

(2016) 11 AHC CK 0115

In the Allahabad High Court

Case No : First Appeal No. 642 and 489 of 1998

Jamuna Sahai

APPELLANT

Vs

Sushree Nayan Tara

RESPONDENT

Date of Decision : 02-11-2016

Acts Referred:

Land Acquisition Act, 1894 — Section 14(1), Section 18
Transfer of Property Act, 1882 — Section 6(e)

Citation : (2017) 3 ADJ 430 : (2017) 121 ALR 551 : (2017) 135 RD 571

Hon'ble Judges : Sudhir Agarwal and Alok Kumar Mukherjee, JJ.

Bench : Division Bench

Advocate : V. Sahai, Advocate, for the Appellant in First Appeal No. 642 of 1998.; Paras Nath Singh, Advocate, for the Respondent in First Appeal No. 642 of 1998.; Kamal Singh Yadav, B. Dayal and V. Sahai, Advocates, for the Appellant in First Appeal No. 489 of 1998

Final Decision : Allowed

Judgement

1. These appeals under Section 54 of Land Acquisition Act, 1894 (hereinafter referred to as "Act 1894") read with Section 96 of Code of Civil Procedure have arisen from judgement and decree dated 16.9.1998 and 29.9.1998 respectively passed by Sri Devendra Kumar Jain, XIIth Additional District Judge, Ghaziabad in Original Suit No.48 of 1996 along with Land Acquisition Reference (hereinafter referred to as "LAR") No.2 of 1996 under Section 30 of Act 1894. Court below has dismissed suit and answered Reference holding that defendant-respondents are entitled for compensation of disputed acquired land.

2. Dispute relates to Gata No.3 area 5-10-10 (pakka) situated at village Yakubpur, Pargana and Tehsil Dadari, District Ghaziabad. The disputed land initially belongs to plaintiffs-appellants. For acquisition of land in dispute and some other, a Notification dated 18.6.1991 under Section 4(1) of Act 1894 was published in U.P. Gazette dated 20.7.1991 by State Government and thereafter declaration dated 18.12.1991 under Section 6/17 of Act 1894 was published in

U.P. Gazette dated 11.1.1992. Pursuant thereto, possession of disputed land was taken by Collector on 30.3.1992. While determination of compensation was pending before Special Land Acquisition Officer/Additional District Magistrate (Land Acquisition, Noida, Ghaziabad) (hereinafter referred to as "SLAO"), defendant-respondents claimed to have purchased right of compensation in respect of disputed land vide sale-deed dated 9.2.1994 for a consideration of Rs. 60,000/- . SLAO, vide award dated 13.11.1995, determined compensation at the rate of Rs. 63.26 per square yard besides 30% solatium, 12% additional compensation and interest as per provisions of Act 1894. The plaintiff-appellants and defendant-respondents both claimed compensation of disputed land. Defendant-respondents filed an application dated 25.3.1994 (Ext.A - 4), claiming their right for compensation subject to objection for enhancement of market value, relying on sale-deed dated 9.2.1994. Plaintiff-appellants instituted Original Suit No. 48 of 1996 seeking declaration of sale-deed dated 9.2.1994 as void and illegal, contending that they have not executed any sale-deed, whatsoever, and said sale-deed is nothing but a forged, manufactured and fabricated document having got prepared by impersonation and presenting some other persons.

3. With respect to dispute of entitlement for compensation, Collector made a Reference under Section 30 and the same was registered with Court below as LAR No.2 of 1996. Original Suit No.48 of 1996 and LAR No.2 of 1996, both, have been decided by a common judgement. Trial Court formulated following five issues in Original Suit No.48 of 1996:-

1- D;k fodz; i= fnukad 09-02-1994 oknhx.k }kjk izfroknhx.k ds i{k esa fu"ikfnr fd;k x;k Fkk] ;fn gkWw rks izHkko\\

(1) Whether the sale deed dated 09.02.1994 was executed by plaintiffs in favour of defendants? If so, its effect?

2- D;k okn bl U;k;ky; ds {ks=kf/kdkj ls ckgj gS\\

(2) Whether the suit is beyond jurisdiction of this Court?

