bihar and Ors. v. Radha Krishna Singh and Ors. this Court dealt with a similar contention and held as under:

40. Admissibility of a document is one thing and its probative value quite another - these two aspects cannot be combined. A document may be admissible and yet may not carry any conviction and weight of its probative value may be nil.

53. Where a report is given by a responsible officer, which is based on evidence of witnesses and documents and has "a statutory flavour in that it is given not merely by an administrative officer but under the authority of a Statute, its probative value would indeed be very high so as to be entitled to great weight.

145(4) The probative value of documents which, however ancient they may be, do not disclose sources of their information or have not achieved sufficient notoriety is precious little.

18. Therefore, a document may be admissible, but as to whether the entry contained therein has any probative value may still be required to be examined in the facts and circumstances of a particular case. The aforesaid legal proposition stands fortified by the judgments of this Court in *Ram Prasad Sharma v. State of Bihar*; *Ram Murti v. State of Haryana*; *Dayaram and Ors. v. Dawalatshah and Anr.*; *Harpal Singh and Anr. v. State of Himachal Pradesh*; *Ravinder Singh Gorkhi v. State of U.P.* ; *Babloo Pasi v. State of Jharkhand and Anr.*; *Desh Raj v. Bodh Raj* ; and *Ram Suresh Singh v. Prabhat Singh @Chhotu Singh and Anr.* In these cases, it has been held that even if the entry was made in an official record by the concerned official in the discharge of his official duty, it may have weight but still may require corroboration by the person on whose information the entry has been made and as to whether the entry so made has been exhibited and proved. The standard of proof required herein is the same as in other civil and criminal cases.

19. Such entries may be in any public document, i.e. school register, voter list or family register prepared under the Rules and Regulations etc. in force, and may be admissible under Section 35 of the Evidence Act as held in *Mohd. Ikram Hussain v. The State of U.P. and Ors.* and *Santenu Mitra v. State of West Bengal.*

20. So far as the entries made in the official record by an official or person authorised in performance of official duties are concerned, they may be admissible under Section 35 of the Evidence Act but the court has a right to examine their probative value. The authenticity of the entries would depend on whose information such entries stood recorded and what was his source of information. The entry in School Register/School Leaving Certificate require to be proved in accordance with law and the standard of proof required in such cases remained the same as in any other civil or criminal cases.

21. For determining the age of a person, the best evidence is of his/her parents, if it is supported by unimpeachable documents. In case the date of birth depicted in the school register/certificate stands belied by the unimpeachable evidence of reliable persons and contemporaneous documents like the date of birth register of the Municipal Corporation, Government Hospital/Nursing Home etc, the entry in the school register is to be discarded. (Vide: *Brij Mohan Singh v. Priya Brat Narain Sinha and Ors.* *Birad Mal Singhvi v. Anand Purohit* ; *Vishnu v. State of Maharashtra* ; and *Satpal Singh v. State of Haryana.*”

The manner in which a document should be admitted in evidence is prescribed in O XIII, rules 3 and 4, CPC. Before a document is admitted in the manner prescribed in the Code, the presiding Judge must necessarily apply his mind to the admissibility of the document.

In **Stroud’s Judicial Dictionary of Words and Phrases**, 10th Edn. the word “Admissible” is stated:

“Admissible (Evidence Act 1938 (c.28 s.1(1)(i)(b)) may mean that a statement referring to matters not within the personal knowledge of the person making the statement but made in accordance with the subsection in the performance of a duty should be admitted by a judge if sitting alone but may be kept from a jury if there is one (**Simpson v Lever [1963] 1 Q.B. 517**).

In P Ramanatha Aiyar's **Advanced Law Lexicon**, 6th Edition words "Admissible" and "Admissible evidence" are stated:

"Admissible. *Pertinent and proper to be considered in reaching a decision. Used with reference to the issues to be decided in any judicial proceeding. [Black's Law Dictionary as cited in State v Nalini, (1999) 5 SCC 253, para 419: 1999 SCC (Cr) 691.] See also Mohd. Farooq Abdul Gafur v State of Maharashtra, (2010) 14 SCC 641, para 86.*

"Admissible." [Evidence Act, 1938 (c.28), Section 1(1)(i)(b)] may mean that a statement referring to matters not within the personal knowledge of the person making the statement but made in accordance with the sub-section in the performance of a duty should be admitted by a judge if sitting alone but may be kept from a jury if there is one (Simpson v Lever, [1963] 1 QB 517).

