

JUDGMENT AND ORDER (CAV)

1. This Second Appeal has been preferred against the judgment and decree of reversal dated 31.08.2005 passed by the learned Civil Judge (Senior Division), Barpeta in Title Appeal No.59/2004 thereby reversing the judgment and decree dated 05.08.2004 passed by the learned Civil Judge (Junior Division) No.1, Barpeta in Title Suit No.2/2003.

2. The Second Appeal preferred by the defendant/appellant was admitted by this Court to be heard on the following substantial questions of law :-

1) Whether the learned Court below erred in canceling the sale deed Ext-4/Unga by shifting a wrong burden of proof on the appellant/defendant?

2) Whether the learned Court below erred in rejecting the determination made by the learned trial Court on the execution of the sale deed Ext.4/Unga in terms of section 73 of the Indian Evidence Act, 1872, in absence of any evidence adduced by the respondent-plaintiff, questioning the execution thereof by her?

3. The brief factual background of this case is that according to the plaintiff she had purchased a plot of land measuring 2 katha 10 lechas covered by dag No.316 from its pattadar Yakub Ali Bhuyan by means of registered deed of sale No.1021 dated 28.07.1982 whereafter, the possession of the land was also delivered to her. The name of the plaintiff was duly mutated in respect of the said plot of land whereafter, the plaintiff had constructed a CI sheet house over the land and has been possessing the same through her tenants. On 07.04.1984 the plaintiff had again purchased another plot of land measuring 1 katha 5 lechas from the same vendor by means of registered deed of sale bearing No.921/84 and entered into possession in respect of the said plot of land. The aforementioned plot of land measuring 1 katha 5 lechas, described in Schedule-C to the plaint, is the suit land, which forms part of the compact plot of land measuring 3 katha 15 lechas described in Schedule-B to the plaint.

4. The plaintiff's case is that the defendant No.1, who is a boundary man of the plaintiff, is a greedy person and has forcibly occupied the Schedule-C land by dispossessing the plaintiff on 06.11.2002. Despite repeated requests made by the plaintiff the defendant refused to vacate the Schedule-C land claiming to have purchased the same from the plaintiff vide registered deed of sale bearing No.193/2000 for a consideration of Rs.7000/-. The defendant is also running a mini cinema hall over the said plot of land without having a valid licence. It is also the case of the plaintiff that she could come to know about the registered deed of sale No.193/2000 only on the date of dispossession of the Schedule-C land. As such, the plaintiff had instituted the suit inter alia, praying for a declaration of her right, title and interest over the 3 katha 15 lechas of land described in Schedule-B to the plaint and also for a decree declaring that the sale deed No.193/2000 dated 28.01.2000 being a forged document be declared illegal, void and inoperative in the eye of law. The plaintiff has also prayed for consequent

uential decree for recovery of khas possession in respect of the Schedule-C land

5. On receipt of summons the defendant had entered appearance and contested the suit by filing his written statement, inter alia, questioning the maintainability of the suit on the ground of want of cause of action, suit being barred by limitation as well as on account of non-joinder of necessary parties. The contesting defendant, while denying the case of the plaintiff, has categorically stated that he has purchased the C-scheduled land from the plaintiff for the consideration amount of Rs.7000/- on the basis of registered deed of sale No.193/2000 dated 21.01.2000. The said sale deed was executed in terms of a baina nama executed by the plaintiff in the year 1988 pursuant where to the defendant was put in possession of the suit land. After taking possession of the suit land, the defendant has improved upon the same by making earth filling and plantation of tree and thereafter constructed the mini cinema hall over the said plot of land which he has been possessing since more than 15 years. On the basis of such pleadings the defendant prayed for dismissal of the suit.

6. Based on the pleadings of the parties, the learned trial Court had framed the following issues :-

- i) Whether there is cause of action for the suit?
- ii) Whether the suit is barred by limitation?
- iii) Whether the plaintiff has right, title and interest over B schedule land?
- iv) Whether the plaintiff was dispossessed by the defendant on 6.11.02 from the C schedule land described in the plaint?
- v) Whether deed no.193/2000 dtd. 28.1.2000 executed in favour of defendant was forged and illegal and liable to be declared as void and inoperative in the eye of law?
- vi) Whether the plaintiff is entitled to get decree as prayed for?
- vii) What other relief or reliefs the parties are entitled to?