3- D;k okn dk ewY;kadu de fd;k x;k gS\\

(3) Whether suit is undervalued?

4- D;k U;k; "kqYd vi;kZIr vnk fd;k x;k gSa\\

(4) Whether Court fee paid is insufficient?

5- oknh fdl vuqrks"k dk vf/kdkjh gS\\

(5) To which relief, plaintiff is entitled?

(English translation by Court)

In LAR No.2 of 1996, Court below formulated following three issues:

1- D;k cSukek@lefiZr i= fnukad 09-02-1994 oknhx.k }kjk fu"ikfnr ugha fd;k

x;k] ;fn fd;k x;k rks izHkko\\

(1) Whether the sale-deed/tendered deed dated 09.02.1994 was not executed by the petitioners? In case of the same being executed, its effect?

2- ,0Mh0,e0 ,y0,0 uks,Mk ds vkns"k fnukad 06-06-1994 dk izHkko\\

(2) Effect of the order dated 06.06.1994 passed by the ADM (LA), Noida?

3- eqvкотk ikus dk vf/kdkjh dkSu gS\\

(3). Who is entitled to get compensation?"

(English translation by Court)

4. Since issues in both the matters were common, both were clubbed and evidence was recorded jointly treating Original Suit No.48 of 1996 as leading case.

5. On behalf of plaintiffs-appellants, Sri Amar Singh and Ratan Singh were examined as P.W. - 1 and P.W. - 2, respectively, while one Rajeev Singh Tyagi, Hand Writing Expert was examined as an expert witness. On behalf of defendant-respondents, Ashok Kashyap, Chandrabhan Bhardwaj, Keshri Singh, Harish Chand Bhati were examined as DW - 1, DW - 2, DW - 3 and DW - 4, respectively. In both the matters, Issue - 1 was of substance, hence taken together and answered in favour of defendant-respondents, as a result whereof, Original Suit No.48 of 1996 of plaintiffs-appellants was dismissed and LAR has been answered by holding that defendant-respondents are entitled to compensation and, consequently, Collector has been directed to pay compensation and other benefits to defendant-respondents.

6. Sri V. Sahai, learned counsel for appellants contended that land in question was already acquired and possession having been taken by Collector on 30.3.1992, it stood vested in State, hence there was nothing which could have been transferred by plaintiff-appellants to defendant-respondents on 9.2.1994, hence sale-deed in question is void ab initio, in view of Section 6 (e) of Transfer of Property Act, 1882 (hereinafter referred to as "Act, 1882). He further contended that 80% of estimated compensation was already received by plaintiff-appellants and that being so, there was virtually nothing remained so as to claim right of compensation that could have transferred by means of alleged sale-deed dated 9.2.1994. He also contended that evidence adduced, patently showed that alleged sale-deed was forged and fictitious, yet court below has erred in law in holding sale-deed as a genuine document and thereupon decreeing the suit.

7. Sri Ravi Kant, learned Senior Counsel assisted by Sri Paras Nath Singh, counsel for respondents, per contra, argued that sale-deed in question, in fact, transfers right to claim compensation which is a right to property, and therefore, it cannot be said that sale-deed is nullity in the eyes of law. He further contended that there was no relief in Original Suit praying for cancellation of sale-deed and that being so, plaintiff-appellants could not have sought relief for ignoring

aforesaid sale-deed dated 9.2.1994.

8. Points for consideration, which need be answered by this Court for deciding these appeals, are:

(1) Whether sale-deed dated 9.2.1994 is void in view of Section 6(e) of Transfer of Property Act, 1882 (hereinafter referred to as "Act 1882"), or otherwise?

(2) Whether sale-deed dated 9.2.1994 is a forged and fictitious document, as claimed by plaintiff-appellants or Court below has rightly held it a genuine document?

(3) Whether Court below has rightly held that defendant-respondents are entitled to payment of compensation of disputed land?