Allowable as judicial proof; worthy of being admitted or received., Section 97 IPC (45 of 1860); capable of being allowed or conceded. [Section 62, Employees' State Insurance Act (34 of 1948)]."

"Admissible evidence. *As applied to evidence, the term means that the evidence introduced is of such a character that the court or judge is bound to receive it; that is allows it to be introduced at trial. [Black's Law Dictionary as cited in State v Nalini, (1999) 5 SCC 253, para 420: 1999 SCC (Cri) 691]. See also Mohd. Farooq Abdul Gafur v State of Maharashtra, (2010) 14 SCC 641, para 86.*

As applied in evidence, the term means that the evidence introduced is of such a character that the court or judge is bound to receive it; that is, allow it to be introduced at trial. To be "admissible" evidence must be relevant, and, inter alia, to be "relevant" it must tend to establish material proposition. Smith v State, Alaska, 431 P.2d 507:509". (emphasis supplied)

The expression “admitted in evidence” would mean the act of allowing the document to be taken on record as part of the evidence but it must be let in as a result of judicial determination of the question whether it can be admitted in evidence or not.

Probative value is the probability of evidence to reach its proof purpose of a relevant fact in issue. It is one of the main elements of admitting evidence, as the admitted evidence must be relevant tending to make the fact in issue more likely or less likely to happen, no matter how slight its probability is (See. **Cornell Law School, Legal Information Institute**).

Evidence is ‘probative’ of a fact in issue if it is capable of having the tendency to which Lord Steyn was referring; in other words, evidence is probative if it tends towards proof or disproof of a fact in issue. The probative ‘value’ of evidence is a description of the strength of its tendency towards proof or disproof of the fact in issue. (See. **Stroud’s Judicial Dictionary of Words and Phrases, 10th Edn.**)

The probative value of a piece of evidence means the weight to be given to it. This is something which has to be judged in accordance with the facts and circumstances of each case. (See. **Ram Bihari Yadav v State of Bihar, AIR 1998 SC 1850: (1998) 4 SCC 517 para 6**).

Khatoon is the defendant and an interested party. She cannot be considered to be competent person to take advantage of Section 32(5) of the Indian Evidence Act, 1870. In our view Section 32(5) does not apply

to the statement made by interested party in denial, in the course of litigation of pedigrees set up by their opponents. The evidence of Khatoon as to the relationship between the original plaintiff no.1 with the original plaintiff nos. 2 and 3 was not made before the question in dispute was raised. On the contrary there are independent credible and cogent evidence prior to the suit where the plaintiff nos. 2 and 3 were shown as sons of Hazi.

In **Gopal Das** (*supra*) the distinction between admissibility and probative value has been lucidly explained. It is stated that where the objection is not that a document is itself inadmissible but that the mode of proof put forward is irregular or insufficient, it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record.

In the instant case, the objection is with regard to the existence of the document itself and the said document could not have been taken on record unless it is produced in accordance with the provision of the Evidence Act. It was only upon satisfaction being recorded that it is a document issued by the appropriate authority from Pakistan prepared under the statutory provisions applicable to such document the document could have been marked as Exhibit and the question of its probative value thereafter could have been assessed at the time of trial.

In **Dolgobinda** (*supra*) the Hon'ble Supreme Court interpreted Section 50 in the following words.

“On a plain reading of the section it is quite clear that it deals with relevancy of a particular fact. It states in effect that when the Court has to form an opinion as to the relationship of one person to another the opinion expressed by conduct as to the existence of such relationship of any person who has special means of knowledge on the subject of that relationship is a relevant fact. The two illustrations appended to the section clearly bring out the true scope and effect of the section. It appears to us that the essential requirements of the section are - (1) there must be a case where the court has to form an opinion as to the relationship of one person to another; (2) in such a case, the opinion expressed by conduct as to the existence of such relationship is a relevant fact; (3) but the person whose opinion expressed by conduct is relevant must be a person who as a member of the family or otherwise has special means of knowledge on the particular subject of relationship; in other words, the person must fulfil the condition laid down in the latter part of the section. If the person fulfils that condition, then what is relevant is his opinion expressed by conduct. Opinion means something more than mere retailing of gossip or of hearsay; it means judgment or belief, that is, a belief or a conviction resulting from what one thinks on a particular question. Now, the "belief" or conviction may manifest itself in conduct or behavior which indicates the existence of the belief or opinion. What the section says is that such conduct or outward behavior as evidence of the opinion held is relevant and may, therefore, be proved. We are of the view that the true scope and effect of section 50 of the Evidence Act has been correctly and succinctly put in the following observations made in Chandu Lal Agarwala v. Khalilar Rahman I.L.R. [1942] Cal. 299 :-

