

CASE NO.:  
Appeal (civil) 2413 of 2006

PETITIONER:  
Anil Rishi

RESPONDENT:  
Gurbaksh Singh

DATE OF JUDGMENT: 02/05/2006

BENCH:  
S.B. Sinha & P.K. Balasubramanyan

JUDGMENT:  
J U D G M E N T  
[Arising out of SLP (Civil) No. 5963 of 2006]

S.B. SINHA, J.

Leave granted.

The defendant in the suit is the appellant herein. He is before us aggrieved by a judgment and order dated 14th December, 2005 passed by the Punjab and Haryana High Court at Chandigarh in Civil Revision No. 1077 of 2005 dismissing his revision application arising out of an order dated 9.2.2005 passed by the Civil Judge (Junior Division), Chandigarh.

An agreement to sell dated 26.03.1990 was entered into by and between the parties hereto in relation to the premises bearing House No. 86, situate in Sector 18A, Chandigarh. A sale deed was executed pursuant to the said agreement to sell on 27.03.1991. However, a suit for declaration was filed by the respondent herein alleging that the said sale deed dated 26.3.1991 was a forged, fabricated and was a void document. The appellant filed his written statement in the said suit denying or disputing the allegations contained therein. On the pleadings of the parties herein, issues were framed by the learned trial Judge including the following:-

"Whether the sale deed dated 26.3.1991 is forged and fabricated as prayed for?"

An application was filed by the respondent for deletion of the said issue and reframe the same. The learned trial Judge reframed the issue allowing the said application in terms of order dated 9.2.2005. Reframed issue No. 2 reads as under:-

"Whether the alleged sale deed dated 26.3.1991 is a valid and genuine document?"

The learned Trial Judge while passing its order dated 09.02.2005 held:-

"Normally the initial burden of proving the execution of a document when it is denied must rest upon the person alleging its execution. Here in the present case the plaintiff has denied the execution of the sale deed. The onus to prove a issue has to be discharged affirmative. "It is always difficult to prove the same in negative". When the fact is proved in affirmative or evidence is led to prove the same. Onus shifts on the other side to negate

the existence of such a fact."

A revision application filed on behalf of the appellant herein against the said order was dismissed by the High Court by reason of the impugned order stating:-

"In the present case, it is the case of the plaintiff-respondent that he had not executed any sale deed dated 26.3.1991 in favour of the defendant-appellant and it was a forged and fabricated document. On the other hand, it is the case of the defendant that the said sale deed is valid and genuine document. The sale deed itself is in possession of the defendant. In such a situation, the defendant is in a dominating position to prove the document affirmatively, whereas it will be difficult for the plaintiff to prove the same. Negatively, who is not even in possession of the sale deed in question. After the defendant proves the validity and genuineness of the sale deed, the turn will come of the plaintiff to prove the document negatively. In this view of the matter, I am of the considered opinion that the trial court has rightly re-framed issue No. 2 and put the onus on the defendant to prove whether the same is valid and genuine document. There is no infirmity in the order dated 9.2.2005 passed by the Civil Judge (Junior Division), Chandigarh\005\005"

In the impugned judgment, the High Court proceeded on the basis that although generally it is for the plaintiff to prove such fraud, undue influence or misrepresentation, but when a person is in a fiduciary relationship with another and the latter is in a position of active confidence, the burden of proving the absence of fraud, misrepresentation or undue influence is upon the person in the dominating position.

The initial burden of proof would be on the plaintiff in view of Section 101 of the Evidence Act, which reads as under:-

"Sec. 101. Burden of proof. \026 Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

In terms of the said provision, the burden of proving the fact rests on the party who substantially asserts the affirmative issues and not the party who denies it. The said rule may not be universal in its application and there may be exception thereto. The learned trial Court and the High Court proceeded on the basis that the defendant was in a dominating position and there had been a fiduciary relationship between the parties. The appellant in his written statement denied and disputed the said averments made in the plaint.

Pleading is not evidence, far less proof. Issues are raised on the basis of the pleadings. The defendant-appellant having not admitted or acknowledged the fiduciary relationship between the parties, indisputably, the relationship between the parties itself would be an issue. The suit will fail if both the parties do not adduce any evidence, in view of Section 102 of the Evidence Act. Thus, ordinarily, the burden of proof would be on the party who asserts the affirmative of the issue and it rests, after evidence is gone into, upon the party against whom, at the time the question arises, judgment would be given, if no further evidence were to be adduced by either side.

The fact that the defendant was in a dominant position must, thus, be proved by the plaintiff at the first instance.