9. In order to answer question - 1, we find that there is no dispute in respect of the fact that disputed land was acquired by State of U.P. by initiating proceedings for acquisition under Act 1894 and in this regard Notification dated 18.6.1991 under Section 4 was published in U.P. Gazette dated 20.7.1991; declaration under Section 6/17 dated 18.12.1991 was published in U.P. Gazette dated 11.1.1992, and, possession of land was also taken by Collector on 30.3.1992, as a result thereof, land had vested in the State of U.P. on 30.3.1992. In view of notices issued under Section 9, SLAO gave opportunity of hearing to various objectors and declared award under Section 18 Act, 1894 on 13th November, 1995, determining market value at the rate of Rs. 63.26 per square yard. Copy of award is on record and shows consideration of objection of Amar Singh son of Hari Ram i.e. appellant no.6 in respect of disputed land. Appellant claimed compensation at the rate of Rs. 400/- per square yard but offered rate of Rs. 63.26 per square yard by SLAO. It is also evident from record that much before pronouncement of award dated 13.11.1995, by SLAO, 80% of estimated compensation was already paid to plaintiff-appellants.

10. Disputed land claimed to be owned by appellant no. 6 Amar Singh and appellant no. 10 Chetram to the extent of ? share, appellants no. 1 to 5 had ? share in total and ? individually while appellants no. 7 to 9 had remaining ? share in total disputed land and 1/9 individually. They submitted an application dated 08.12.1995 before Additional District Magistrate (Land Acquisition), Noida Phase-II, Ghaziabad [hereinafter referred to as A.D.M. (L.A.)] requesting for payment of compensation as per award dated 13.11.1995. The defendant-respondents filed objection dated 01.02.1996, stating that defendant had already filed an application on 25.03.1994 before A.D.M. (L.A.), claiming compensation and therein appellants filed their no objection letter and only thereafter A.D.M. (L.A.) passed order on 06.06.1994 for payment of compensation to defendant-respondents. Admittedly, defendant-respondents claimed compensation, founded on sale deed dated 09.02.1994 which was registered on 17.02.1994 in the office of Sub-registrar, Noida. Plaintiff-appellants however have disputed the very execution of said sale deed and claimed that same is forged and fictitious and has been got prepared by impersonation and misrepresentation.

11. Since land in dispute vested in State of U.P. when possession was taken by Collector under Section 17 of Act, 1894, the first question which we have to examine is, whether sale deed dated 09.02.1994 can be said to be a document executable so as to have effect of transfer of property to the defendant-respondents. The term "transfer of property" had been defined under Section 5 of Act 1882 and reads as under; -

"5. "Transfer of property" defined. - In the following sections "transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, or to himself and one or more other living persons; and "to transfer property" is to perform such act.

[In this section "living persons" includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals.]"

12. The term "property" has not been defined under Act 1882, instead it defines "immovable property" under section 3, which reads as under:-

" "Immovable property" does not include standing timber, growing crops, or grass;"

13. It is in fact not a definition of Immovable property but specify things which are not included within the term "immovable property". We find definition of "immovable property" in Section 3 (26) of General Clauses Act, 1897 (hereinafter referred to as Act, 1897) which is inclusive and reads as under:-

"Immovable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth."

(emphasis added)

14. In Suresh Chand v. Kundan (2001) 10 SCC 221, in Para 6 of the judgement, Court has said that in absence of any special definition of "immovable property" under Act 1882, general definition contained in General Clauses Act shall prevail. To the same effect is the law laid down in Srimati Santabai v. State of Bombay and others, A.I.R. 1958 SC 532 Para 28. The definition of "immovable property" under Section 3(26) of General Clauses Act is inclusive. The phrase "benefits to arise out of land" in larger sense is nothing but interest in land, for example, annual allowance charge of land, a right to collect dues at fair held on a plot of land, a Haat or market, a right to possession and management of Saranjam, a right to collect any fee or other dues in respect of particular land, a live inquest in requisition of a immovable property, a right of way, a fairy, a fishery, etc.

15. Section 6 of Act, 1882 specifically provides that property of any kind may be transferred, except as otherwise provided by Act 1882 or by any other law for

the time being in force. The exceptions as above are nine and read as under; -

(a) The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred.

(b) A mere right of re-entry for breach of a condition subsequent cannot be transferred to any one except the owner of the property affected thereby.

(c) An easement cannot be transferred apart from the dominant heritage.

(d) An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him.

(dd) A right to future maintenance, in whatsoever manner arising, secured or determined, cannot be transferred.

