

(1957) 07 PAT CK 0006
In the Patna High Court
Case No : A.F.A.D. No. 804 of 1952

Dulhin Mahabati Kuer

APPELLANT

Vs

Raghunandan Prasad Singh and Others

RESPONDENT

Date of Decision : 30-07-1957

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 2, 96
Evidence Act, 1872 — Section 101, 102

Citation : AIR 1958 Patna 249 : (1957) 5 BLJR 658

Hon'ble Judges : Kanhaiya Singh, J

Bench : Single Bench

Advocate : R.S. Chatterji and Gupteshwar Prasad, for the Appellant; U.N. Sinha and Baidyanath Prasad II, for the Respondent

Final Decision : Dismissed

Judgement

Kanhaiya Singh, J.—This is an appeal from a judgment and decree of the Additional Subordinate Judge, Muzaffarpur, dated 25th April, 1952, which reversed a judgment and decree of the Munsif of the same place dated 21st February, 1951, and dismissed the plaintiffs suit.

2. The suit which gave rise to this appeal was a simple suit for establishment of title to and confirmation of possession of the properties detailed in the schedule to the plaint or, in the alternative, recovery of possession. But it raised an important question of law regarding onus of proof because of non-production of evidence by either party. The facts lie in short compass and may be stated as follows. The disputed properties admittedly belonged to one Sujan Kuer. He died leaving behind him his widow Anupa Kuer. The plaintiff is the daughter's daughter of Sujan. It appears on 26th January, 1943, the plaintiff's mother Lakshmi Kuer executed in her favour a deed of gift in respect of her father's properties. Between October, and December, 1947, Ramkhelawan Singh, defendant second party, claiming to be the daughter's son of Sujan executed three deeds of sale in favour of the defendants first party in respect of the

disputed properties. The plaintiff instituted the present suit on 23rd January, 1948, and claimed that Sujan died leaving behind him only one daughter, Lakshmi Kuer, her mother, herself (his daughter's daughter) and his widow, Anupa Kuer, that on the death of Sujan his entire properties came into possession of his widow Anupa Kuer, that after Anupa Kuer's death, her mother Lakshmi Kuer entered into possession and remained in possession until her death and that thereafter the plaintiff obtained possession and is still in possession of the disputed properties. There was a stout denial that Ramkhelawan was the daughter's son of Sujan. The plaintiff asserted that her father left behind him no daughter of the name of Ramsundar Kuer. On these allegations, she contended that the sale deeds in favour of the defendants first party were without right and without title and was not binding upon her. She claimed, therefore, confirmation of possession or, in the alternative, recovery of possession.

3. The suit was contested by both the defendants first party and the defendant second party. They filed two separate written statements. Their defence is common. They admitted that the plaintiff was the daughter's daughter of Sujan. They further admitted that the plaintiff's mother Lakshmi Kuer was in possession of the properties of Sujan. They denied, however, that the plaintiff's mother was the sole daughter of Sujan. They alleged that the latter died leaving him surviving besides his widow, two daughters, Lakshmi Kuer and Ramsundar Kuer, and that Ramkhelawan, defendant second party, was the son of Ramsundar Kuer. They further alleged that both Ramsundar and Lakshmi were in joint possession of the properties of Sujan. Ramsundar, it is said, predeceased Lakshmi. The defendants alleged further that though on the death of Ramsundar defendant second party and his brother were entitled in law to possess and occupy the entire properties of Sujan, they allowed Lakshmi to remain in possession of half share in the properties as before and that when Lakshmi died they got possession of the entire properties.

They denied the possession of the plaintiff. They also challenged the genuineness of the deed of gift propounded by the plaintiff and characterised it as collusive and fraudulent. They asserted that Ramkhelawan had title and right to transfer the entire properties to defendants first party and that the defendants first party had acquired by purchase an indefeasible right.

4. The learned Munsif framed five issues for the determination of the suit. They are as follows:

"1. Has the plaintiff cause of action and right to sue?

2. Was Mosst Ramsundar Kuer daughter and defendant No. 4 daughter's son of Sujan Kuar as alleged by the defendants?

3. Is the registered hibanama dated 28-1-43 executed by Mosst. Lachini Kuer in favour of the plaintiff valid and operative?

4. Has deendant second party any authority to execute any sale deed to

defendants 1st party? If so, is the same valid and for consideration?

5. Is the plaintiff entitled to the relief claimed? If so, to what extent?"

It appears that at the time of hearing neither party adduced any oral or documentary evidence and they invited the Court to give decision on the basis of the onus of proof,

5. At the time of argument it appears that issue No. 1 was not pressed by the parties. Therefore, the learned Munsif decided this issue in favour of the plaintiff. Similarly, as no evidence was adduced by either party, he held that as the onus of proof as to whether Ramsundar Kuer was a daughter of Sujan lay on the defendants and they had failed to discharge the onus, it must be held that Ramsundar was not the daughter of Sujan, As to issue No. 3, he held for similar reasons that the deed of gift dated 26th January, 1943, was not valid and operative. The decision of issue No. 4 rested on the findings on issue No. 2 and as the defendants had failed to prove that Ramkhelawan was the daughter's son of Sujan, the learned Munsif held that the defendant second party had no authority to execute the sale deeds in favour of the defendants first party and further that, therefore, they were not genuine and valid. Lastly, as to issue No. 5 he held that the plaintiff was entitled to the relief claimed. Accordingly he decreed the suit.

