A MARWARI KUMHAR AND ORS.

v.

BHAGWANPURI GURU GANESHPURI AND ANR.

AUGUST 10, 2000

B [V.N. KHARE AND S.N. VARIAVA, JJ.]

Evidence Act, 1872—Section 65(c), (f)—Secondary evidence—In case of public documents which is lost or destroyed—Whether admissible in evidence—Held, Yes.

C *Civil Procedure Code, 1908—Suit for declaration—Between appellants and respondents becoming final—Subsequent suit for possession by appellants—Respondents claiming title by adverse possession—No pleading that title became adverse after the decree in declaration suit—Suit decreed by trial Court—Appeal allowed by Appellate Court—Second appeal by appellant dis-*
D *missed—Whether respondents can claim adverse possession—Held, no.*

The Appellants, belonging to the Marwari Kumhar Community were holding religious functions in a temple and were using the Dharamshala situated on the suit property. They had engaged one 'G' who acted as a Pujari for the temple. After the death of 'G' his wife and son, the respond-
E **ents herein, started claiming ownership to the property. The Community, therefore, filed a representative suit, in December 1945, for a declaration of their title against the respondents. They also claimed in that suit that they were entitled to keep on performing their religious functions and to use the Dharamshala as they always have been doing. The respondents**
F **contended that the suit property was owned by 'G' and that the Community had no right, title or interest in the suit property. The suit was decreed in favour of the Community. It was specifically held that 'G' and the respondents were mere Pujaris. Against the decree the respondents filed an Appeal. That Appeal was allowed. The Community then filed a Second**
G **Appeal. The Second Appeal was allowed in 1948. The decree of the trial court was restored by the High Court and it became final.**

Since the respondents again started asserting their title, a second suit, for possession of the property, was filed in December, 1960. In this suit the appellants claimed that the 1st respondent had executed a Nokarnama
H **on 31st October 1948, that they had lost all their papers. In the suit the**

Appellants relied upon an ordinary copy of the judgment in the earlier suit and a certified copy of the decree in that suit. The Nokarnama was also lost and only oral evidence was led about it. The respondent/defendants again claimed title as legal heirs of deceased 'G'. The respondents also claimed that they and their predecessor i.e., G were in open, adverse and hostile possession since long and that in any event they had acquired title by adverse possession.

The trial court relied upon the judgment in the earlier proceedings and held that the title in the property vested in the community. It was noted that it was already held that the respondents and their predecessor were on the suit property only as Pujaris. The trial court accepted the oral evidence and held that it was proved that a Nokarnama was executed. It was held that the earlier Judgment was binding on the respondents and that this suit was not barred by Order 2 Rule 2 C.P.C. It was held that the suit was within time and that the respondents had not been able to prove adverse possession.

The appeals filed by the respondents were allowed by a common Judgment. The Appellate Court held that the earlier judgment being a public document only a certified copy could have been tendered in evidence. The Appellate Court held that the earlier judgment could not be held to have been proved as only an ordinary copy had been tendered in evidence, the Appellate Court held that the Community had failed to prove its title and that the Nokarnama was not proved. The Appellate Court held that the Respondents had been able to prove that 'G' and the respondents had been in possession for a long period of time and that they perfected title by adverse possession, the Appellate Court dismissed the suit.

The Appellants filed a second Appeal which was dismissed. It was held that an ordinary copy of the earlier judgment could not have been admitted in evidence and that the same could not be looked into, that the appellants had failed to prove their title to the suit property; that the Nokarnama was not proved and that the respondents have acquired title by adverse possession.

Disposing of the appeal, the Court

HELD : 1. Under sub-clause (c) of Section 65 of the Evidence Act, where the original has been lost or destroyed, then secondary evidence of

A the contents of the document is admissible. Sub-clause (c) is independent of sub-clause (f). Secondary evidence can be led, even of a public document, if the conditions as laid down under sub-clause (c) are fulfilled. Thus if the original of the public document has been lost or destroyed then the secondary evidence can be given even of a public document. Thus the ordinary
B copy of the earlier judgment was admissible in evidence and had been correctly marked as an exhibit by the trial Court. [375-C; D-G]

Mst. Bibi Aisha and Ors. v. *The Bihar Subai Sunni Majlis Avaqaf and Ors.*, AIR (1969) Supreme Court 253, relied on.

