

(1975) 03 DEL CK 0007

In the Delhi High Court

Case No : Civil Miscellaneous (Main) Appeal No. 10 of 1973

Ishar Das

APPELLANT

Vs

The Administer, Union Territory of Delhi and Others

RESPONDENT

Date of Decision : 31-03-1975

Acts Referred:

Citation : (1975) ILR Delhi 233

Hon'ble Judges : S.I. Rangarajan, J

Bench : Single Bench

Advocate : H.S. Dhir and B.J. Nayar, for the Appellant;

Judgement

S. Rangarajan, J.

(1) The tenant is the petitioner win) is aggrieved by the order dated 8-1-1973 of the Assistant Coininissioncr with the powers of Competent Authority under the Slum Areas (Improvement and Ocarance) Act, 1956 (hereinafter called the Act,, granting permission to take proceedings to evict him from the business premises, bearing No. 1066, Maliwara, Nai Sarak, Delhi.

(2) Having found that the relationship of landlord and tenant existed between the parties the Competent Authority went further to find that the alleged sub-letting was true-which is a question to be decided by the Rent Controller. He granted permission to the landlord/ respondcnt(s) to evict him from the said premises but without giving any specific finding as required by section 19(4) of the Act on the tenant's ability to find alternative accommodation within his means if he were evicted, an aspect to which I have made more detailed reference in Kirath Chand Vs. P.R. Varshneya and Others, 0). Mr. H. S. Dhir, learned counsel for the petitioner did not take the position before me that a purchaser from the landlord, after the granting of permission, could not defend the impugned order granting permission.

(3) Only a few facts which arc relevant at this stage may be noticed. The landlord had stated in his affidavit that the tenant owned a big house bearing

municipal No. 32/6, Gita Colony, Delhi, which would be of not less than Rs. 30,000.00 in value, that he was working as a gold-smith having a license under the Gold (Control) Act. 1968 and the rules framed there under, that he had sublet a portion of the shop to two persons, namely, Ranjit Singh and Mian Moujee engraver and gold polisher, respectively, and was Realizing from them Rs. 250.00 per month. It was added that he had tools and machinery worth Rs. 5000.00 and that he was getting an income of not less _than Rs. 700.00 per month from carrying on his vocation as a gold-smith. The tenant, had, however, admitted that he had a house but explained that it had been purchased from the Government of India for Rs. 1700.00 only. It may be noticed that in the present petition the petitioner has further stated that though the house was purchased for Rs. 1700.00 by his predecessor-in-interest he had purchased the same from him for Rs. 5000.00 in 1966-a fact which had not been set out before the Competent Authority.

(4) The tenant had further stated that the tools which he had would be hardly worth Rs. 300.00 , that he had a family consisting of his wife, five sons and two daughters to maintain, that he had not sublet the premises and that the two persons referred to by the landlord only occasionally work under him on a piece-rated basis. As against the averment in the written statement that he was getting Rs. 250.00 , month the statement in the affidavit was that he was getting about Rs. 200.00 per month. Not much significance could be attributed to this variation because in the very nature of things the income cannot be fixed.

(5) The Competent Authority drew an inference that the house was worth Rs. 30,000.00 as alleged by the landlord merely because a copy of the sale deed had not been filed; the authority had also persuaded itself that the subletting to those two persons was proved because the affidavits of those two persons had not been filed. For the sake of completeness, however, it may be added that in this Court the tenant has also filed the affidavit of one of them namely, Mian Moujee stating that he has been working with his uncle Mansur Ali who has also been doing the business of polishing gold ornaments in shop No. 1099, Maliwara, Nai Sarak, Delhi and that the petitioner used to call him occasionally, from his uncle's shop, whenever necessary and pay him for his labour. The other person, Ranjit Singh, used to do the work of engraving of the ornaments made by the petitioner-a specialised kind of work-only occasionally for the tenant--and he used to be paid for his labour. He also stated that Ranjit Singh worked for about a year during 1970-71 and had not thereafter done any work for the petitioner; he had also been doing polishing work for the petitioner occasionally during that period also.

