# Israr and Others Vs Rafi and Others

**Court:** Allahabad High Court

**Date of Decision:** July 3, 2008

**Acts Referred:** Civil Procedure Code, 1908 (CPC) â€" Section 100
Evidence Act, 1872 â€" Section 18, 31, 4, 63, 74

**Citation:** (2008) 4 AWC 3995 : (2008) 105 RD 476

**Hon'ble Judges:** Poonam Srivastav, J

**Bench:** Single Bench

**Final Decision:** Dismissed

## Judgement

Poonam Srivastav, J.
Heard learned Counsel for the appellants and Counsel for the respondents.

2. This is plaintiffs second appeal against the judgment and decree dated 18.11.1981, passed in Civil Appeal No. 323 of. 1979. Rafi and others v.

Israr and others setting aside the judgment and decree dated 24.9.1979 passed in Suit No. 47 of 1979, Israr and Ors. v. Rafi and Ors.

According to the plaintiffs, they claimed to be owner in possession of plot No. 14 having an area of 5 biswa situated in Village Miserpura, Tappa

96, Pargana Kantit, district Mirzapur since the time of their ancestors. They utilized the land for stocking cow dung cake and other articles. They

also claimed that they had planted 4 mango trees, one berry tree and certain bamboo clumps. Claim of ownership was on the basis of possession

since a very long time and after abolition of Zamindari the land stands settled in their favour under Sections 9 and 6 of U.P.Z.A. and L.R. Act. The

Pradhan of Gaon Sabha instiued a criminal case in the Nyay Panchayat against the plaintiff No. 3 disputing his possession over the plot No. 14,

which was decided in his favour and the defendants have no concern with the land whatsoever.

3. Cause of action arose when the defendants started threatening and interfering with the plaintiff''s possession and also to demolish hut of the

plaintiff, cut away trees and take forcible possession.

The defendants filed written statement denying plaint allegation of the plaintiffs and disputed that the suit is not maintainable. The defendants

claimed that they are in possession over plot No. 14 since last 10 years and constructed hut and khaprail and used the disputed land, for tethering

cattle etc. Possession is continuous, it was alloted by the Gaon Sabha and lease deed was executed in respect of area of 1.50 square yard to each

of the defendants on 20.11.1978. Thus, they are in possession over 450 square yard of the land on the disputed plot and also certain area of plot

No. 13.

4. It was also denied that there was any contest with Gaon Sabha regarding the land in the Nyay Panchayat.

The plaintiffs examined Israr as P.W. 1, Mohd. Ali as P.W. 2, and Bakrid as P.W. 3. Documentary evidence, in support of the plaintiffs contention

filed was paper Nos. 8Ga, 9Ga, 31Gaand 64Ga.

The defendants examined Rafi as D.W. 1, Nanhe D.W. 2, Chhangur as D.W. 3, besides documentary evidence from paper Nos. 50Ga, 54Ga

and 67Ga and also paper Nos. 33Ga and 35Ga. The trial court decreed the suit placing reliance on a document purporting to be statement of Rafi,

before the Nyay Panchayat and also judgment given in the earlier proceedings.

5. The defendants/respondents preferred a civil appeal, which stood allowed.

The instant second appeal has been admitted on the following substantial questions of law:

1. Whether the lower appellate court acted illegally in dismissing the plaintiffs" suit without reversing the findings of the trial court on the question of

ownership and possession over the land shown by letters Ka, Kha, Ga. and Gha in the plaint map?

2. Whether the lower appellate court failed to raise the statutory presumption regarding the correctness of the certified copy containing the

statement of Rafi Ahmad?

3. Whether the lower appellate court was justified in ignoring the admission of Rafi, defendant, contained in the certified copy of the statement,

even though defendants did not summon the original to disprove the signature of Rafi on the said document?