C 2. The respondents were parties to the earlier proceedings. The 1st respondent was properly represented by his mother the 2nd respondent. The earlier suit had been hotly contested. The earlier judgment was, therefore, binding on both the respondents. [370-A; 375-H]

3. In the earlier judgment it had clearly been held that the title to the
D property vested in the appellants. It was held that 'G' and the respondents were merely Pujaris. That judgment attained finality in May, 1948, when in the Second Appeal the decree was confirmed. Thus upto 7th of May, 1948, the respondents were in possession merely as Pujaris. Their claim to title, through 'G' had been negatived by a competent Court. That finding
E was binding on the respondents. Both the first Appellate Court and the Second Appellate Court failed to appreciate that on principles of *res-judicata* respondents were precluded from denying Appellants' title to the suit property. They were precluded from claiming that they had acquired title by adverse possession through G. Both the Courts failed to appreciate that it was for the respondents to allege and show that after 7th May 1948
F their possession became adverse. In the pleadings the claim to adverse possession is based on the claim that 'G' was in possession as owner. It is nowhere pleaded that after 7th May, 1948 the possession became adverse. In the evidence of the respondents, nowhere was it claimed that after 1948 the respondents or any of them had perfected title by adverse possession.
G [376-A-D]

4. Both the Appellate Courts below fell in error in holding that the appellants had failed to prove title and that the respondents had established title by adverse possession. On the contrary the decree in the earlier suit established the title of the appellants and showed that the respondents
H were in possession merely as Pujaris. In the absence of any proof as to the

date, time and the manner in which possession as a Pujari got converted into open, hostile and adverse the claim for adverse possession could not be upheld. Both the Appellate Courts below have seriously erred, both in law and on facts, in dismissing the suit of the appellants. [376-E-F]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2937 of 1989.

From the Judgment and Order dated 3.10.85 of the Madhya Pradesh High Court in S.A. No. 722 of 1974.

K.B. Sinha, Ms. Kawaljit Kochar, S.K. Jain and J.D. Jain for the Appellants.

S.K. Gambhir, T.N. Singh, B.M. Sharma, Anil K. Sharma and Avinash Sinha for the Respondents.

The Judgment of the Court was delivered by

S.N. VARIAVA, J. This Appeal is against the Judgment dated 3rd October, 1985 by which the Second Appeal filed by the Appellant (herein) has been dismissed.

Briefly stated the facts are as follows :

The appellants are representing Marwari Kumhar Community of Dewas. The suit was filed in a representative capacity. The Marwari Kumhar Community were holding religious functions in the temple and were using the Dharamshala situated on the suit property. They had engaged one Ganeshpuri, who acted as a Pujari. The said Ganeshpuri died on 11th of February, 1945. The son of Ganeshpuri (who is Respondent No. 1 herein) and the wife of Ganeshpuri (who is Respondent No. 2 herein) started claiming ownership to the property. Therefore the Community filed a representative suit, sometime in December 1945, for a declaration of their title. They also claimed in that suit that they were entitled to keep on performing their religious functions and to use the Dharamshala as they always have been doing. At that time 1st Respondent was a minor. He was therefore represented by his guardian i.e. his mother. The 2nd Respondent had also been sued in her individual capacity. In that suit the Respondents took up the contention that the suit property was owned by Ganeshpuri. They claimed that the Community had no right, title or interest in the suit property. The suit came to be decreed in favour of the Community. It was specifically held that Ganeshpuri and the Respondents were mere Pujaris. Against this decree the Respondents filed an Appeal. That Appeal was allowed.

A The Community filed a Second Appeal before the then High Court of Dewas. That Second Appeal was allowed on 7th May 1948. The decree of the trial court was restored by the High Court.