(6) The Competent Authority could not fairly come to a conclusion about the value of the house merely on account of the non-production of the sale deed (or a copy of it) without even asking the petitioner to produce the same; similarly even without asking the petitioner to file the affidavits of the other two persons and giving an opportunity of doing so it was not permissible to draw an inference

adverse to the tenant. These requirements are dictated by ordinary fairness. The Competent Authority has, I am afraid, jumped to the conclusion that the tenant had not come "with clean hands" merely because he had not tiled affidavits from other persons who could speak about his earnings from his vocation as a goldsmith. I am unable to follow how the absence of any affidavit, to corroborate to what the tenant had stated regarding his earnings, would make his hands "unclean".

(7) I am conscious that it may not be always feasible to record a finding, in precise terms, as to what exactly is the income of the tenant a rough assessment alone may be often possible. Since the statute requires that before granting permission there should be a clear finding that the tenant is in a position to find alternative accommodation without creating another slum, every feasible endeavor has to be made to reach such a finding on the basis of relevant and sufficient material.

(8) The premises in question are no doubt business premises. A Full Bench of this Court has held in *Gauri Shankar Gupia v. The Financial Commissioner (C.M. (M) 79 of 1973)* decided on 28-2-1975 that Section 19 of the Act applies to buildings irrespective of the question whether they were used for residential or nonresidential purposes. Especially having regard to the fact that the petitioner has a wife and seven children to maintain the means found should be such as would enable him to find alternative business accommodation without creating another slum. The finding reached by the Competent Authority on this question does not appear to be of that quality or description. It seems difficult to say that the Competent Authority had even applied its mind to this aspect of the matter. I have made similar observations in a number of cases where the finding was not of the required description or quality and remitted them to the Competent Authority for such a finding being given.

(9) Mr. Bikramajit Nayyar, learned counsel for Respondent No. 3, however, urged that if the registers maintained by the tenant as prescribed by the Gold (Control) Act and the Rules, which were displayed during the hearing, had been filed he might have been able to draw certain inferences regarding the quantum of business etc. in spite of there being no column to show the charges for repairing ornaments.

(10) Detailed arguments were also addressed to me on the question of burden and onus of proof. It was held by T. V. R. Tatachari, J. (as he then was) in *Mandir Dass Jain Vs. P.R. Varshneya and Another*, that it was for the landlord to establish positively that the tenant had sufficient means for securing alternative accommodation and that it was only thereafter that the burden shifted to the tenant to show that he did not have the means to secure alternative accommodation. It was further observed that even though a landlord would not be in a position to know the exact extent of the income, barring perhaps in a few cases, since he is the person who comes to the Court with the application for permission u/s 19 of the Act for institution of eviction proceedings against the

tenant, he had to allege what, according to his knowledge or information, is the income of the tenant, and adduce such evidence as is possible for him before the Competent Authority. It was held that the burden then shifts to the tenant and it is for him to adduce positive and satisfactory evidence regarding his income which is specifically within his knowledge. Reference was also made by Tatachari, J., in support of this position, to an earlier judgment of S. N. Shankar, J. in *Manohar Lal Bhatia v. Naunit Ram Bhatia* (Civil Misc. (Main) No. 58 of 1970) decided on 27-1-1971.

(11) In *Mohinder Singh v. Compelent Anihorily and Another* 1973 RCR 306, V. S. Deshpande, J. had observed as follows:

"In granting or refusing the permission the Competent Authority shall consider whether alternative accommodation within the means of the tenant would be available to him if he were evicted within the meaning of section 19(4)(a) of the Act. In deciding this question, the Competent Authority shall bear in mind that the means of the tenant are a fact within his special knowledge within the meaning of section 106 of the Evidence Act and, Therefore, the burden of proving that his means are inadequate to find alternative accommodation shifts to the tenant there under and also u/s 102 of the Evidence Act."

