

IN THE BOARD OF REVENUE FOR RAJASTHAN, AJMER**Revision No.634/2013/LR/Udaipur :**

1. Ghasu Singh S/o Shri Nanda Singh
 2. Bhanwari Bai W/o late Shri Laxman Singh
 3. Bhawani Singh S/o late Shri Laxman Singh
 4. Sushri Leela D/o late Shri Laxman Singh, minor
through mother Smt. Bhanwari Bai
- All are by caste Rajput, residents of Village Semad,
Tehsil Gogunda, District Udaipur.

... Petitioners.

Versus

1. Jalam Singh S/o Shri Nanda Singh, by caste Rajput,
R/o Village Semad, Tehsil Gogunda, District Udaipur.
2. Kesar Bai D/o Shri Nanda Singh, by caste Rajput,
R/o Village Bheem Ji Ka Guda, Tehsil Gogunda, District Udaipur.
3. Sohan Bai D/o Shri Nanda Singh W/o Shri Shiv Singh,
by caste Rajput, R/o Thoriya, Tehsil Gogunda, District Udaipur.

... Non-petitioners.

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S.B. (Camp : Udaipur)

Shri Satish Chand Kaushik, Member

Present :

Shri K.L. Chordiya : counsel for the petitioners.
Shri Sampatlal Bohra : counsel for non-petitioners.

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Dated : 18.7.2016

J U D G M E N T

This revision petition has been preferred under section 84 of the Rajasthan Land Revenue Act, 1956 (in short to be referred "the Act") being aggrieved with the order of learned Sub Divisional Officer, Gogunda dated 22.11.2012 in case no.235/2010.

2. The factual matrix of the case is that a revenue suit under sections 88, 188, 92A, 53 and 54 of the Rajasthan Tenancy Act was filed by the plaintiff-petitioners against defendant-non-petitioners. The written statement of the suit was filed by the defendant-non-petitioners and replication of the same was also filed by the plaintiffs. After considering the plaint, written statement and replication, the learned S.D.O., Girwa, Udaipur framed the issue in the matter on 09.4.2009 and the matter was posted for plaintiffs' evidence. However on 30.6.2009, for the evidence of plaintiff, the affidavits of PW-1, PW-2, PW-3, PW-4 and PW-5 i.e. of Ghasu Singh, Jalam Singh, Kesar Singh, Om Singh and Ram Singh respectively were filed and matter was posted for cross-examination of plaintiffs' witnesses. But thereafter, witnesses were not present before the court for cross examination. As on 20.10.2011, it was specifically mentioned in the order sheet that "फरीकेन उपस्थित। वादी की साक्ष्य अनुपस्थित। मौका चाहा अन्तिम अवसर दिया जाता है। दिनांक 03.11.2011 को पेश हो।"

On 03.11.2011 also, no witness was present and the matter was again posted for 22.12.2011 giving the last opportunity for evidence. On 22.12.2011, no witness was produced by the plaintiff before the court, instead one application under order 14 Rule 5 read with section 151 of the Code of Civil Procedure was moved and the matter was posted for arguments and order for the same. After hearing the arguments on 08.11.2012, on the application under Order 14 Rule 15 CPC, the learned S.D.O., Gogunda dismissed the application vide his order dated 22.11.2012. Being aggrieved with the order, this revision petition has been moved inter alia on the ground that the plaintiffs asked for the modification of issues no. 4 and 5 and asked that in place of issues no. 4 and 5, the following issues to be framed :-

"आया प्रतिवादी संख्या 1 द्वारा नन्दा सिंह जो कि 95 वर्ष की उम्र के थे जो अपना भला-बुरा सोचने समझने की स्थिति में थे एवं उन्होंने पूर्ण विक्रय मूल्य प्राप्त कर विक्रय पत्र एवं अपना अन्तिम इच्छा पत्र प्रतिवादी संख्या 1 के पक्ष में विधिवत सम्पादित करवाया। उक्त दोनों ही दस्तावेज पूर्णतः विधिवत एवं सही हैं ?"