7. During trial, both sides had adduced oral as well as documentary evidence. The issue Nos.(iii) and (v) were the most important issues in the facts and circumstances of the case. The learned trial Court had held that the plaintiff has failed to prove that the sale deed No.193/20900 was a forged document and therefore, declined to declare her right, title and interest over the C-schedule land. However, the learned trial Court had upheld the claim of the plaintiff over the remaining portion of the Schedule-B land. The suit filed by the plaintiff was, therefore, partly decreed by declaring her right, title and interest over 2 katha 10 lechas of land by leaving aside the C-schedule land.

8. Being aggrieved by the judgment and decree dated 05.08.2004 passed by the trial court, the plaintiff as appellant had preferred Title Appeal No.59/2004 before the Court of learned Civil Judge (Senior Division), Barpeta. After hearing the learned counsels for the parties the Lower Appellate Court had allowed the appeal filed by the plaintiff by reversing the judgment and decree passed by the trial Court by holding that since the plaintiff has denied the execution of the registered deed of sale bearing No.193/2000 (Ext-Unga) it was the burden of the defendant to prove and establish the execution of the same. Since the defendant has failed to discharge such burden of proof, hence, the sale deed No.193/2000 was held to be a forged document. The learned Lower Appellate Court had also taken exception to the recourse taken by the trial Court in visually comparing her signature available in the sale deed No.193/2000 under Section 73 of the Indian Evidence Act, 1872 so as to arrive at a conclusion that the signature contained in the said sale deed shows similarity with the admitted signature of the plaintiff. According to the learned Lower Appellate Court, it was not proper for the trial Court to make such visual comparison of the signature by referring to Section 73 of the Evidence Act without taking expert opinion in the matter.

9. I have heard Mr. M. H. Ahmed, learned counsel appearing for the appellant as well as Mr. K. Basar, learned counsel representing the respondent.

10. While referring to the first substantial question of law framed by this Court, Mr. Ahmed submits that a perusal of the judgment under appeal would go to show that the plaintiff has failed to lead any evidence in support of her claim that the sale deed No.193/2000 (Ext-Unga) was a forged document. Notwithstanding the same the learned Lower Appellate Court had decreed the suit filed by the plaintiff allegedly on account of the fact that the defendant has failed to prove due execution of the sale deed thereby, wrongly shifting the burden of proof upon the defendant. He further submits that under Section 73 of the Evidence Act, the Court is empowered to make visual comparison of the admitted signature. Since the plaintiff has failed to refer the matter for expert opinion, hence, the trial court was wholly justified in making a visual comparison of the signature under Section 73 of the Evidence Act, 1872.

11. Per contra, Mr. K. Basar, learned counsel for the respondent, submits that the present is a case of total denial of execution of the sale deed No.193/2000 by the plaintiff. Since she has denied the execution of the sale deed, hence, the burden was wholly on the defendant side to prove the execution of the same and the plaintiff did not have any burden to prove any negative fact. He submits that as per Section 67 read with Section 68 of the Evidence Act the defendant was under an obligation to prove the execution of the sale deed (Ext-Unga) by examining the witnesses which he has failed to do. As such, the judgment and decree passed by the learned Lower Appellate Court does not suffer from any infirmity.

12. Mr. Basar further submits that during the cross-examination of the DW 1, Sanuwar Huussain, he has himself admitted that the plaintiff was entitled to right over the entire B-scheduled land. In view of such admission there was no further requirement of adducing evidence in support of the case of the plaintiff since under Section 58 of the Evidence Act, facts admitted need not be proved. In support of his argument Mr. Basar has relied upon the following judgments :

1. 2000(1) GLT 623 [Sabga Ram Das vs. Mahendra Das]
2. LAWS (SC)-1958-11-15 [H. Venkatachala Iyengar v. B. N. Thimmajamma]
3. AIR 1979 SC 14 [The State (Delhi Administration v. Pali Ram)]

to contend that the burden of proving Ext-Unga sale deed in accordance with Section 67 of the Evidence Act was squarely upon the defendant and not on the plaintiff. He further submits that the trial court could not have made a visual comparison of the signature of the plaintiff by taking recourse to Section 73 of the Evidence Act since the aforesaid disputed signature formed the core of the controversy involved in the Title Suit.