(12) In a still later decision, *Rajinder Kumar Jain v. H. C. Arora etc.* 1974 RLR 274, Deshpande, J. found that there was no conflict between what he had said and what had been decided earlier by T. V. R. Tatachari, J. and summarised the legal position as follows :-

"The initial burden of proof on the landlord is to aver and to prove that the relationship of landlord and tenant exists between the parties and that the tenant is in occupation of the premises of the landlord. The landlord may also aver that the tenant is in possession of the means to find alternative accommodation. He may make such averment according to such knowledge and belief as he may have entertained in this respect. But there may be honest cases in which landlords would not really know anything about the means of the tenant. In my view, in such cases, the landlords may truthfully say that they do not know if the tenant is in possession of the means to find alternative accommodation. In such a case, the landlord may simply say that he would like to have the permission for filing an eviction petition against the tenant unless the Competent Authority is satisfied that the tenant is not in possession of means to find alternative accommodation. The question of burden of proof is dealt with in Chapter VII of the Evidence Act beginning with section 101. The relevant section in this respect is section 106 which lays down that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. The income of the tenant is a fact which is especially within his knowledge. The burden of proving the same is. Therefore, on him. If, Therefore, neither the landlord nor the tenant adduces any evidence as to the income of the tenant, it is the tenant whose defense will fail and the landlord would obtain a permission for filing an eviction petition against him in view of section 102 of the Evidence Act."

Act."

(13) Rajindar Sachar, J. had, in Chuni Lal Kapur v. Prakash Wanti etc. 1975 RLR 110(""), referred to the initial onus of proof about means of tenant being on the landlord as per Section 101 of the evidence Act and the onus shifting on the tenant as per Section. 102 of the Evidence Act after its discharge.

(14) There seems no difficulty about the aspects covered already by these decisions. Further difficulties can arise-and do arise as in this case-about whether it is sufficient for the landlord to make any statement, however fanciful, regarding the means of the tenant and claim the onus, which has shifted to the tenant, remains with him always thereafter and docs not shift back to him (the landlord) at any time. thereafter. To fully deal with this aspect it seems necessary to read the relevant sections of the Evidence Act, namely, Sections 101, 102, 103 and 106 of the Evidence Act. They are:

"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."

"102. The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.

"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."

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

(15) Subba Rao, J. (as he then was), speaking for the Supreme Court in Addagada Raghavamma and Another Vs. Addagada Chenchamma and Another, referring to sections 101 to 103 explained the distinction between burden of proof and onus of proof in the following terms :

"THERE is an essential distinction between Burden of proof and onus of proof: burden of proof lies upon the person who has to prove a fact and it never shifts, but the onus of proof shifts. The burden of proof in the present case undoubtedly lies upon the plaintiff to establish the factum of adoption and that of partition. The said circumstances do not alter the incidence of the burden of proof. Such considerations, having regard to the circumstances of a particular case, may shift the onus of proof. Such a shifting of onus is a continuous process in the evaluation of evidence."

(16) The burden of proof that lies u/s 101 and that u/s 102 of the Evidence Act is distinguishable : the former has been described as a "legal" or "persuasive burden" and the latter as the evidential burden or as the "burden of adducing evidence" (Phipson). It is easy enough to say concerning the legal or persuasive

