

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CR No.4599 of 2017(O&M)
Date of Decision-27.11.2018

Roshan Lal and others

...Petitioners

Versus

Romeh Kumar and others

... Respondents

CORAM:-HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. Karan Singh Cheema, Advocate
for the petitioners.

Mr. Satbir Rathore, Advocate
for the respondents.

RAJ MOHAN SINGH, J.

[1]. Petitioners have challenged the order dated 05.04.2017 passed by Additional Civil Judge (Senior Division), Mukerian, vide which application filed by the plaintiffs/petitioners for reframing of issue No.2 was dismissed.

[2]. Plaintiffs filed a suit for declaration with the plea that Faili Ram was real brother of the plaintiffs. He had left the house without telling anything to the plaintiffs or the deceased brother of the plaintiffs namely Nanak Chand who was father of defendants No.1 and 2 and to other relatives for more than 22 years ago. His

whereabouts were not known and he was not heard by the plaintiffs for the aforesaid period. He was presumed to be civilly dead in the eyes of law. Faili Ram was recorded as owner of land measuring 48 kanals 9 marlas i.e. the suit land. After the civil death of Faili Ram, the plaintiffs being brothers and sisters claimed to be only heirs of Faili Ram under Hindu Succession Act as Faili Ram was a bachelor. Defendant No.1 in connivance with marginal witnesses and scribe, forged and fabricated general power of attorney dated 21.11.2008 by way of placing some imposture in his place. The alleged general power of attorney was never executed by Faili Ram as he was civilly dead for more than 22 years. General power of attorney dated 21.11.2008 was claimed to be forged and fabricated. On the basis of said general power of attorney, defendant No.1 further sold the land in favour of defendants No.3 to 7 vide registered sale deed dated 12.12.2008. The said sale deed was also claimed to be illegal and *non-est*.

[3]. The suit was contested by the defendants. Defendants relied upon agreement dated 24.06.1983 and photographs of Faili Ram with plaintiffs No.1 and 2 of 3-4 years earlier and several respectables of village who identified Faili Ram before Tehsildar and SDM, Mukerian. The mutation of sale deeds executed by general power of attorney of Faili Ram was a contested issue and the mutation was sanctioned in favour of defendants No.3 to 7 after due contest. Faili Ram himself offered for DNA test with his

brother, but the plaintiffs did not dare to do so. Even now defendants No.1 to 7 remained ready to produce Faili Ram for DNA test with the plaintiffs but the same was denied. Faili Ram was claimed to be a religious person and he often remained on tour in the company of Saints and by taking benefit of that, the plaintiffs sold his land of village Dokwal (HP). General power of attorney dated 21.11.2008 was claimed to be legal and valid.

[4]. Both the parties went to trial on definite issues. Issue No.2 was framed by the trial Court in the following manner:-

“Whether the alleged power of attorney dated 21.11.2008 and sale deed dated 12.12.2008 is null, void and result of fraud and mis-representation? OPP”

[5]. Plaintiffs/petitioners claimed reframing of the issue in the following manner:-

“Whether the power of attorney dated 21.11.2008 is legal, valid and sale deeds dated 12.12.2008 executed by the defendant No.1 on the basis of power of attorney are legal and valid? OPD”

[6]. The application for reframing of issue No.2 was contested by the respondents/defendants on the plea that the onus to prove a relevant fact is always on the party who asserts inaffirmative.

[7]. Earlier application was disposed of by Civil Judge (Junior Division), Mukerian vide order dated 29.01.2014 by observing that it is the duty of defendant No.1 to prove the validity

of power of attorney and subsequent sale deeds because the documents are to be produced and proved by the defendants and the plaintiffs have to rebut the said evidence. In such eventuality, the burden of proving the issue would be shifted upon the defendants. The application was allowed. The burden of proving issue No.2 was ordered to be shifted upon the defendants.

[8]. Against the said order, CR No.1806 of 2014 was filed in the High Court. The said revision petition was allowed on the premise that while passing the order, the trial Court has not given any view about the judgment cited by the party reported as **Pritam Singh Vs. Raj Kumar, 2013(4) RCR (Civil) 126**. The case was remanded to the trial Court for decision afresh after hearing the parties. Thereafter, the trial Court dismissed the application vide the impugned order.

[9]. Learned counsel for the petitioners referred to **Subhash Chander and others Vs. M/s Active Promoters Pvt. Ltd., 2015(1) RCR (Civil) 62** and contended that when specific allegations have been made by the plaintiffs in respect of document being fraudulent, then the burden is on the defendants to prove the document to be genuine because it is a settled principle of law that the person who claims some right on the basis of document, is required to positively prove the same. In **Thiruvengada Pillai Vs. Navaneethammal and another, 2008(2) RCR (Civil) 262**, the Hon'ble Apex Court held that when

the execution of an unregistered document produced by the plaintiff was denied by the defendant, then asking the defendant to establish the document to be forged was not a sound proposition. The Courts below proceeded on the basis that it is for the party, who asserts something, to prove that thing; and as the defendant alleged that the agreement was forged, it was for him to prove it. The Hon'ble Apex Court held that the Courts below had lost sight of the fact that the party who propounds the document will have to prove it. In the said case, it was the plaintiff who had come to the Court alleging that the defendant had executed an agreement to sell in his favour. Defendant therein denied the same. The burden was on the plaintiff to prove that the defendant had executed the agreement and not on the defendant to prove the negative.