(e) A mere right to sue cannot be transferred.

(f) A public office cannot be transferred, nor can the salary of a public officer, whether before or after it has become payable.

(g) Stipends allowed to military, naval, air-force and civil pensioners of the Government and political pensions cannot be transferred.

(h) No transfer can be made (1) in so far as it is opposed to the nature of the interest affected thereby, or (2) for an unlawful object or consideration within the meaning of section 23 of the Indian Contract Act, 1872 (9 of 1872), or (3) to a person legally disqualified to be transferee."

(emphasis added)

16. For the case in hand we are concerned with Section 6(e) which says a "mere right to sue" cannot be transferred. Section 6 came up for consideration in *Union of India v. Sri Sarada Mills Ltd.* A.I.R. 1973 SC 281 wherein it held that a bare right of action, might be, claims to damages for breach of contract or claims to damages for tort and assignment of the mere right of litigation, is bad. An assignment of property is valid even although that property may be incapable of being received without litigation. The reason behind the rule is that a bare right of action for damages is not assignable because the law will not recognize any transaction which may savour maintenance of champerty. It is only when there is some interest in the subject matter that a transaction can be saved from imputation of maintenance. That interest must exist apart from the assignment and to that extent must be independent of it.

17. In the context of right to receive compensation under an instrument executed by erstwhile owner whose land is forcibly acquired by owner-subsequent purchasers, whether the same would hit by Section 6 (e) has been considered recently by this Court in First Appeal No. 804 of 2002 *Jal Sansthan, Agra v. Smt. Krishna Kumari* decided on 01.03.2016 and following Supreme Court Judgement in *M/s. Khorshed Shapoor Chenai Etc. v. Assistant Controller of*

Estate Duty A.I.R. 1980 SCC 775 and another judgement of this Court in Food corporation of India v. Kailash Chand 2014 (1) A.D.J. 379 this Court has held that transfer of "right to receive compensation of land acquired by State" is property but once notification under Section 4(1) is issued, owner of the land cannot create any encumbrance upon such land, to bind Government and a subsequent purchasers would not acquire any title to property. In Para 31 of judgement, this Court said as under :-

"31. Thus, submission that a subsequent purchaser has no right for all purposes including compensation has no merit inasmuch as right to receive compensation is right to property assignable under Section 6 of Act, 1882. Hence, sale-deeds executed by erstwhile owners to subsequent purchasers may not create any encumbrance on acquired land but would be valid so as to transfer right to claim compensation from erstwhile land owners to subsequent purchasers."

18. In the light of the aforesaid exposition of law we have to examine from the document in question i.e. sale deed dated 09.02.1994, whether it transfers disputed land to the purchasers or only right to receive compensation was transferred. This document is Paper No. 5A (Ex. A3). At the very initial part of the document, it says the first party is absolute owner of Gata No. 3, Area 5 Bigha 10 Bishwa 10 Biswansi, situated at Village Yakubpur, District Ghaziabad. This statement in the sale deed dated 09.02.1994 is patently incorrect or false in as much as aforesaid land had already vested in State of U.P. on 30.03.1992 when Collector took possession thereof, pursuant to acquisition notifications and State of U.P. got title thereof vested in it without any encumbrance. Subsequently, Ex. A3 also mentions about two notifications dated 18.06.1991 and 18.12.1991 issued under Sections 4 and 6 of Act, 1982 and also the factum that possession thereof has been taken by Collector on 30.03.1992. It also says that in Revenue record, mutation has already taken place and name of New Okla Industrial Development Authority has been entered as owner of the disputed property. Having said so, it further says that first party i.e. vendors, have obtained complete estimated compensation of aforesaid land and now they have no title, or relation with the aforesaid land. Then, it says that vendors are "owners in possession" of interest in the aforesaid land and for that purpose are entitled to claim the same in law and such interest is being sold/transferred to second party, that is, defendant-respondents. Once it is said that the vendors have collected entire compensation of disputed land, this factum that such compensation may have been enhanced in litigation after that was transferred, in our view, will bring the deed in question as transferring "a mere right to sue" and would be hit by Section 6 (e) of Act 1882. This is further writ large from the following stipulation in the deed dated 09.02.1994:

izFke i{kx.k f}rh; i{kx.k dks vf/kdkj nsrs gS fd mijksDr Hkwfe ds ekots ds IEcU/k esa o mijksDr Hkwfe ds vius fgr ds fo"k;ksa esa f}rh; i{kx.k vius uke ls 28, ,y0vkj0,0,DV ds vUrxZr l{ke vf/kdkjh ,l0,y0,0vks0 dysDVj xkft;kckn ds nQ~rj ls izkIr djs rFkk mijksDr Hkwfe dk ekotk c<+okus ds fy;s l{ke vf/

kdkjh ,l0,y0,0vks0 dysDVj ds ;gkWa vUrxZr /kkjk 18 ,y0vkj0 ,DV esa vius uke ls vkifRr izLrr djsa rFkk ftyk tt xkft;kckn ds U;k;ky; esa rFkk ekuuh; mPp U;k;ky; bykgkckn o mPpre U;k;ky; ubZ fnYyh Hkkjr esa dksbZ Hkh dk;Zokgh djsa vkSj jsQjsUl rS;kj dj;k;s vkSj iSjoh djsa rFkk fdlh Hkh vkns"k dh dksbZ vihy fuxjkuh] fjV] utjlkuh fdlh Hkh U;k;ky; ls ljdkjh o xSj&ljdkjh esa vius uke ls djsaA ml ij izFke i{kdk.k o mlds okjiku dks dksbZ vkifRr fdlh Hkh izdkj dh ugha gksxhA

"The first parties vest the second parties with the rights that they may approach the office of the competent officer (SLAO/Collector), Ghaziabad in connection with compensation for the aforesaid land and their interests therein u/s 28(a) of LR Act; and they may, for enhancement of compensation for the aforesaid land, submit on their behalf the objections u/s 18 of LR Act with the competent officer, SLAO (Collector); and they may seek any remedy or get the reference prepared or do pairvi before the Court of District Judge, Ghaziabad or before the Hon"ble Allahabad High Court or before the Hon"ble Supreme Court of India at New Delhi; and they may officially/unofficially file any appeal, revision and writ against any order before any court. The first parties and their successors shall have no objection whatsoever."

(English translation by Court)

19. The above stipulation contemplates a chance of higher compensation in litigation and intends to transfer the same. This is evidently a mere "right to sue" and not any interest in the disputed land. We, therefore, answer question 1 against defendant-respondents and in favour of appellants.

20. Now coming to the second question, we find that all the vendors i.e. plaintiff-appellants (except 4,5 and 8) are said to have pressed their thumb impression on sale deed dated 09.02.1994. The witnesses are Pritam Singh s/o Kishan Lal and Chandrabhan Bhardwaj s/o Mela Ram, who are resident of Shahdara, Delhi. All the appellants, except appellants 4, 5 and 8 have put their thumb impression on the deed as per the version of defendant-respondents. The document was authored by Sri Harish Chand Bhati, Advocate. The said document was proved before Court below by Sri Harish Chand Bhati, Advocate, DW4 and Chandra Bhan Bhardwaj, DW2. Interestingly, judgement of Court below shows that though Pritam Singh was also a witness of execution of document, but Exhibit A3 did not have his signature. This was admitted by DW4 and is evident from following extract of the findings of Trial Court.

ihre flag dks ,d lky igys ls tkurk Fkka izn"kZ ,&3 ij mlds nLr[kr ugha gSA Hkwyo"k mlds }kjk nLr[kr djuk jg x;k gSA

"I knew Peetam Singh for the past one year. Exhibit A-3 does not bear his signature. He has by mistake omitted to put his signature."