6. It is thus clear that the entire argument in the Instant second appeal revolves around the alleged admission made by Rafi defendant before Nyay

Panchayat. Certified copy of the statement has been adduced in evidence. Contention of the Counsel for the appellants is that since it was the

certified copy, there is a presumption of its correctness unless and until rebutted by the defendants. Since document was not rebutted by calling the

record of the proceedings, therefore, Judgment and decree of the lower appellate court suffers from substantial error.

7. Learned Counsel for the appellants was heard at length on two days. He has laid emphasis that since the defendant Rafi admitted possession of

Mohammad on the disputed land in his statement before the Nyay Panchayat,- therefore, certified copy of the said statement was adduced in

evidence in the present suit and thus, in view of-the admission of the defendant, the appellants are entitled for a decree of permanent injunction.

The certified copy brought on record was specifically denied by Rafi, who was examined as D.W. 1. He stated that he never appeared as a

witness before the Nyay Panchayat and no such admission was made by him. This assertion also finds place in the written statement itself. The

plaintiffs neither got the record summoned nor tried to prove the statement by adducing any oral statement of Sarpanch or Gram Pradhan of the

Gaon Sabha save for the certified copy of the statement. There was nothing else to support the admission of Rafi, the certified copy brought on

record is sole basis of the claim of the plaintiffs. The plaintiffs simply filed copy of the statement, which is paper No. 31C. The lower appellate

court on the face of express denial by Rafi that he ever appeared before the Nyay Panchayat as witness and denied his statement, there was

nothing else before the lower appellate court to confirm findings of the trial court.

9. Learned Counsel for the appellants has placed certain provisions of the Evidence Act wherein secondary evidence is admissible. Section 63(3)

of Evidence Act, explains that secondary evidence means copies made from or compared with the original.

Counsel for the appellants submits that since before issuing certified copy, it is also compared with the original, therefore, document is admissible in

evidence and explicit reliance should have been placed by the lower appellate court on the said statement.

10. After giving a careful consideration, I am of the view that this is not a case where certified copy adduced in evidence relates to entries in the

record or register or certain notification etc. but it is oral statement of the person, who has himself denied in the Court that he ever gave such

statement or made any admission whatsoever. After clear denial by the defendant Rafi, it was duty of the plaintiffs to have got the record

summoned or got it proved by someone, who had seen him making such statement.

11. Thus, I am not in agreement with the submission made by the Counsel for the appellants in view of Sections 63(3) of Indian Evidence Act

(hereinafter referred to as the Act).

Learned Counsel for the appellants has substantiated and impressed his argument on the basis of Sections 4 and 79 of the Act. His submission is

that a joint reading of the two provisions, no doubt a presumption regarding genuineness is to be drawn yet since the alleged statement of Rafi

brought on record is a public document within meaning of Section 74 of the Act. The submission is that the court below committed a grave error in

not placing reliance.

12. Counsel for the appellants has cited two decisions of the Apex Court in AIR 1959 SC 96 , paragraph No. 7 and Sitaramacharya (dead)

through L.Rs. Vs. Gururajacharya (dead) through L.Rs., and also Full Bench decision of this Court in Ajodhya Prasad Bhargava Vs. Bhawani

Shanker Bhargava and Another,

13. In the judgment in Full Bench of this Court no doubt held that an admission by a witness does not require elucidation in cross-examination of

the witnesses but the crux of the matter in the said case was that the Counsel appearing on behalf .of the witness had made a clear admission to the

effect that the statement produced was in fact given by the said witness. This is not the case in the instant case, neither the Counsel nor the witness

has made any such admission. On the contrary there is specific denial by the witness, not only in his statement but also in the written statement. In

the circumstances, the Full Bench decision in case of Ayodhya Prasad (supra) is of no help to the appellants.