It was necessary to frame that issue and the burden of proof of the issue was given to defendant because the defendant has got a registered sale deed in his favour by taking the benefit of the ailment and the old age of the

executant and in this regard, the plaintiff-applicant has also referred the judicial pronouncements AIR 2006 Allahabad page 273, AIR 1970 Mysore page 270 and AIR 2007 Rajasthan page 166, but the learned lower court has not considered the factual matrix of the matter and dismissed the application of the applicant even without considering the legal pronouncements submitted before it.

3. I have heard learned counsel for the parties and perused the record.

4. The learned counsel for the petitioners argued that the order of the learned S.D.O., Gogunda dated 22.11.2012 is misconceived which is liable to be set aside. Without assigning any reason, the learned lower court dismissed the application by referring that the legal pronouncements submitted are not applicable to the present case.

5. On the other hand, learned counsel for non-petitioners argued that there is no illegality or perversity in the order of the learned S.D.O., Gogunda. The order is well reasoned and the learned S.D.O. specifically mentioned that the document executed by deceased Nanda Singh is a registered document and there is no mention on the document by Sub Registrar that Nanda Singh is not having the capacity of listening and understanding, neither it is mentioned that he is not of sound mind. Apart from this, the registered document cannot be challenged before the revenue court nor is it in jurisdiction of the revenue court to frame an issue like this.

6. The learned counsel submitted the judicial pronouncement AIR 2001 Guwahati page 181, AIR 2005 Supreme Court page 233 and AIR 1995 Orissa page 270 and argued that there is no illegality in the issues framed and burden of proof cannot be shifted on defendant. The suit is of plaintiff and the plaintiff is duty bound to prove his case and as such the issues framed by the learned lower court are good in law and facts and no modification required in it and the learned court has rightly shifted the burden of proof on plaintiff in respect of issues no. 4 and 5.

7. I have heard learned counsel for both the parties and gone through the legal pronouncements submitted before the Board.

8. Both the counsel argued vehemently that the burden of proof will lie upon the opposite party in respect of execution of the document. Both the parties have argued about the burden of proof and onus to prove. The law on the point as referred and after considering the legal position, I just want to refer the legal pronouncement made by the Hon'ble Supreme Court in the matter of Daulat Ram and ors. Vs. Soda and others AIR 2005 SC page 233. In that pronouncement, the Hon'ble Apex Court specifically mentioned that burden to prove that the will was forged or that it was obtained under undue influence or coercion or by playing a fraud, is on the person who alleges it to be so. In the present matter, the plaintiff is taking the plea that the document executed is forged one and as such it is his duty to prove it. In AIR 2001 Guwahati page 181, it is specifically mentioned that the plaintiff has to prove his case, he cannot take advantage of the weakness of defendant and the same view was taken by the Orissa High Court in the matter of AIR 1995 Orissa page 270 Nirakar Das Vs. Gorhari Das. It was held that under sections 101 to 103, the burden of proof of civil suit lies on plaintiff. Plaintiff must establish his own case. He cannot take advantage of the failure of the defendant. These judicial pronouncements were submitted by non-petitioners, however, counsel for the petitioners referred the judicial pronouncements AIR 2006 Allahabad 273 Ramu Mahaveer Vs. Ghurhoo Samu and argued that the plaintiff vendor was old man of 70 years of age living with his nephew defendant who was in dominating position. The nephew got the transfer of entire property in his favour by alleged deed excluding the real daughters of the plaintiff vendor. In such a circumstance, initial burden would be on defendant vendee to prove that the deed was valid and has been executed in all fairness and bonafide and not otherwise influenced by any fraud or misrepresentation. In other legal pronouncement AIR 1970 Mysore page 270 S. Ranjana Vs. S.M. Dhondusa. In the matter, the transfer of undivided co-parcenary interest by a co-parcener without consideration was held to be void. The learned counsel for petitioner mentioned the judicial pronouncement Jagan Singh Vs. Chotey Lal 1973 RLW page 675 and argued that under section 207 of the Tenancy Act, suit for cancellation of sale deed and possession of