It would appear that sometime thereafter the Respondents again started asserting their title. Therefore the present suit, for possession of the property, B was filed on 7th of December, 1960. In this suit it had been claimed that the 1st Respondent had executed a Nokarnama on 31st October 1948. The Appellant/Plaintiffs had lost all their papers. They, therefore, relied upon an ordinary copy of the Judgment in the earlier suit and a certified copy of the decree in that suit. The Nokarnama was also lost and only C oral evidence was led about it. The Respondent-Defendants again claimed that Ganeshpuri was the owner of the suit property. They claimed title to the suit property as his heirs. They claimed that they and their predecessor i.e. Ganeshpuri were in open, adverse and hostile possession since long and that in any event they had acquired title by adverse possession. They claimed that a suit for possession was barred by provisions of Order 2 D Rule 2 Civil Procedure Code in as much as in the earlier suit relief for possession should have been and was not claimed. They also claimed that the suit was barred by limitation.

The trial court accepted Plaintiff/Appellants case and decreed the suit on E 20th of September 1968. The trial court relied upon the judgment in the earlier proceedings and held that the title in the property vested in the Community. It was noted that it was already held that the Respondents and Ganeshpuri were on the suit property only as Pujaris. The trial court accepted the oral evidence and held that it was proved that a Nokarnama was executed. It was held that the earlier judgment was binding on the Respondents and that this suit was not F barred by Order 2 Rule 2 C.P.C. It was held that the suit was within time and that the Respondents had not been able to prove adverse possession.

The 1st and the 2nd Respondents filed two separate Appeals. Both these Appeals were allowed by a common judgment dated 1st November, 1974. The Appellate Court held that the earlier Judgment being a public document only G a certified copy could have been tendered in evidence. The Appellate Court held that the earlier judgment could not be held to have been proved as only an ordinary copy had been tendered in evidence. The Appellate Court held that the Community had failed to prove its title. The Appellate Court held that the Nokarnama was not proved. The Appellate Court held that the Respondents H had been able to prove that Ganeshpuri and the Respondents had been in

possession for a long period of time and that they perfected title by adverse possession. The Appellate Court, therefore, dismissed the suit.

The Appellants filed a Second Appeal which has been dismissed by the impugned judgment. In the impugned judgment it had been held that an ordinary copy of the earlier judgment could not have been admitted in evidence and that the same could not be looked into. It was held that the Appellants had failed to prove their title to the suit property. It has been held that the Nokarnama was not proved. It is held that the Respondents have acquired titled by adverse possession.

It is to be seen that the first and the second Appellate Courts have proceeded on the footing that the earlier judgment between the parties was not proved and could not be looked into. They have so held on the ground that an ordinary copy of the judgment was inadmissible in evidence. Both the Courts declined to take note of what had been finally decided, after contest, by Courts of competent jurisdiction. In so doing both the Courts ignored that fact that the Respondents had not denied that earlier there was a suit filed by the Appellants against them and that in that suit ultimately the title of the Appellants was affirmed. It was not denied that on 7th May, 1948 the then High Court of Dewas confirmed the decree of the trial court. A certified copy of that decree had also been marked in evidence. Both the Courts also ignored the fact that the Respondents were not claiming that the copy which was produced was not the correct copy. The Respondents were merely claiming that the earlier judgment did not bind them. It is also important to note that both the Courts have not disbelieved the case of the Appellant/Plaintiff that the original copy was no longer available in the records of the Court and the certified copy which had been obtained by the Appellants had been lost. Both the Appellate Courts only relied upon sub-clause (f) of Section 65 of the Evidence Act and held that as the judgment was a public document, it could be proved only by a certified copy of the judgment and no other kind of secondary evidence was admissible. Having held that the earlier judgment could not be looked into both the Courts then cast a strict burden on the Appellants to again prove their title and held that the Appellants had not proved their title. Both the Courts have then held that Ganeshpuri and the Respondents were in possession for long and that they had acquired title by adverse possession. It is pertinent to note that neither the first Appellate Court nor the second Appellate Court have held that Respondents have been able to prove adverse possession by virtue of their possession since 7th May, 1948.

A In our view, both the Courts below have erred in law and on facts in coming to this conclusion. Both the Courts below have adopted an entirely erroneous approach for the reasons set out hereafter.

