

(2004) 08 J&K CK 0003
In the Jammu And Kashmir High Court
Case No : Civil Revision No. 115 of 2003

Charan Dass

APPELLANT

Vs

Chander Shekhar Gupta and Others

RESPONDENT

Date of Decision : 20-08-2004

Acts Referred:

Jammu and Kashmir Civil Procedure Code, 1977 — Order 14 Rule 5
Jammu and Kashmir Evidence Act, 1977 — Section 101

Citation : (2006) 1 JKJ 39

Hon'ble Judges : Sudesh Kumar Gupta, J

Bench : Single Bench

Advocate : K.K. Pangotra and S.C. Gupta, for the Appellant; Virinder Bhat, for the Respondent

Final Decision : Dismissed

Judgement

S.K. Gupta, J.—This revision is directed against the order dated 15.4.2003 propounded by Sub Judge, Katra, whereby the applications of

the defendants-respondents, for recasting of issues and for permission to place on record the additional documents, have been allowed.

2. A suit for declaration came to be commenced by the plaintiff-petitioner, seeking to declare the gift deed dated 8.7.1982, registered on

8.9.1982, with regard to land measuring 18 marlas under survey No. 582/201, situate at Katra, as null, void and in-operative with a further relief

of permanent prohibitory injunction, restraining the defendants-respondents from interfering into the said land, transfer or alienate it in any manner

whatsoever. The case of the plaintiff-petitioner before the trial court is that he became the owner of the land on the basis of a gift deed dated

4.10.1968, executed by one Munshi Ram. The said gift deed is not, however, in controversy in the suit. Petitioner further stated to have executed a

power of attorney in favour of respondent-defendant No. 3, only for handling the legal matters in respect to the suit land and not for its sale or

transfer by any mode whatsoever. It was on service of a notice upon him from Tehsildar Reasi on 5.9.2000, whereby he was called upon to attend

the mutation proceedings in respect of the land on the basis of gift deed dated 8.7.1982, that the said gift deed had been executed by the petitioner

through his attorney, defendant No. 3, in favour of deceased Girdhari Lal, who happens to be the father of attorney, respondent No. 3. Further

case of the petitioner is that he is in possession of the suit land as owner and so is reflected in the revenue record and the respondents-defendants

are interfering into his possession and on the basis of the gift deed are out to effect the sale and transfer the land. After filing the written statement

by the defendants on a blend of legal and factual grounds, the trial court framed issues on 21.4.2001 in the context and contour of the pleadings. It

was during the currency of the trial that defendants-respondents made applications, one for seeking recasting of the issues and the other for

permission to bring on record additional documents.

3. The trial court, after hearing the rival contentions of the parties, allowed the applications vide order-dated 21.9.2002, impugned in this revision

petition.

4. I have heard the learned Counsel for the parties and also gone through the relevant provisions of law touching the controversy. The main plank

of the petitioner contention is that since the matter in controversy is the competency and authority of the defendant No. 3 to execute the gift deed in

favour of his father, Girdhari Lal Gupta, in such circumstances the burden of proof shall be on the respondents-defendants, particularly when the

respondent No. 3 asserted of having executed the alleged gift deed on the basis of attorney dated 8.7.1982. His further submission is that since his

ownership and possession of the suit land is clearly established from record, the burden shifts on the defendants, who have controverted the claim

of the petitioner in this regard and prove it by evidence, more particularly when the defendants admit the ownership of the land on the basis of gift

deed dated 4.10.1968 executed by Munshi Ram in favour of the petitioner-plaintiff. The petitioner further stated that there were neither good

reasons nor sufficient grounds for recasting the issues already framed. The trial

court has exercised the jurisdiction illegally and with material

irregularity, which has caused injustice to the petitioner and has prayed for setting aside the order impugned.