"It is only 'opinion as expressed by conduct' which is made relevant. This is how the conduct comes in. The offered item of evidence is 'the conduct', but what is made admissible in evidence is 'the opinion', the opinion as expressed by such conduct. The offered item of evidence thus only moves the Court to an intermediate decision : its immediate effect is only to move the Court to see if this conduct establishes any 'opinion' of the person, whose conduct is in evidence, as to the relationship in question. In order to enable the Court to infer 'the opinion', the conduct must be of a tenor which cannot well be

supposed to have been willed without the inner existence of the 'opinion'.

When the conduct is of such a tenor, the Court only gets to a relevant piece of evidence, namely, the opinion of a person. It still remains for the Court to weigh such evidence and come to its own opinion as to the factum probandum - as to the relationship in question."

We also accept as correct the view that s. 50 does not make evidence of mere general reputation (without conduct) admissible as proof of relationship : Lakshmi Reddi v. Venkata Reddi.

In the said decision the question arose with regard to whether Satyabadi is a grandson of Lokenath and can be said to have special means of knowledge as to the disputed relationship namely the relation between Lokenath and his alleged daughters Ahalya and Malabati. The said issue was answered in the following words:

"..... As to Satyabadi's special means of knowledge, we have in this case the evidence of Janardan Misra and Dharanidhar Misra, which evidence independently shows that Satyabadi was the grandson of Lokenath, being the son of his daughter, Ahalya. It may be stated here also that it was admitted that Ahalya was Satyabadi's mother, and that would show that Satyabadi had special means of knowledge as to who his mother's father was". (emphasis supplied)

In the instant case, Khatoon could not establish that she had special means of knowledge as to the relationship between Din Mohammad and the plaintiff nos. 2 and 3. There are no independent witnesses either.

In **Birad Mal Singhvi** (supra) is clearly distinguishable as in the instant case the competent person produced the document from proper custody and has explained the reason for the correction. The said person

was called as a witness by the defendants to disprove the plaintiff's claim of their relationship with the original plaintiff no.1.

Under the Evidence Act there is an essential distinction between the phrase "burden of proof" as a matter of law and pleading and as a matter of adducing evidence. Under S.101 of the Evidence Act, the burden in the former sense is upon the party who comes to court to get a decision on the existence of certain facts which he asserts. That burden is constant throughout the trial; but the burden to prove in the sense of adducing evidence shifts from time to time having regard to the evidence adduced by one party or the other or the presumption of fact or law raised in favour of one or the other. **(K.S. Nanji & Co. v. Jatashankar Dossa, AIR 1961 SC 1474, 1478: (1962) 1 SCR 492)**

Burden of proof would mean that a party has to prove an allegation before he is entitled to a judgment in his favour.

The tests that can conveniently be adopted for ascertaining on whom the burden of proof lies are first, to consider which party would succeed if no evidence were given on either side, and secondly to examine what would be the effect of striking out of the record the allegations to be proved; bearing in mind that the burden of proof must be on the party that would fail, if either of these steps were pursued.

The defendants have raised the issue of non-joinder and mis-joinder of parties. The burden of proving the fact that the plaintiff nos. 2 and 3 are sons of Din Mohammad is on the defendants. They have substantially

asserted the affirmative of the issue, namely, the relationship of Din Mohammad with the plaintiff nos. 2 and 3 but have failed to discharge the burden.

The Court is required to apply only the standards of a prudent man in judging what is to be deemed to be proved according to law. [See : **Garib Singh & Ors. v. State of Punjab** reported in **1972(3) SCC 418**]

PW2 and PW3 has produced evidence fairly and reasonably tending to show they are the sons of the plaintiff No.1. The defendants tried to create a confusion in the mind of the court by producing documents whose existence and authenticity are in grave doubt. They took eighteen long years to produce a sham document with the sole intention to delay the trial.

The appeal is completely unmeritorious and dismissed with exemplary cost of Rs. 1 lakh.

We direct the department to send down the L.C.R. immediately to the learned 11th Bench of City Civil Court at Calcutta in Title Suit no. 869 of 1986.

All occupational charges deposited with the learned Registrar General in terms of the order dated 15th February, 2010 with accrued interest shall be paid to the decree holders upon proper identification.

The trial court is directed to execute the decree within 3 months from the date of communication of this order by the decree holders.

I agree

(Soumen Sen, J.)

(Uday Kumar, J.)