6. There was a sharp difference of opinion between the learned Munsif and the learned Subordinate Judge on the question of onus. In the opinion of the learned Subordinate Judge, the onus of proving that the plaintiff was the only heir of the last male holder and that the defendant second party had no concern with the family of Sujan lay on the plaintiff and, therefore, she had to prove affirmatively not only that she was the daughter's daughter of Sujan but also negatively that Sujan had no other preferential heir. He, accordingly, cast the onus of proof on the plaintiff, and since, in his opinion, this onus had not been discharged he unsuited the plaintiff. Now, the plaintiff has come up in second Appeal.

7. Mr. R.S. Chatterji appearing for the appellant contended that on the admission of the parties that the plaintiff was the daughter's daughter of Sujan and further that her mother was in possession of the properties of Sujan, the plaintiff was entitled to succeed without further proof and if the defendants wanted to defeat her right to succeed to the properties of Sujan on the ground of the existence of a preferential heir, it was for the defendants to establish affirmatively what they asserted in the defence. On the other hand, Mr. U.N. Sinha appearing for the respondents contended that it was not enough for the plaintiff to establish some relationship with Sujan, but in order to succeed to his properties she must further establish that there was no other heir entitled in law to succeed to the properties of Sujan in preference to her. The only question that arises for decision in this appeal is whether in a suit of this nature the burden is on the plaintiff to prove not only that she was the daughter's daughter of Sujan but also the negative fact that Suj'an left behind him no other preferential heir. As to the

law regarding burden of proof, there is is not much dispute. In the case of AIR 1949 278 (Privy Council) , their Lordships of the Privy Council laid down the law as follows:

"What is called the burden of proof on the pleadings should not be confused with the burden of adducing evidence which is described as "shifting". The burden of proof on die pleadings never shifts, it always remains constant (see Pickup v. Thames Insurance Co., 1878 3 QBD 594 : 47 LJ QBD 749 (B)). These two aspects of the burden of proof are embodied in Ss. 101 and 102 respectively of the Indian Evidence Act. Section 101 states:

"Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which ho 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."

Section 102 states:

"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".

This section shows that the initial burden of proving a prima facie case in his favour is cast on the plaintiff; when he gives such evidence as will support a prima facie case, the onus shifts on to the defendant to adduce rebutting evidence to meet the case made out by the plaintiff. As the case continues to develop, the onus may shift back again to the plaintiff. It is not easy to decide at what particular stage in the course of the evidence the onus shifts from one side to the other. When after the entire evidence is adduced, the tribunal feels it cannot make up its mind as to which of the versions is true, it will hold that the party on whom the burden lies has not discharged the burden; but if it has on the evidence no difficulty in arriving at a definite conclusion then the burden of proof on the pleadings recedes into the background". It will appear from the above that the initial burden lies on the plaintiff to prove prima facie the facts asserted by him to sustain his case. It is well settled that the facts asserted by one party and admitted by the other need not be proved. The real question is whether on the facts admitted in this case the plaintiff will be entitled to a judgment in her favour. It is to be noticed that the plaintiff claimed a right to succeed to the estate of her grandfather. The defendants admitted that the plaintiff was the daughter's daughter of the last male holder. The question is, is this fact of relationship sufficient in law to entitle her to the estate of her grandfather? In my opinion, it is obvious that for a succession to an estate mere relationship with the last male holder of the estate is not enough.

Whenever a person claims title to the estate jof another by inheritance or succession, it is imperative for him to prove not only that he was related in some way or other with the last male holder of the estate but also that under the law

of succession governing the parties he was the only heir entitled to succeed to the estate at the material time. In other words, he must prove not only that he was related in a particular manner but also that no nearer heir was in existence. This will imply no doubt a proof of a negative assertion. There is, however, no invariable rule that all allegations must be proved by the party who affirmatively asserts them. In the case of *Poolin Beharee Sein v. Messrs. R. Watson and Co.* 9 Suth WR 190 (C), the Full Bench of the Calcutta High Court has held that the general rule of evidence is that if, in order to make out a title, it is necessary to prove a negative, the party who avers a title must prove it.

In the case of *Mt. Chunna Kunwar Vs. Lala Mukat Behari Lal and Others* a Division Bench of the Allahabad High Court has laid down that where a person claims to succeed another on ground of relationship with the latter, he should establish not only his own relationship with the last male holder, but also, *prima facie*, that no nearer heir was alive. It quoted with approval the following passage from the decision in *Rama Row v. Kuttiya Goundan* 34 Ind Gas 294: (AIR 1017 Mad 872) (E):

"It is no doubt incumbent on a plaintiff seeking to succeed as a reversioner to establish affirmatively the particular relationship which he puts forward. He is also bound to satisfy the Court that, to the best of his knowledge, there are no nearer heirs. He cannot be expected to do anything more. It is for those who claim that their kinship is nearer than that of the plaintiff to prove that relationship".