[10]. In **K. Laxmanan Vs. Thekkayil Padmini and others, 2009(1) RCR (Civil) 388**, the Hon'ble Apex Court held that when there are suspicious circumstances in the execution of Will, the onus is on the propounder to explain them to the satisfaction of the Court. It is only after such discharge of responsibilities, the Court would accept the Will as a genuine document. Learned counsel also relied upon **Pritam Singh Vs. Raj Kumar's case (supra)**. Para No.7 of the aforesaid judgment reads as under:-

"7. The test of how a burden is discharged is brought through [Section 102](#) of the Evidence Act, as follows:-

"102. On whom burden of proof lies.- The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

The test shall be as to what is to happen if no evidence is given on either side and that is how the burden is to be seen. A person, who was relying therefore that there was a valid service of notice, and yet another person contending that he was not served at all and that he never refused, if both the parties did not give any evidence, it would have only resulted in a finding that there was no service. The burden, in this case, must therefore be on the person, who affirmed that there was a valid service which was refused and it will be an untenable argument to make that the defendant must put the court bailiff in witness-box as his witness to deny that he did not serve the summons and that the defendant did not refuse to receive the same. It will be inverting a legal logic to levels which the statute does not provide for. I will, therefore, reject the argument that there had been any valid service of notice."

[11]. On the other hand, learned counsel for the respondents also relied upon **Pritam Singh Vs. Raj Kumar's case (supra)** and contended that in terms of Section 102 of the Evidence Act, the burden of proof in a suit or proceeding shall lie on that person who would fail if no evidence at all were given on either side. In the cited case, there was a dispute regarding valid service which was denied by the opposite party. If both the parties did not give any evidence, it would have only resulted in a finding that there was no service. The burden, in that case, must

therefore be on the person, who affirmed that there was a valid service which was refused and it was held that defendant was not required to put the Court Bailiff in witness-box as his witness to deny that he did not serve the summons and that the defendant did not refuse to receive the same. In that eventuality, it will be inverting a legal logic to levels which the statute does not provide for. The Court in the aforesaid proposition, rejected the arguments of valid service propounded by the plaintiff as against the defendant who had denied the same.

[12]. Sections 101 and 102 of the Evidence Act would assume importance in the present context. Section 101 of the Evidence Act provides for initial burden of proof. 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. If a person desires a Court to give judgment that another person be punished for a crime, then the first person must prove that the second person has committed the crime. Section 102 of the Evidence Act deals with the proposition on whom burden of proof lies. 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. The burden of proof in a suit or proceeding lies on that

person who would fail if no evidence at all were given on either side.

[13]. In **Anil Rishi Vs. Gurbaksh Singh, 2006(3) RCR (Civil) 347**, it was held by the Hon'ble Apex Court that the initial burden of proof would be on the plaintiff in view of Section 101 of the Evidence Act. 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. The elementary Rule in terms of Section 101 of the Act is inflexible. In terms of Section 102 of the Act, the initial onus is always on the plaintiff and if plaintiff 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.

[14]. In **Bajaj Auto Ltd. Vs. TVS Motor Company Ltd. (Madras High Court), 2010(36) RCR (Civil) 447**, it was held that burden of proof generally lies on a party who asserts a particular fact. In other words, it would be on a party whose suit would fail, if no evidence was led. Onus of proof by a party would cease when the opposite party admits the transaction. Burden of proof on the pleadings of a party, never shifts to the other party. The initial burden of proving a particular fact is always on the party who asserts the same in affirmative. When he produces evidence in

support of his statement, onus would shift to the opposite party to adduce evidence in rebuttal to meet the case made out by the other party. In civil cases, onus of proof is never fixed permanently, but it keeps on fluctuating very frequently.

[15]. In view of aforesaid reasoning, the judgment cited by both the parties supports the cause of the plaintiffs/petitioners who are conversely placed in terms of onus arising from the ratio laid down in **Pritam Singh Vs. Raj Kumar's case (supra)**.

[16]. For the reasons recorded hereinabove, it can be appreciated that the person who claims some right on the basis of a document is required to prove the same positively. In the instant case, general power of attorney as relied by the defendants and the sale deeds executed on the basis of said general power of attorney are to be proved in terms of execution by the defendants and thereafter, onus will be shifted upon the plaintiffs to prove the same to be fraudulent. The reframing of issue thereby fastening the liability on the defendants in my considered opinion, is lawful and the trial Court should have accepted the same on legal parameters.

[17]. For the reasoning recorded hereinabove, this revision petition is allowed. Impugned order dated 05.04.2017 passed by Additional Civil Judge (Senior Division), Mukerian is hereby set aside. Reframing of issue No.2 as claimed in the application shall

be done by the trial Court and thereafter, the suit shall proceed in accordance with law.

(RAJ MOHAN SINGH)
JUDGE

27.11.2018
Prince

Whether Reasoned/Speaking	Yes/No
Whether Reportable	Yes/No