13. I have considered the rival submissions made by and on behalf of the parties and have also perused the materials available on record.

14. The case of the plaintiff, as apparent from the pleadings contained in the plaint, is that the sale deed No.193/2000 was never executed by her and the same is a forged document. She has also prayed for recovery of possession of the Schedule-C land which was a purportedly transacted by the sale deed No.193/2000.

The sale deed in question being a registered document, a presumption as regards its validity would always arise in the eye of law unless the contrary is proved. Since the foundational fact of the plaintiff's claim was that the sale deed Ext-Unga was a forged document, the burden of proof under Section 101 read with Section 102 of the Evidence Act was upon the plaintiff to prima facie prove and establish her case by leading evidence to show that the sale deed Ext-Unga was a forged document. However, it appears from the record that save and except denying execution of the sale deed, the plaintiff has failed to lead any evidence in support of her aforesaid claim.

15. In the case of Anil Rishi vs. Gurbaksh Singh reported in (2006) 5 SCC 558 the Hon'ble Apex Court has observed as follows :-

18. 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 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.

19. There is another aspect of the matter which should be borne in mind. A distinction exists between 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 in 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.

From the above, it is, therefore, apparent that merely because it would be difficult for a litigant to lead evidence to prove a negative fact, the same cannot be a ground for dispensing with the burden of proof under Section 101 and 102 of the Evidence Act.

16. In another unreported decision of this Court rendered on 09.09.2015 in connection with RSA No.90/2009 it has been observed as follows :-

24. The general principles of law that can be gainfully culled out from the judicial pronouncements noted above is that the burden of proof cast under Sections 101 and 102 of the Indian Evidence Act, 1872 is the persuasive burden or the onus probandi. The persuasive burden to prove and establish the case always lies upon the plaintiff and the said burden never shifts upon the defendant.

What may, however, shift is the onus to lead evidence in the sense that once the plaintiff side succeeds in prima facie establishing his pleaded case by leading evidence, the onus will then shift upon the defendant side to lead evidence so as to disprove the case. The parties may also have to discharge the burden of establishing the admissibility of the evidence by leading evidence in respect thereof. The initial burden to establish the basic allegations made in the plaint constituting the foundational facts, regardless of whether such assertion is couched in the affirmative or in the negative, would undoubtedly lie upon the plaintiff and the failure to discharge the said burden must lead to the dismissal of the suit.

17. In another decision reported in 2012 (3) GLT 867 [Pawan Kumar Patodia vs. Vijoy Kumar Bhutoria & others] this Court has held that when an allegation of forgery is made the burden heavily lies on the person making such allegation to prove such forgery (para 22).

18. In the instant case, a perusal of the materials on record shows that the plaintiff's side has failed to discharge the persuasive burden of prima facie establishing her case by leading evidence to show that the sale deed No.193/2000 was a forged document. Therefore, the learned Lower Appellate Court had committed

d serious error in law in holding that the burden of proof was upon the defendant to establish the due execution of Ext-Unga sale deed. Since the plaintiff side has failed to discharge the initial burden of proving and establishing her case, hence, the suit ought to have resulted in dismissal. Such being the position, the substantial question of law No.1 framed by this Court stands answered in favour of the appellant/defendant and against the respondent/plaintiff.

19. Since it has been already held that the suit filed by the plaintiff is liable to be dismissed on account of failure on her part to produce evidence in support of her claim, hence, the answer to the second substantial question of law becomes merely academic in the facts and circumstances of the case and hence, need not be answered by this Court in the present appeal.

20. In view of what has been observed herein before, I am of the opinion that the appeal must succeed on merit and consequently the same stands allowed. The judgment and order passed by the learned Lower Appellate Court declaring the title of the plaintiff over the Schedule-C land followed by recovery of possession is hereby set aside. The judgment and decree passed by the trial Court is hereby affirmed. Having regard to the facts and circumstances of the case, there would be no order as to cost.

Prepare a decree accordingly.

Registry to send back the LCR expeditiously.