

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision:30.04.2014

+ **CM(M) 26/2014, CM Nos.540-41/2014 & 2019/2014**

JAGDISH PRASAD AGGARWAL AND ANR Petitioners
Through: Mr. Prashant Shukla, Adv.

versus

SHASHI JAIN Respondent
Through: none.

CORAM:
HON'BLE MR. JUSTICE NAJMI WAZIRI

% **MR. JUSTICE NAJMI WAZIRI**

1. This petition challenges an order dated 28.3.2011 which directs the petitioner-defendant to lead his evidence first i.e. before the plaintiff to be called upon to lead her evidence.

2. The plaintiff had filed a suit seeking possession, damages and mesne profits against the defendants apropos a property which she claims to have purchased through a duly registered sale deed on 21.07.2003. She claimed to have purchased it from her husband who was duly authorized through Power of Attorney by Smt. Manorma Devi, widow of late Sh. Dhanpat Rai the erstwhile owner. The defendant No.1 contested the suit on the ground that they were in

possession of the suit property for the last about 40 years and had become owners of the same through an oral gift by the Late Sh. Dhanpat Rai to his younger brother of Sh. Jagish Prasad-defendant No.1. That after the framing of issues on 28.03.2011, the Trial Court directed the defendant to lead evidence first on Issue No. 5 i.e. “Whether the defendant becomes the owner of the suit property through oral gift? OPD”. This order was challenged in appeal which resulted in the impugned order. The petitioner had contended that in view of Section 101 of the Evidence Act it was the duty of the plaintiff to prove the facts pleaded in the plaint; it would be grossly unjust to insist upon the defendant to first prove his defence against the claim of the plaintiff since, it was incumbent upon the plaintiff who sought to enforce a right to first establish that right in law. The petitioner had argued that an enforceable right must sustain itself on its own merit and ought to be enforceable on its own strength de hors the defence taken by a defendant.

3. The lower Courts upon considering the argument of the parties, reasoned that the issues were framed way back on 28.03.2011; no review application was filed against it nor was it challenged by way of

an appeal; the defendant having already led her evidence by examining two witnesses who had been duly cross examined, were now reluctant in leading further evidence; that although, the Trial Court had allowed the summoning of other witnesses of the defendants they were dragging their feet; the application seeking shifting of onus of leading evidence first had been filed more than two and a half years after the framing of issues on 28.3.2011; it was found to be time barred and not maintainable; the delay had not been explained; the defendant could not be permitted to resile from his acceptance of the order of 28.03.2011, which acceptance was manifest in the leading of two witnesses who have been cross-examined and discharged. The Court concluded that the relief sought for recalling of the aforesaid order fell in the realm of an appeal and it was therefore not maintainable.

4. In support of the contention that Section 101 Evidence Act required the plaintiff to prove his case first, learned counsel for the petitioner relied upon the Supreme Court's judgment in ***Rangammal v. Kuppuswami and Anr.*** MANU/SC/0620/2011 which held that: "since it is well establish dictum of the Evidence Act that misplacing

burden of prove would vitiate judgment. It is also equally and undoubtedly true that the burden of proof may not be of much consequence after both the parties lay evidence, but while appreciating the question of burden of proof, misplacing of burden of proof on a particular party and recording findings in a particular way definitely vitiates the judgment....this position stands reinforced by several authorities including the one delivered in the case of ***Kippula Koteshwara Rao v. Koppula Hemant Rao*** 2002 AIHC 4950 (AP)”

The said judgment also referred to ***State of J & K v. Hindustan Forest Company*** (2006) 12 SCC 198 which held that: “the onus is on the plaintiff to positively establish his case on the basis of material available and it cannot rely on the weakness or absence of the defence to discharge the onus.” Learned counsel further relief upon the Supreme Court’s Judgement in ***Parimal v. Veena @ Bharti*** MANU/SC/0105/2011 which held inter-alia:

“15.The provisions of Section 101 of the Evidence Act provide that the burden of proof of the facts rests on the party who substantially asserts it and not on the party who denies it. In fact, burden of proof means that a party has to prove an allegation before he is entitled to a judgment in his favour. Section 103 provides that burden of proof as to any particular fact lies on that person who

wishes the court to believe in its existence, unless it is provided by any special law that the proof of that fact shall lie on any particular person. The provision of Section 103 amplifies the general rule of Section 101 that the burden of proof lies on the person who asserts the affirmative of the facts in issue.”

5. Lastly, counsel relied upon the judgment in **Anil Rishi**

V.Gurbaksh Singh MANU/SC/8133/2006 which holds:

“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: (1) 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 of 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. ”

6. The law with respect of the plaintiff having to lead evidence first has been clearly spelt out. However, the facts of the present case

would make an exception where the plaintiff claimed ownership on the basis of a registered sale deed whereas the defendant merely on the basis of an oral gift. The Trial Court had directed the defendant to lead evidence first because if the defendant established his ownership over the suit property, the plaintiff's claim of transfer of title on the basis of the sale deed would be shattered. The contesting parties then proceeded with the suit for more than two and a half years. The order was unchallenged and indeed the defendant had led two witnesses who cross examined and discharged. The petitioner-defendant was then required to complete his evidence but he had become reluctant now, for reasons best known to him. This Court is of the view that after two and a half years, when the suit has progressed, the defendant could not be permitted to resile from his acceptance of the Trial Court's order of 28.03.2011 and seek to undo the progress of the trial. Evidently, when the issues were framed, the Trial Court felt that a degree of probability had been brought about by the plaintiff in his favour on the basis of the sale deed, so as to shift the onus of proof upon the defendant, in which case it would be for the defendant to discharge his onus of proof. In ***Anil Rishi Vs. Gurbux Singh*** (supra) the Supreme Court held:

*“16. In **R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple and Anr.**, 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** (1962) 2 SCR 933 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.””*

7. From the aforesaid discussion what emerges is that the onus of proof needed to be discharged first by the defendant since his claim of adverse possession by way of an oral gift which was never before mentioned or asserted or declared to any third party or to the plaintiff,

extolled and inspired a lesser degree of probability as compared to a registered sale deed transferring right, title and interest in favour of the plaintiff. In law, the latter document would be more readily reliable in evidence and prima facie believable. Therefore, the onus of proof could have been shifted to the defendant to prove Issue No.5 first. The view taken by the Trial Court is a plausible view in law. It does not suffer from any material irregularity warranting the interference by this Court in its revisionary jurisdiction. An appeal against the order of 28.03.2011 if maintainable, would have to be preferred before the appropriate forum. The petition lacks merit and is accordingly dismissed.

**NAJMI WAZIRI
(JUDGE)**

APRIL 30, 2014/acm