(English translation by Court)

21. Trial Court has held that plaintiff-appellants did not adduce any evidence to show that the document was executed by fraud and misrepresentation since they

did not examine any witness to the sale deed. Following findings of Court below in this regard are worthy to be reproduced herein it:

bl okn esa ;g rF; egRoiw.kZ gS fd oknh us vius c;ku esa /kks[kk o lkft" k ds rF;ksa dks izLrqR ugha fd;k gSA bl izdkj oknh dh miyC/k lk{; ls ;g Li"V gksrk gS fd oknhx.k dks fof" k"V :i ls fdLh Hkh /kks[kk o lkt ds rF;ksa dh tkudkj ugha gS vkSj vius lgh rF;ksa dks fNikus dk tkucw>dj iz;Ru fd;k gSA bl okn esa oknhx.k us cSukesa ds fdLh Hkh xokg dks lk{; esa izLrqR ugha fd;k gSA

"In this suit, it is material that the fact of fraud and conspiracy has not been mentioned by the plaintiff in his statement. In this way, from the evidence produced by the plaintiff, it is clear that the plaintiffs do not have specific knowledge of any fraud and conspiracy and they have tried to wilfully conceal the correct facts. In this suit, the plaintiffs have not produced in evidence any witness to the sale-deed."

(English translation by Court)

22. Plaintiff-appellants challenged sale deed dated 09.02.1994 on the ground that they have not executed the said sale deed and the document is a manufactured one. Two of the appellants, Amar Singh and Ratan Singh appeared in witness box and deposed in support of their stand. Besides PW3, a Hand Writing Expert, produced by plaintiff-appellants submitted a report, stating that signatures and thumb impressions on the document were different than those of plaintiff-appellants. Thus onus to prove this fact was initially discharged by plaintiff-appellants. Thereafter onus shifted upon defendant-respondents to prove that document was genuine and actually executed by plaintiff-appellants. Admittedly, one of the witnesses, Pritam Singh had not signed Exhibit A3, the sale deed dated 09.02.1994. He was also not produced by defendant-respondents in support of document to prove that document was executed in his presence and he was witness thereto. Since respondents were relying and intend to take benefit of Ex-A3 hence onus lay upon them to produce attesting witnesses and also to explain reason of absence of signature of one of such witness. Absence of his signature on document was admitted by defendant's witness, DW4 i.e. Harish Chand Bhati, Advocate who claimed to have authored the said deed. It has also come in the findings of Court below that PW1 Amar Singh, appellant no. 6 in his deposition admitted that Harish Chand Bhati was the Advocate, who accompanied appellants when they obtained 80% compensation from the office of Land Acquisition Officer and 20% balance compensation from the office of S.L.A.O., in Sector 6, Noida. Findings of Court below to this effect are reproduced as under :-

bl LVst ij ;g rF; vR;Ur egRoiw.kZ gS fd vej flag xokg us vius c;ku esa ;g rF; Li"V :i ls Lohdkj fd;k fd 80 izfr"kr izfrdj Hkwfe vtZu vf/kdkjh ds ;gkWa ls tc mBk;k Fkk rc mldks o vU; oknhx.k dks f" kuk[r gjh"kpUn HkkVh ,MoksdsV us dh FkhA 20 izfr"kr izfrdj mBkus dh ckor Hkh gesa lsDVj&6 uks,Mk esa gks x;s FksA

"At this stage, it is very important that the witness Amar Singh has in his

statement clearly admitted that 80 percent amount of compensation was collected from the Office of The Land Acquisition Officer and he and other plaintiffs were identified by Advocate Harish Chand Bhati. We were taken to Sector - 6, Noida for collection of 20 percent amount of compensation as well?"

(English translation by Court)

23. Having said so, it has been observed that office of Sub-Registrar is also in Sector-VI, Noida and therefore, inference can be drawn that the plaintiff-appellants went to office of Sub-Registrar to collect amount of consideration towards 20% remaining compensation. No finding has been recorded by Court below as to what compensation remained which was to be received by plaintiff-appellants and transferred to defendant-respondents. Findings with regard to transfer of right of 20% compensation to defendant-respondents vide sale-deed in question is nothing but perverse, incorrect and based on no material on record. There is no thing to show that plaintiffs went to collect 20% compensation but was not paid or could not receive.

24. With regard to the expert opinion, Court below has found that both sides have adduced evidence of experts in support of respective case of two sides. Experts were examined as PW3 and DW1. Court below has not recorded its own finding as to which report was credible or reliable and has proceeded to hold that in view of its otherwise findings, it is justified to infer that document in question was executed by plaintiff-appellants.