Strong reliance has been placed by the High Court in the decision of this Court in Krishna Mohan Kul @ Nani Charan Kul & Anr. v. Pratima Maity & Ors., [AIR 2003 SC 4351]. In that case, the question of burden of proof was gone into after the parties had adduced evidence. It was brought on record that the witnesses whose names appeared in the impugned deed and which was said to have been created to grab the property of the plaintiffs were not in existence. The question as regards oblique motive in execution of the deed of settlement was gone into by the Court. The executant was more than 100 years of age at the time of alleged registration of the deed in question. He was paralytic and furthermore his mental and physical condition was not in order. He was also completely bed-ridden and though his left thumb impression was taken, there was no witness who could substantiate that he had put his thumb impression. It was on the aforementioned facts, this Court opined:-

"12\005The onus to prove the validity of the deed of settlement was on the defendant No. 1. When fraud, misrepresentation or undue influence is alleged by a party in a suit, normally, the burden is on him to prove such fraud, undue influence or misrepresentation. But, when a person is in a fiduciary relationship with another and the latter is in a position of active confidence the burden of proving the absence of fraud, misrepresentation or undue influence is upon the person, in the dominating position, he has to prove that there was fair play in the transaction and that the apparent is the real, in other words, that the transaction is genuine and bona fide. In such a case the burden of proving the good faith of the transaction is thrown upon the dominant party, that is to say, the party who is in a position of active confidence. A person standing in a fiduciary relation to another has a duty to protect the interest given to his care and the Court watches with jealousy all transactions between such persons so that the protector may not use his influence or the confidence to his advantage. When the party complaining shows such relation, the law presumes everything against the transaction and the onus is cast upon the person holding the position of confidence or trust to show that the transaction is perfectly fair and reasonable, that no advantage has been taken of his position\005"

This Court in arriving at the aforementioned findings referred to Section 111 of the Indian Evidence Act which is in the following terms:-

"Sec. 111. Proof of good faith in transactions where one party is in relation of active confidence. \026 Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence."

But before such a finding is arrived at, the averments as regard alleged fiduciary relationship must be established before a presumption of undue influence against a person in position of active confidence is drawn. The factum of active confidence should also be established.

Section 111 of the Evidence Act will apply when the bona fides of a transaction is in question but not when the real nature thereof is in question.

The words 'active confidence' indicate that the relationship between the parties must be such that one is bound to protect the interests of the other.

Thus, point for determination of binding interests or which are the cases which come within the rule of active confidence would vary from case to case. If the plaintiff fails to prove the existence of the fiduciary relationship or the position of active confidence held by the defendant-appellant, the burden would lie on him as he had alleged fraud. The trial Court and the High Court, therefore, in our opinion, cannot be said to be correct in holding that without anything further, the burden of proof would be on the defendant.

The learned trial Judge has misdirected himself in proceeding on the premise "it is always difficult to prove the same in negative a person/party in the suit."

Difficulties which may be faced by a party to the lis can never be determinative of the question as to upon whom the burden of proof would lie. The learned Trial Judge, therefore, posed unto himself a wrong question and arrived at a wrong answer. The High Court also, in our considered view, committed a serious error of law in misreading and misinterpreting Section 101 of the Indian Evidence Act. With a view to prove forgery or fabrication in a document, possession of the original sale deed by the defendant, would not change the legal position. A party in possession of a document can always be directed to produce the same. The plaintiff could file an application calling for the said document from the defendant and the defendant could have been directed by the learned Trial Judge to produce the same.

There is another aspect of the matter which should be borne in mind. A distinction exists between a burden of proof and onus of proof. The right to begin follows onus probandi. It assumes importance in the early stage of a case. The question of onus of proof has greater force, where the question is which party is to begin. Burden of proof is used in three ways : (i) to indicate the duty of bringing forward evidence in support of a proposition at the beginning or later; (ii) to make that of establishing a proposition as against all counter evidence; and (iii) an indiscriminate use in which it may mean either or both of the others. The elementary rule is Section 101 is inflexible. In terms of Section 102 the initial onus is always on the plaintiff and if he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the same.

In R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple and Anr. [JT 2004 (6) SC 442], the law is stated in the following terms :

"29. In a suit for recovery of possession based on title it is for the plaintiff to prove his title and satisfy the court that he, in law, is entitled to dispossess the defendant from his possession over the suit property and for the possession to be restored to him. However, as held in A. Raghavamma v. A. Chenchamma there is an essential distinction between burden of proof and onus of proof: burden of proof lies upon a person who has to prove the fact and which never shifts. Onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence. In our opinion, in a suit for possession based on title once the plaintiff has been able to create a high degree of probability so as to shift the onus on the defendant it is for the defendant to discharge his onus and in the absence thereof the burden of proof lying on the plaintiff shall be held to have been discharged so as to amount to proof of the plaintiff's title."

For the reasons aforementioned, the impugned judgment cannot be sustained. The order reframing the issue is set aside thus reviving the issue originally framed. The Trial Court will be free to frame any additional issue if it is felt necessary.

The appeal is allowed as above.

JUDIS