burden that it lies on whichever party would fail if no evidence were given on either side or if the allegation to be proved is struck out of the record. But, as Rupert Cross points out "A moment's reflection should suffice to show that these tests are only applicable to the evidential burden ; they cannot apply to the legal burden in all cases." "As a matter of commonsense", "the legal burden of proving all facts essential to their claims normally rests upon the plaintiff in a civil suit or that prosecutor in criminal proceedings"; it would go to such length as the burden of proof of the assertion still resting upon the plaintiff even "if the assertion of a negative is an essential part of the plaintiff's case." (Vide Bowen, L.J. in *Abrath v. North Eastern Rail, Co.*, 1883 11 Q.B.D. 440 a decision which was affirmed by the House of Lords in (1886) 11 A.C. 247. Cross explains the difficulty which may sometimes arise with regard to the question whether an assertion is essential to a party's case or that of the adversary by referring to the decision of the House of Lords in *Joseph Constantine Steamship Line, Ltd. v. Imperial Smelting Corporation, Ltd.* 1942 A.C. 154 (9). In that case the charterer of the ship claimed damages from the owners for failure to load ; the owners pleaded frustration of the contract by reason of the destruction of the ship owing to an explosion. The question of fact for determination was whether the explosion had been caused by the fault of the owner, but the evidence was scanty on this question. The House of Lords held that the plaintiff had the legal burden of proving default when frustration of the contract was pleaded. In some cases, as Cross explains, it becomes necessary to ascertain the "legal burden of proof" even after consulting the precedents concerned with the various branches of substantive law. Even greater difficulty arises when the existence or non-existence of any fact in issue may be known for certain by one of the parties and this is often said to have an important bearing on the incident of burden of proof of that fact. Reference in this connection is made by him to *R. v. Turner*, 1816) 5 M. S. 206 where the accused was prosecuted for having pheasants and hares in his possession without the necessary qualification or authorisation; ten possible qualifications had been mentioned in the relevant statute. The King's Bench held that it was unnecessary for the Crown to prove that these qualifications did not apply to the case. In *R. v. Spurge* (1961) 2 Q.B. 205 it was held that "there was no rule of law that where the facts are peculiarly within the knowledge of the accused the burden of establishing any defense honied on these facts shifts to the accused" .

(17) Cross argues that very little evidence is required to satisfy an evidential burden when owed by the parties lacking such knowledge and that, where the alternative of a negative averment is peculiarly within the knowledge of the opponent of that averment, he bears the evidential burden on the issue in the first instance. There is also a further citation by Cross from Lord Mansfield (*Blatch v. Archer* (1774) 1 Cowp. 63 at p. 65) as follows:

"IT is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to produce, and in the power of the other to have contradicted."

THERE is also a further quotation from Stephen's Digest of the Law of Evidence, 12th Ed. art. 104, to the following effect:

(18) Reference has been made to some of these aspects in an endeavor to comprehend the amplitude of the concept of The "shifting" of onus as a "continuous process in the evaluation of evidence" as explained by Subba Rao J. The above passages from Cross and the legal literature on the subject cited by him clearly show that in some cases at least it may not be enough to start at the point where the onus shifts from the landlord to the tenant and to let it stay with him for ever, unless by what he has done or failed to show, in other words, by his failure to play the ball back to the other, the legal burden which has been placed on the landlord, under this piece of substantive law has been discharged. It cannot, for instance, be said that once the landlord gives a version of the tenant's means, however fanciful it may be the onus shifts to the tenant, it stays permanently with him thereafter and that the landlord has nothing further to do with it. To say so would obviously be to throw the burden on the tenant despite Section 19 laying the legal burden, in terms of section 101 of the Evidence Act, on the landlord. It is, Therefore, crucial to understand the distinction what Subba Rao, J. explained as the distinction between "burden of proof" and "onus of proof" and the "onus of proof" being "continuously shifting in the appreciation of evidence". It would be an easy enough situation where the tenant does not let in any evidence at all or is seen to be guilty of fraudulent conduct and suppresses such evidence as may be in his possession or power and such suppression may in the circumstances of the case give rise to an adverse inference being properly drawn against him. The difficulty in appreciating the evidence in a situation of "shifting of onus as a continuous process", cannot be overcome by reliance on crutches like "unclean hands", an expression which seems to be frequently adopted by the Competent Authority in a manner that seems to rob it altogether of meaning.

(19) The Competent Authority seems to have done just this in the present case; it has not even recorded a finding concerning the means of the tenant in the manner required (an aspect: which I have discussed at some length, among others, in Chiranji Lal v. Mahabir Singh and another (C.M. (Main) 211 of 1971 decided on 8-2-1972)

(20) On the materials it also seems difficult to come to any satisfactory conclusion one way or the other regarding the tenant's means.

(21) It seems necessary, Therefore, to direct the Competent Authority to give both sides an opportunity of adducing such further evidence as they may desire and that the matter will then be disposed of according to law and in the light of the observations in this judgment. This C.M. (Main) petition is accordingly accepted, the impugned order is quashed and the case is remitted to the Competent Authority for fresh disposal. There will be no order as to costs in the circumstances. The parties to appear before the concerned Competent Authority on 28-4-75.