

(2015) 01 AHC CK 0120
In the Allahabad High Court
Case No : Writ B No. 4991 of 2015

Jagmohan and Others

APPELLANT

Vs

Dy. Director of Consolidation and Others

RESPONDENT

Date of Decision : 30-01-2015

Acts Referred:

Evidence Act, 1872 — Section 101, 102, 59, 67, 68

Transfer of Property Act, 1882 — Section 123

Uttar Pradesh Consolidation of Holdings Act, 1953 — Section 12, 5(1)(c)

Citation : (2015) 127 RD 150

Hon'ble Judges : Ram Surat Ram (Maurya), J

Bench : Single Bench

Advocate : J.P. Singh and Dharendra Singh, for the Appellant; R.N. Singh, Advocates for the Respondent

Final Decision : Allowed

Judgement

Ram Surat Ram (Maurya), J.—Chief Standing Counsel has accepted notices for respondents-1 to 3 and Sri R.N. Singh Yadav has accepted for respondent-4, who states that he has instruction on behalf of remaining contesting respondents-5 to 10. He does not propose to file counter-affidavit. Respondents-11 and 12 are the proforma respondents. With the consent of the parties, writ petition is decided finally. Heard Sri J.P. Singh, for the petitioners and Sri R.N.S. Yadav, for respondents-4 to 10 (hereinafter referred to as the respondents). The writ petition has been filed for quashing the order of Deputy Director of Consolidation dated 7.1.2015, passed in proceedings under section 12 of U.P. Consolidation of Holdings Act, 1953 (hereinafter referred to as the Act).

2. The dispute between the parties is in respect of chak 47 [carved out from plots 620 (area 0.295 hectare), 621 (area 0.011 hectare), 622 (area 0.010 hectare) and 623 (area 0.010 hectare)] of village Chakdeva, tappa Chhitpur, tahsil Mohammadabad Gohna, district Azamgarh (at present Mau), which belonged to Smt. Daswati widow of Basdev. Smt. Daswati wanted to sell the land

in dispute and obtained permission of Settlement Officer Consolidation to sell it as required under section 5(1)(c) of the Act on 16.3.1967. According to the petitioners, Smt. Daswati executed a sale-deed dated 17.3.1967 in favour of Jag Mohan, Jangi and Jahagi (now represented by the petitioners and respondents-11 and 12). According to the respondents, Smt. Daswati executed a sale-deed in favour of Rajbali, Suryabali and Paltan (now represented by respondents-4 to 10) on 1.5.1967 of the land in dispute. The respondents denied execution of sale-deed dated 17.3.1967 by Smt. Daswati. On the basis of sale deeds both of them applied for mutation of their names over the land in dispute under section 12 of the Act.

3. The cases were consolidated and tried by Consolidation Officer, who allowed mutation application of the petitioners and appeal filed by the respondents was dismissed by Settlement Officer Consolidation by order dated 8.10.1968. However, Deputy Director of Consolidation, by order dated 24.9.1970, allowed the revision of the respondents and remanded the matter to Consolidation Officer for fresh decision. After remand, Consolidation Officer, by the order dated 6.6.1975 directed for recording the names of the respondents. Assistant Settlement Officer Consolidation, by order dated 18.9.1978, allowed the appeal of the petitioners and again remanded to Consolidation Officer. But in the revision Assistant Director of Consolidation, by order dated 6.7.1979 directed Settlement Officer Consolidation to decide the appeal himself giving opportunity of additional evidence to the parties. After remand, the matter remained pending for a long time. The petitioners moved an application dated 17.12.1997, for obtaining expert report, in respect of thumb impression of Smt. Daswati as affixed on the sale-deed dated 17.3.1967. The respondents moved an application dated 17.12.1997 that as Smt. Daswati, in her statement had admitted execution of sale-deed dated 1.5.1967 as such there was no need for expert report of thumb impressions of Smt. Daswati on this sale deed. Settlement Officer Consolidation framed an additional issue on 6.8.1998 as to whether Smt. Daswati executed sale-deed dated 17.3.1967 in favour of Jag Mohan and others and the sale-deed contained her thumb impressions. On that very day, Jag Mohan made an endorsement, which signed by his advocate also, on his application dated 17.12.1997 that he did not want for expert examination of thumb impressions. Thereafter, the appeal was heard by Settlement Officer Consolidation, who by order dated 25.11.1999 found that Smt. Daswati was examined before Consolidation Officer on 19.5.1968. In her statement, she had merely shown her ignorance in respect of execution of the sale-deed in favour of the petitioners and had not specifically denied execution of sale-deed dated 17.3.1968, as such there was no denial of the execution of the sale deed, which is a registered document and its due execution was proved by the marginal witness. sale-deed dated 17.3.1968 was prior in time as such liable to be accepted. On these findings, he allowed the appeal and set aside the order of Consolidation Officer and directed for recording names of the petitioners over disputed land.