Section 65 of the Evidence Act reads as follows :

B "65. *Cases in which secondary evidences relating to documents may be given.* - Secondary evidence may be given of the existence, condition or contents of a documents in the following cases. -

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

C

of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or

of any person legally bound to produce it,

D

and when, after the notice mentioned in section 66, such person does not produce it;

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

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

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

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

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

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

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

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

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

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

Thus it is to be seen that under sub-clause (c) of Section 65, where the original has been lost or destroyed, then secondary evidence of the contents of the document is admissible. Sub-clause (c) is independent of sub-clause (f). Secondary evidence can be led, even of a public document, if the conditions as laid down under sub-clause (c) are fulfilled. Thus if the original of the public document has been lost or destroyed then the secondary evidence can be given even of a public document. This is the law as has been laid down by this Court in *Mst. Bibi Aisha and Others* v. *The Bihar Subai Sunni Majlis Avaqaf and Others,* reported in AIR (1969) Supreme Court 253. In this case a suit had been filed for setting aside a registered mokarrari lease deed and for restoration of possession of properties. The suit had been filed on behalf of a Waqf. The Original Waqf Deed was lost and an ordinary copy of the Waqf Deed was produced in evidence. The question was whether an ordinary copy was admissible in evidence and whether or not secondary evidence could be led of a public document. The Court held that under section 65 clauses (a) and (c) secondary evidence was admissible. It is held that a case may fall both under clauses (a) or (c) and (f) in which case secondary evidence would be admissible. It was held that clauses (a) and (c) were independent of clause (f) and even an ordinary copy would, therefore, be admissible. As stated above the case that the original was no longer available in Court records and the certified copy was lost has not been disbelieved. Thus the ordinary copy of the earlier judgment was admissible in evidence and had been correctly marked as an exhibit by the trial court. C D E F G

In this case there is the additional factor that the factum of there being such a judgment was not denied. The Respondents did not contend that the copy which had been produced was not the correct copy. All that the 1st Respondent had pleaded was that the earlier judgment was not binding on him. H

A The Respondents were parties to the earlier proceedings. The 1st Respondent was properly represented by his mother the 2nd Respondent. The earlier suit had been hotly contested. The earlier judgment was, therefore, binding on both the Respondents. In the earlier judgment it had clearly been held that the title to the property vested in the Appellants. It was held that Ganeshpuri and the B Respondents were merely Pujaris. That judgment attained finality on 7th of May, 1948, when in the Second Appeal the decree was confirmed. Thus up to 7th of May, 1948, the Respondents were in possession merely as Pujaris. Their claim to title, through Ganeshpuri, had been negatived by a competent court. That finding was binding on the Respondents. Both the first Appellate Court and the second Appellate Court failed to appreciate that on principles of *res-*C *judicata* Respondents were precluded from denying Appellant's title to the suit property. They were precluded from claiming that they had acquired title by adverse possession through Ganeshpuri. Both the Courts failed to appreciate that it was for the Respondents to allege and show that after 7th May, 1948 their possession became adverse. In the pleadings the claim to adverse possession D is based on the claim that Ganeshpuri was in possession as owner. It is nowhere pleaded that after 7th May, 1948 the possession became adverse. We have also read the evidence of the Respondents. Nowhere has it been claimed that after 1948 the Respondents or any of them had perfected title by adverse possession. The trial Court correctly appreciated this fact. Both the Appellate Courts below fell in error in holding that the Appellants had failed to prove title and that the E Respondents had established title by adverse possession. On the contrary the decree in the earlier suit established the title of the Appellants and showed that the Respondents were in possession merely as Pujaris. In the absence of any proof as to the date, time and the manner in which possession as a Pujari got converted into open, hostile and adverse the claim for adverse possession could F not be upheld. In our view both the Appellate Courts below have seriously erred, both in law and on facts, in dismissing the suit of the Appellants.

Under the circumstances the judgments of the First Appellate Court dated 1st November, 1974 and the impugned judgment dated 3rd October, 1985 require to be and are hereby set aside. The decree of the trial court dated 20th G September, 1968 is restored. The Appeal stands disposed of accordingly. There will be no order as to costs.

V.M. Appeal disposed of.