

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.10890 OF 2019

MADHAVRAO VENKATRAO PATIL THROUGH LRS
VERSUS
HEAD MASTER ZP PRIMARY SCHOOL AND OTHERS

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Advocate for Petitioners : Smt. M.D.Thube-Mhase i/b Lex Aquila
AGP for Respondent 3 : Shri S.W.Munde

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CORAM : RAVINDRA V. GHUGE, J.
Dated: August 31, 2019
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PER COURT :-

1. The petitioners / plaintiffs are aggrieved by the order dated 7.12.2018, passed by the trial Court, by which, application Exhibit 148 filed by the petitioners in RCS No. 148 of 2017 (Old No.473 of 2011), praying for deleting issue No.2 and framing a new issue, has been rejected.

2. The learned Advocate for the petitioners has strenuously criticized the impugned order, contending that issue No.2 leads to a presumption that the Gift Deeds dated 6.5.1959 and 4.4.1961 are the genuine documents. The petitioners have canvassed that these documents are false, bogus and fabricated. Once the defendants rely on such Gift Deeds, they have to prove the contents of the said documents and only then the onus would shift on to the plaintiffs to prove that they are bogus and fraudulent documents. The grounds set

out in the memo of the petition are strenuously canvassed.

3. Having considered the submissions of the learned Advocate for the petitioner, I have gone through the issues cast on 23.3.2012, Exhibit 148 and the impugned orders.

4. The principle of onus probandi would apply in this case. The defendants have averred in the written statement that the Gift Deeds dated 6.5.1959 and 4.4.1961 are in existence. Needless to state a party which relies upon certain documents and produces the said documents, has to prove its contents. Merely granting an Exhibit number would not mean that the document stands proved and the contents could be read in evidence. Whether the defendants desire to do so or not, is an issue to be dealt with by the defendants.

5. The plaintiffs have specifically averred in the plaint that the defendants have prepared bogus Gift Deeds. This averment in the plaint indicates that the plaintiffs are aware of the two Gift Deeds which they term to be bogus and fabricated. The plaintiffs have further averred that on the basis of the Gift Deeds, 7/12 extracts have been entered and the names of the defendants have been mutated in the records. As the plaintiffs gathered knowledge from the office of the Sub-Registrar at Ausa that the said Gift Deeds are not registered,

that they term those Gift Deeds to be bogus and fabricated.

6. In the matter of Kalma Devadattam Vs. Union of India [AIR 1964 SC 880], it is held in paragraph No.11 as under:-

"About the title of the plaintiffs to items 46 to 51 in the schedule annexed to the plaint, the High Court disagreed with the Trial Court. These properties were purchased in the names of two of the three plaintiffs by the sale deed Ext. A-230 dated March 15, 1944. The consideration of the sale deed was Rs. 23,500/- of which Rs. 5,019/- had been paid in advance in four installments before March 15, 1944, and the balance of Rs. 18,481/- was paid before the Sub-Registrar to the vendors who conveyed the properties to Devadattam and Devarayulu two of the three plaintiffs acting by their mother Narayanamma as their guardian. The properties having been purchased in the names of the two plaintiffs the burden prima facie lay upon the Taxing authorities to establish that the sale deed was taken for and on behalf of the joint family or with the aid of joint family funds. Evidence was led by both the sides to support their respective versions. The Trial Court held that the plaintiffs' case that their grandmother Seshamma provided the consideration was not proved, but there was also no evidence to show that the consideration was provided by the joint family, and as the burden of proof lay upon the Union, their case must fail. The High Court however held that the burden which lay upon the Union to prove that the properties were purchased out of the joint family funds was duly discharged. The question of onus probandi is certainly important in the early stages of a case. It

may also assume importance where no evidence at all is led on the question in dispute by either side; in such a contingency the party on whom the onus lies to prove a certain fact must fail. Where however evidence has been led by the contesting parties on the question in issue, abstract considerations of onus are out of place; truth or otherwise of the case must always be adjudged on the evidence led by the parties. "

7. In the matter of Narayan Govind Gavate Vs. State of Maharashtra [(1977) 1 SCC 133], it is held in paragraph Nos. 18 to 22 as under:-

"18. Turning now to the provisions of our own Evidence Act, we find the general or stable burden of proving a case stated in Section 101 as follows :

101. 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.

The principle is stated in Section 102 from the point of view of what has been sometimes called the burden of leading or introducing evidence which is placed on the party initiating a proceeding. It says :

102. *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.*

In practice, this lesser burden is discharged by merely showing that there is evidence in the case which supports the case set up by the party which comes to Court first, irrespective of the side which has led that evidence. An outright dismissal in limine of a suit or proceeding for want of evidence is thus often avoided. But, the burden of establishing or general burden of proof is heavier. Sometimes, evidence coming from the side of the respondents, in the form of either their admissions or conduct or failure to controvert, may strengthen or tend to support a petitioner's or plaintiff's case so much that the heavier burden of proving or establishing a case, as distinguished from the mere duty of introducing or showing the existence of some evidence on record stated in Section 102, is itself discharged. Sufficiency of evidence to discharge the onus probandi is not, apart from instances of blatant perversity in assessing evidence, examined by this Court as a rule in appeals by special leave granted under Article 136 of the Constitution. It has been held that the question whether an onus probandi has been discharged is one of fact (see: AIR 1930 P. C. 91). It is generally so.

19. *"Proof", which is the effect of evidence led, is defined by the provisions of Section 3 of the Evidence Act. The effect of evidence has to be distinguished from the duty or burden of showing to the Court what conclusions it should reach. This duty is called the "onus probandi", which is placed upon one of the parties, in accordance with appropriate provisions of law applicable to various situations, but, the effect of the evidence led*

is a matter of inference or a conclusion to be arrived at by the Court.

20. *The total effect of evidence is determined at the end of a proceeding not merely by considering the general duties imposed by Sections 101 and 102 of the Evidence Act but also the special or particular ones imposed by other provisions such as Sections 103 and 106 of the Evidence Act. Section 103 enacts :*

103. The 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 law that the proof of that fact shall lie on any particular person.

And, Section 106 lays down :

106. When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

21. *In judging whether a general or a particular or special onus has been discharged, the Court will not only consider the direct effect of the oral and documentary evidence led but also what may be indirectly inferred because certain facts have been proved or not proved though easily capable of proof if they existed at all which raise either a presumption of law or of fact. Section 114 of the Evidence Act covers a wide range of presumptions of fact which can be used by Courts in the course of administration of justice to remove lacunae in the chain of direct evidence before it. It is, therefore, said that the function of a presumption often is to "fill a gap" in evidence.*

22. True presumptions, whether of law or of fact, are always rebuttable. In other words, the party against which a presumption may operate can and must lead evidence to show why the presumption should not be given effect to. If, for example, the party which initiates a proceeding or comes with a case to Court offers evidence to support it, the presumption is that such evidence does not exist. And if some evidence is shewn to exist on a question in issue, but the party which has it within its power to produce it, does not, despite notice to it to do so, produce it. the natural presumption is that it would, if produced, have gone against it. Similarly, a presumption arises from failure to discharge a special or particular onus."

8. In view of the above, it is obvious that the plaintiffs have the elementary knowledge about the existence of the Gift Deeds and as they contend that these Gift Deeds are bogus and fabricated, the onus and burden would lie on the plaintiffs to prove that they are bogus.

9. In view of the above, I do not find that the trial Court has committed an error in passing the impugned order dated 7.12.2018. This petition, being devoid of merits is, therefore, dismissed.

(RAVINDRA V. GHUGE, J.)

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