4. The respondents filed a revision (presently registered as Revision No. 336 of 2014-15) from the aforesaid order, which was heard by Deputy Director of Consolidation, who by order dated 7.1.2015, found that execution of sale-deed dated 17.3.1967 by Smt. Daswati was not proved. In spite of denial of Smt. Daswati, the petitioners could not obtain expert report in respect of her thumb impressions contained on the sale deed. Although permission of Settlement Officer Consolidation for selling the land in dispute was obtained on 16.3.1967 but its certified copy was issued on 20.3.1967 and 23.3.1967 as such the execution of the sale-deed on 17.3.1967, i.e. before issuance of certified copy of the permission of Settlement Officer Consolidation was not probable. The petitioners further committed mistake in fabricating the sale-deed in the name of Daswanti although permission was in the name of Daswati. For these reasons, he held that due execution of sale-deed dated 17.3.1967 was not proved and he accepted sale-deed dated 1.5.1967. He allowed the revision, set aside order of Settlement Officer Consolidation and restored the order of Consolidation Officer. Hence this writ petition has been filed.

5. The Counsel for the petitioners submits that in sale-deed dated 17.3.1967 fact about obtaining the permission by Smt. Daswati was mentioned. Execution of sale-deed was proved by the marginal witness namely Ram Jatan. The document is a registered document and its due execution was proved by the marginal witness as required under section 59 read with section 67 of the Evidence Act, 1872 and the document was liable to be accepted. The petitioners discharged their burden of proof, onus was shifted on the respondents to disprove the registered documents. Smt. Daswati in her statement before Consolidation Officer-has not specifically denied execution of the sale-deed dated 17.3.1967, she merely shown her ignorance, which was deliberate and mischievous as in spite of the fact that she had already sold the land in dispute to the petitioners, she executed another sale-deed dated 1.5.1967. In such circumstances, she had no option but to support her subsequent sale deed. So far as additional issue framed by Settlement Officer Consolidation regarding her thumb impressions on sale-deed dated 17.3.1967, is concerned, when the petitioner filed an application for obtaining the expert report in respect of thumb impressions affixed on sale-deed dated 17.3.1967, the respondents filed an application stating therein that there is no need for expert report. In such circumstances the application of the petitioners was not pressed. Settlement Officer Consolidation relying upon statement of Smt. Daswati, in which she had not specifically denied execution of the sale-deed dated 17.3.1967, allowed the appeal of the petitioners. After sale-deed dated 17.3.1967, Smt. Daswati had no right to sell the land in dispute. The respondents had an enmity with the petitioners and knowingly obtained subsequent sale-deed in her collusion although she had no right to execute the subsequent sale deed. Deputy Director of Consolidation has illegally gave importance of issuance of certified copy of the permission as certified copy of permission was not required to be presented at the time of registration of the document. Deputy Director of Consolidation has misread the statement of Smt.

Daswati in holding that she had denied execution of sale-deed dated 17.3.1967. So far as discrepancy of the name of Smt. Daswati in the sale deed, is concerned, it was mistake committed by the scribe, the parties were illiterate and could not check this mistake. The order of Deputy Director of Consolidation is illegal and is liable to be set aside.

6. I have considered the arguments of the Counsel for the parties and examined the record. Under Evidence Act, 1872, execution of registered document is required to be proved by the marginal/attesting witness. In this case, original sale-deed dated 17.3.1967 was filed and its due execution was proved by marginal witness Ram Jatan. The respondents took the case that it was a forged documents and did not contain thumb impressions of Smt. Daswati. Onus was shifted upon the respondents to disprove the document.

7. Relevant sections 101 and 102 of Evidence Act, 1872, are quoted below:--

"101. Burden of proof- 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. On whom burden of proof lies.- 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."