agricultural land when it is contended that deed is void ab initio, then only the revenue record can try it, but where the sale deed is alleged to be voidable, only civil court can try the same. In this matter, the said document is void ab initio and as such the onus is on defendant-non-petitioners. It was also argued by referring AIR 2007 Rajasthan page 166 Prahlaad Vs. Lad Devi that if there is no considerable proof, the sale will be treated as void ab initio and as such it is the duty of the defendant to prove that he has gotten the document registered in his favour after valid consideration. In AIR 2003 SC page 4351, Krishna Mohan Kul alias Nani Charu Kul Vs. Pratima Maity, it was held that the document was alleged to be executed by old, ailing, illiterate person aged about 106 years, onus to prove execution of deed cannot be placed on plaintiff. Burden of proving good faith of transaction would be on defendant, dominant party. AIR 1981 Allahabad page 222 and AIR 1982 Gujarat were also mentioned and as such the learned counsels argued on burden to prove.

9. After considering all these arguments and go through the factual matrix of the matter, I would like to refer the difference between burden of proof and onus of proof. In AIR 1964 SC page 136 Raghavamma Vs. Chenchamma, the Hon'ble Apex Court clarified the difference between burden of proof and onus of proof as under :-

"It is also well to bear in mind that there is an essential distinction between "burden of proof" and "onus of proof"; burden of proof lies upon the person who has to prove a fact and it never shifts, but the onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence. Burden of proof has two distinct meanings, namely (i) the burden of proof as a matter of law and pleadings, and (ii) the burden of proof as a matter of adducing evidence. Section 101 of the Evidence Act deals with the former and Section 102 of the Evidence Act with the latter. The first remains constant but the second shifts. In a claim application, therefore, the burden of proof, in the first sense, certainly lies on the claimant. If he examines himself and his witness, if any, and if the evidence, tested in the light of the principles set out above, is found to be acceptable, the onus shifts on the tortfeasor to prove those circumstances, if any, which dislodge the assertions of the claimants. If the tortfeasor fails to prove before the court any fact or circumstance which tends to affect the evidence led by the claimant, the claimant would be entitled to ask the court to hold that he has established the case and, on that basis, to make a just award. It would thus appear that though the legal

burden, - the burden as a matter of law and pleadings - remains constant on the claimant, the burden as a matter of adducing evidence changes often times as the trial of the claim petition progresses."

Again the Hon'ble Supreme Court in AIR 2006 SC page 1971 Anilrishi Vs. Gurbux Singh upheld that "in suit for declaration, it was alleged that the sale deed was forged and fabricated. Whether the deed is valid, the burden of proof is on plaintiff."

10. As such, it is very much clear that burden of proof and onus of proof are having great difference. If once the evidence starts, the burden of proof lost its sanctity and onus shifts accordingly. The burden of proof is a static phenomena, it never changes. A person who is challenging any fact, it is his duty to prove the fact alleged and as such it is the duty of the plaintiff to prove his allegations made in the suit. After his evidence, the onus shifts on defendant to rebut it. In the present case also, the plaintiff has filed the suit and alleged that the document (sale deed) issued in favour of the defendant is a forged and frivolous document. In such a circumstance, it is the primary duty of the plaintiff to prove the fact and thereafter the onus will be on the defendant. There is no illegality or perversity in any of the issues framed by the learned S.D.O. and learned S.D.O. has rightly rejected the application moved under Order 14 Rule 5 CPC for shifting of burden of proof on defendant and reframing of issues.

11. As discussed above, this revision petition is having no merit and liable to be rejected; hence rejected. The order of learned Sub Divisional Officer, Gogunda dated 22.11.2012 is hereby upheld.

Pronounced in open court.

(SATISH CHAND KAUSHIK)
Member

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