5. So far as the matter relating to framing of issues or recasting old issues is concerned, Rule 5 of Order 14 CPC empowers the court with ample

powers to amend issues or frame additional issues at any stage of proceedings and it does not contemplate that the power must be exercised when

application is made; on the other hand, it saddles on the Court duty to exercise power suo motu for determining the matters in controversy

between the parties, if that was necessary to do so. Once the issues have been framed and also thereafter recasted, but before the trial has

commenced, the power of the court is not restricted to recast the issues or to change the onus, in appropriate cases, on such terms as it deems fit.

While recasting the issues the court is well within its powers under Rule 5 of Order 14 CPC, to change the burden thereof, where it finds

necessary, to determine the matter in controversy between the parties and disposal of the suit effectively. Therefore, the first contention raised by

Mr. Pangotra, learned Counsel for the petitioner, that issues once framed could not be recasted, and the court does not have the power to amend

or recast the issues for the second time, is devoid of any merit and cannot be accepted, particularly when the parties have yet to start the evidence.

6. As regards the burden of proof with regard to issues relating to the ownership of the suit land and also in respect of challenge to the impugned

gift deed, it has been placed on the petitioner-plaintiff by the trial court, after recasting the issues.

7. Mr. K.K. Pangotra, learned Counsel for the petitioner, submitted that in view of the assertions of the defendants-respondents in their written

statement, the controversy revolves round the fact that whether the gift deed was executed by defendant No. 3, attorney holder of the petitioner, in

good faith, the burden of proof shall be upon the defendants-respondents. His further submission is that, in such circumstances the presumption is

against the validity of the gift deed.

8. It is not in dispute that the petitioner-plaintiff has based his suit for declaration in alleging that the impugned gift deed dated 8.7.1982, in respect

of the suit land, is invalid, null and void. The general rule is that the party, who

alleges any matter in issue, must prove it. This would be simple

enough if there were only one fact in issue, but there may be several issues, the burden of proof of some of them being on one party and of others

on the other party. Section 101 of the Evidence Act is based on the general rule that the burden of proof lies on the party who asserts the

affirmation of the issue, or question in dispute according to the maxim, *ei incumbit probatio, qui dicit; non qui negat* (the burden of proof lies

upon him who asserts; not upon him who denies) a rule which, the commonsense of mankind at once asserts. It further follows that the burden of

proof lies at first on that party against whom the judgment of the Court would be given if no evidence at all were adduced.

9. In this case, the petitioners assertion with regard to ownership and possession of the suit land has been emphatically denied by the respondents-

defendants, having set up their own title to the suit land on the basis of a gift deed. Further, the claim of the petitioner-plaintiff that the land may not

be transferred or alienated by the respondents-defendants, or interference caused in his possession, is also denied by the respondents-defendants

in their written statement. In such an event when the petitioner-plaintiff alleges to be owner in possession, the burden lies on him to prove, by

adducing evidence, the fact of ownership and possession. Similarly, the petitioner-plaintiff has asserted, for grounds stated in the plaint, that the gift

deed executed by respondent-defendant No. 3, as attorney, in favour of his father, is invalid, null and void, is a plea required to be proved by

evidence by the petitioner-plaintiff and the onus to prove this issue has to be placed on the petitioner- plaintiff and not on the respondents-

defendants. Defendants-respondents, in such, circumstances, cannot be called upon to prove the validity of the gift deed on the basis of which they

have set up their own title to the suit land. The onus is always on a person who asserts a proposition or fact which is not self-evident. The burden

of proof, under law, and also the admitted circumstances of the case, in respect of the aforesaid issues in this case, would lie on the petitioner-

plaintiff.

10. I do not find any jurisdictional error or material irregularity in the well considered order passed by the trial court, necessitating interference in

this revision.

11. As regards the application for production of documents, allowed by the trial court, Mr. K.K. Pangotra, learned Counsel for the petitioner, during the course of arguments, did not press his challenge to the same.
12. For what has been stated and discussed above, the revision petition, possessing no merit, is accordingly dismissed.
13. Record be remitted back to the trial Court forthwith alongwith a copy of this order. Parties, through their counsel, are directed to put in their appearance before the trial court on 14.09.2004.