What we get in this case that the plaintiff is admitted by the defendants to be last grand-daughter of the male-holder *Sujan*. No further evidence was adduced in this case, and the question is whether on this admission the plaintiff could claim a title to succeed to the estate of her grand-father. In view of the decisions referred to above it is not enough, and before the defendants are called upon to prove the case made by them, it was incumbent upon the plaintiff to prove also that to the best of her knowledge no nearer heir existed at the time when the succession opened. What will be the quantum of evidence to prove the non-existence of nearer heir will depend upon the facts of each case. But in many cases it will be enough if the plaintiff comes to the witness-box and states that to the best of his or her knowledge no nearer heir was alive. Unless such evidence is adduced, it cannot be said that the plaintiff has discharged the onus that initially lay upon him to prove *prima facie* his case.

In this case, there was no such evidence. It will appear from the pleadings that the plaintiff alleged that *Sujan* died leaving behind him only one daughter named *Lakshmi Kuer*, her mother. The defendants, of course, admitted that *Lakshmi Kuer* was the daughter of *Sujan* but denied the assertion of the plaintiff that she was the only daughter of *Sujan* and asserted that he left him surviving another daughter called *Ramsundar Kuar*. It was not at all necessary for the defendants to prove that *Sujan* died leaving him surviving another daughter *Ramsundar Kuar* and a son by her called *Ramkhelawan* defendant second party, unless the plaintiff

has adduced evidence before to prove prima facie that Sujan left behind him no heir nearer than the plaintiff.

When the plaintiff adduces evidence in prima facie proof of the case that no nearer heir existed, the onus will shift to the defendants to prove affirmatively that there was in existence an heir nearer than the plaintiff. There will be no shifting of this onus unless the initial burden of proof that law casts on the plaintiff was discharged. In my considered opinion, the onus was on the plaintiff to prove not only that she was the grand-daughter of Sujan but also that she was the sole surviving heiress entitles to succeed to his estate in preference to the defendants. In absence of such proof, the learned Subordinate Judge, in my opinion was right in dismissing the plaintiff's suit.

8. It was next contended by Mr. Chatterji that in view of the issues framed in this suit no further proof was to be given by the plaintiff. The issues framed in the suit have been stated above. But, it will appear that the decision on the issues as recorded by the learned Munsif was not enough to entitle the plaintiff to a judgment in her favour. There is nothing in these issues to relieve the plaintiff of the initial burden of proving that she was the preferential heiress of Sujan when succession opens. The onus still remains, and unless it is discharged the plaintiff cannot succeed. In my opinion, this argument is also untenable and must be overruled.

9. Lastly, it was contended by Mr. Chatterji that the appeal in the court below and also this appeal were incompetent, because in view of the agreement between the parties no appeal lay from the decision of the learned Munsif. In this connection, he referred to the decision of the Allahabad High Court in the case of Ballabh Das Vs. Sri Kishen , and to the case of Robert Murray Burgess v. Andrew Morton 1896 AC 136 (G). For this contention he relied upon the fact that both parties had agreed not to adduce any evidence. It will appear that there was no agreement in writing between them. The only agreement between them was, as stated by the appellate Court, namely, that "the parties agreed that they would not adduce any oral evidence & the Court would write out a judgment and the party who had the onus to prove its case would lose". If that was the agreement, then it is quite obvious that the parties did. not agree to abide by the decision of the Court. The only agreement between the parties was that they would not adduce any evidence, and by agreement between them they invited the Court to write a judgment on the basis of onus of proof. There was no agreement that even when the decision was wrong in law as to the question of onus of proof they will not appeal against the decision. This was not the case here. This distinction was recognised even in the case of Ballabh Das (F), above referred to. Sulaiman J., observed as follows:

"The first point which I have to see is whether the view of the learned Judge as regards the competency of the appeal was correct or not. The answer to this question depends on the interpretation of the agreement between the parties. If the Court is certain that the intention of the parties was that whatever decision

the Subordinate Judge arrived at should be binding upon the parties then there would be no right of further apceal. On the other hand if their intention merely was that they would not produce oral evidence but that the case should be decided on documentary evidence only the right of appeal would remain intact."

In all such cases, therefore, the question is whether the parties had agreed to abide by the decision. If not, their right to appeal from the decision of the Court was not taken away. In the Allahabad case, referred to above, the agreement was to accept the decision of the Court. Hence, that case is distinguishable. For similar reasons, the case of Robert Murrey Burgess also is distinguishable. In my opinion, in this case the right of appeal was not barred by virtue of the agreement.

10. It follows that the case was rightly de cided by the learned Subordinate Judge & there is no merit in this appeal, which is, accordingly, dismissed with costs.