8. Supreme Court in Pares Nath Thakur Vs. Mohani Dasi and Others, (1960) 26 CLT 1 : (1960) 1 SCR 271 held that the well-established rule applicable to suits of the kind it was dealing with, that the burden of proof is heavy on a plaintiff who sues for a declaration of a document solemnly executed and registered, as a fictitious transaction. Again in R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami and V.P. Temple and Another, AIR 2003 SC 4548 : (2004) 6 JT 442 : (2004) 136 PLR 612 : (2003) 8 SCALE 474 : (2003) 8 SCC 752 : (2003) 4 SCR 450 Supp : (2003) AIRSCW 5316 : (2003) 8 Supreme 193 held that there is an essential distinction between burden of proof and onus of proof: burden of proof lies upon a person who has to prove the fact and which never shifts. Onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence. In our opinion, in a suit for possession based on title once the plaintiff has been able to create a high degree of probability so as to shift the onus on the defendant it is for the defendant to discharge his onus and in the absence thereof the burden of proof lying on the plaintiff shall be held to have been discharged so as to amount to proof of the plaintiff's title. In the present case, the trial Court and the first appellate Court have noted that the plaintiff has not been able to produce any deed of title directly lending support to his claim for title and at the same time the defendant too has no proof of his title much less even an insignia of title. Being a civil case, the plaintiff cannot be expected to prove his title beyond any reasonable doubt; a high degree of probability lending assurance of the availability of title with him would be enough to shift the

onus on the defendant and if the defendant does not succeed in shifting back the onus, the plaintiff's burden of proof can safely be deemed to have been discharged. In the opinion of the two courts below, the plaintiff had succeeded in shifting the onus on the defendant and, therefore, the burden of proof which lay on the plaintiff had stood discharged. Again in *Anil Rishi Vs. Gurbaksh Singh*, AIR 2006 SC 1971 : (2006) 4 CTC 524 : (2006) 11 JT 521 : (2006) 143 PLR 775 : (2006) 5 SCALE 153 : (2006) 5 SCC 558 : (2006) 1 SCR 659 Supp : (2006) AIRSCW 2394 : (2006) 4 Supreme 62 held that 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.

9. Even the documents (except will), which are required to be attested compulsorily, if specifically denied by the executant under of the Evidence Act, 1872, can be proved by attesting witness. Section 68 is quoted below:--

"68. Proof of execution of document required by law to be attested.-If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied."

Supreme Court in *Brij Raj Singh [dead] by L.Rs. and Others Vs. Sewak Ram and Another*, AIR 1999 SC 2203 : (1999) 3 JT 298 : (1999) 2 SCALE 690 : (1999) 4 SCC 331 : (1999) 2 SCR 779 : (1999) 2 UJ 837 : (1999) AIRSCW 2228 : (1999) 4 Supreme 287 held that the gift deed was executed by the original owner and presented for registration by a duly authorised power of attorney and the document was duly attested by 2 witnesses, out of whom one was examined to prove the deed and nothing more is required to satisfy the requirements of section 123 of the Transfer of Property Act, particularly when no specific denial was taken to the execution or attestation of the gift deed in the written statement or even subsequently before the Trial Court.

10. Settlement Officer Consolidation, found that Smt. Daswati, in her statement, had merely shown her ignorance in respect of execution of the sale-deed in favour of the petitioners and had not specifically denied execution of sale-deed dated 17.3.1968, as such there was no denial of the" execution of the sale deed, which was a registered document and its due execution was proved by the marginal witness. Thus even if execution of sale-deed dated 17.3.1967 was denied, onus was shifted upon the respondents to prove that it did not contain the thumb impressions of Smt. Daswati as the petitioners have proved its due execution according to law. After executing sale-deed dated 17.3.1967, Smt. Daswati left with no right to execute another sale-deed as such this sale-deed will prevail over subsequent sale deed.

11. As the argument of the Counsel for the petitioners that in the document dated 17.3.1967 mentioned about the obtaining of permission of Settlement Officer Consolidation thus the fact is fully corroborated that the permission was obtained on 16.3.1967, Deputy Director of Consolidation has illegally gave much importance about issuance of certified copy of the permission on subsequent date although for registration of the sale-deed copy of permission was not required. Similarly Deputy Director of Consolidation has gave much importance in respect of discrepancy of the name of Smt. Daswati, which was mistake committed by the scribe as the parties were illiterate could not check it at that time. The execution of the sale-deed was proved according to the provision of Evidence Act, 1872 by the attesting witness Ram Jatan. Admittedly there was no other lady of the name of Smt. Daswanti. In such circumstances, registered document was not liable to be ignored. The order of Deputy Director of Consolidation is illegal and is liable to be set aside. In the results, the writ petition succeeds and is allowed. The order of Deputy Director of Consolidation dated 17.1.2015 is set aside. The matter is remanded to Deputy Director of Consolidation who shall decide the revision afresh in accordance with law. Since matter is lingering for a long time, he shall make effort to decide it expeditiously preferably within four months. The parties are given liberty to file an application for expert report, if admitted thumb impression of Smt. Daswati is available.