14. I have perused the decisions of the Apex Court in the case of-Sitaramacharaya (supra) wherein it has been held that admission made by the

party would be relevant evidence u/s 18 of the Evidence Act but has also ruled that Section 31 provides that admissions are not conclusive proof

of the matter admitted but they may operate as estoppel under the provisions of law. This case relates to the admission made by the party in that

very case. In the instant appeal, the so-called admission made by one of the defendants in certain proceedings before the Nyay Panchayat, is

expressly denied by the same person himself. Not only this, the defendant has disputed and denied that he ever appeared before the Nyay

Panchayat in any proceedings and gave statement. Specific denial is also in the pleadings. Therefore, I am of the considered view that the lower

appellate court was absolutely correct in not placing any reliance on such evidence. Substantial questions of law on which this appeal was

admitted, clearly saddles the appellants with the burden of specific rebuttal by getting the record of Nyay Panchayat summoned.

15. In absence of any proof, the Court had no other option and it was correct while refusing to place reliance on the certified copy. This question

of law does not arise in the instant case since no presumption can be raised regarding correctness of the certified copy of the statement of Rafi,

who was examined as a defence witness and unequivocally denied to have given any statement whatsoever. Thus, a duty was cast on the plaintiffs,

who were gaining some benefit from such statement to have, got it proved and established and confronted the defence witness only then they were

entitled for any relief whatsoever.

16. In view of the aforesaid findings, I am of the considered view that the Judgment and decree of the lower appellate court does not suffer from

any error of law and the defendant''s appeal was rightly allowed. The trial court decreed the suit only on the basis of statement before the Nyay

Panchayat by one of the defendants and it was clearly denied by Rafi. I have perused the written statement since record is available. In paragraph

No. 18 of the written statement, denial is very clear. I have perused statement of Rafi. I do not find any illegality whatsoever in the findings

recorded by the lower appellate court.

17. The Apex Court depreciated the liberal construction and generous application of provisions of Section 100, C.P.C. Hon"ble Supreme Court

was of the view that only because there is another view possible on appreciation of evidence that cannot be sufficient for interference u/s 100,

C.P.C. For ready reference, extract of paragraph No. 7 of the case of Veerayee Ammal Vs. Seeni Ammal, is quoted below:

7 ...We have noticed with distress that despite amendment, the provisions of Section 100 of the Code have been liberally construed and

generously applied by some Judges of the High Courts with the result that objective intended to be achieved by the amendment of Section 100

appears to have been frustrated. Even before the amendment of Section 100 of the Code, the concurrent finding of facts could not be disturbed in

the second appeal. This Court in Paras Nath Thakur v. Mohani Dasi held: AIR. 1205 3 .

It is well-settled by a long series of decisions of the Judicial Committee of the Privy Council and of this Court, that a High Court, on second

appeal, cannot go into questions of fact, however, erroneous the findings of fact recorded by the Courts of fact may be. It is not necessary to cite

those decisions. Indeed, the learned Counsel for the plaintiff-respondents did not and could not contend that the High Court was competent to go

behind the findings of fact concurrently recorded by the two Courts of fact.

18. Similar view has been expressed in a number of other decisions by the Apex Court In the cases of Thiagarajan and Others Vs. Sri

Venugopalaswamy B. Koil and Others, ; Rajeshwari Vs. Puran Indoria, Gurdev Kaur and Ors. v. Kaki and Ors. 2006 All LJ 1481 (SC) : 2006

(3) AWC 2373 and Kondiba Dagadu Kadam Vs. Savitribai Sopan Gujar and Others,

19. The Apex Court in the recent case of Santosh Hazari Vs. Purushottam Tiwai (Dead) by Lrs., ruled that a point of law which admits of no two

opinions may be proposition of law but cannot be a substantial question of law. To be "substantial" a question of law must be debatable, not

previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way,

in so far as the rights of the parties before it are concerned. It will, therefore, depend on the facts and circumstances of the each case whether a

question of law is substantial one and involved in the case or not? The same view has been expressed by the Apex Court in the case of

Govindaraju Vs. Mariamman, .

20. The judgments under challenge cannot be interfered in this appeal in exercise of jurisdiction u/s 100, C.P.C. The two judgments do not suffer

from any error and no substantial question of law arises. The instant second appeal lacks merit and is, accordingly, dismissed with costs.