25. We may notice at this stage that even author of document, Harish Chand Bhati, who had not signed the same and this fact was admitted by him in his deposition but says that he may have forgotten to sign the document. Relevant findings in this regard read as under.

gjh"kpUn HkkVh ds cSukek izn"kZ ,&3 ij uke fy[kk gS] ysfdu mlds gLrk{kj ugha gS] ftldh ckor Mh0MCyw0&4 us Lo;a c;ku fd;k gS fd cSukesa ij mlds gLrk{kj Hkwyo"k djus ls jg x;s gSA

"The sale-deed being Exhibit A-3 has the name of Harish Chand Bhati written thereon but it does not bear his signature, regarding which DW - 4 has in his statement himself stated that his signature on the sale-deed has been omitted by mistake."

(English translation by Court)

26. When a document is registered in the office of Sub-Registrar, thumb impression and signatures are obtained by Sub-Registrar on its own Register also. Defendant-respondents made no effort to get appropriate record summoned from the office of Sub-Registrar, particularly when document was challenged forged and fictitious, obtained by impersonation. It was also not signed by one of two witnesses as well as author.

27. In our view, Court below has erred in law, firstly by stretching burden of

proof of the factum of fraud and misrepresentation of aforesaid document on plaintiff-appellants on the ground that no witnesses of document were examined as plaintiffs' witnesses. Plaintiff-appellants when challenged document as a forged and fictitious one, they never admitted that any person was accepted by them as a witness to such document. Hence, question of producing such witnesses by plaintiffs could not have arisen. Benefit of document was claimed by defendant-respondents. Hence onus to produce witnesses to prove document lay upon them. There is a distinction between "burden of proof" and "onus".

28. The well known distinction between "burden of proof" and "onus of proof" need not be repeated hereat. It is well establish that when a suit is filed, burden of proof lies upon the plaintiff who has sought relief from the Court and failure to prove its case would disentitle him from getting any relief. The onus shifts from stage to stage. The distinction between "burden of proof" and "onus" has been discussed by Court in para 19 of judgment in Anil Rishi v. Gurbaksh Singh, AIR 2006 SC 1971. The said paragraph reads as under:

"There is another aspect of the matter which should be borne in mind. A distinction exists between a 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 is 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."

29. In R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami and V.P. Temple and another (2004) 6 JT (SC) 442, Court said in para 29, as under:

"In a suit for recovery of possession based on title it is for the plaintiff to prove his title and satisfy the court that he, in law, is entitled to dispossess the defendant from his possession over the suit property and for the possession to be restored to him. However, as held in A. Raghavamma v. A. Chenchamma 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."

30. The onus to prove fraud lies upon a person who alleges fraud. In Krishna

Mohan Kul @ Nani Charan Kul and another v. Pratima Maity and others, AIR 2003 SC 4351, Court said:

"12. The onus to prove the validity of the deed of settlement was on the defendant No. 1. When fraud, misrepresentation or undue influence is alleged by a party in a suit, normally, the burden is on him to prove such fraud, undue influence or misrepresentation. But, when a person is in a fiduciary relationship with another and the latter is in a position of active confidence the burden of proving the absence of fraud, misrepresentation or undue influence is upon the person, in the dominating position, he has to prove that there was fair play in the transaction and that the apparent is the real, in other words, that the transaction is genuine and bona fide. In such a case the burden of proving the good faith of the transaction is thrown upon the dominant party, that is to say, the party who is in a position of active confidence. A person standing in a fiduciary relation to another has a duty to protect the interest given to his care and the Court watches with jealousy all transactions between such persons so that the protector may not use his influence or the confidence to his advantage. When the party complaining shows such relation, the law presumes everything against the transaction and the onus is cast upon the person holding the position of confidence or trust to show that the transaction is perfectly fair and reasonable, that no advantage has been taken of his position."

31. Thus burden to prove fraud was on plaintiffs. They discharged initial onus by producing two co-owners in witness box who deposed to support their stand. Then onus shifted upon the defendants who were beneficiary and ought to have proved that document is genuine. This distinction has been misappreciated by Court below. In other words Court below in our view, has committed a manifest error of law by failing to appreciate difference between "onus" and "burden of proof" at the stages at which onus shifts upon other side.

32. Considering the entire facts, particularly that 80% compensation was already received by plaintiff-appellants and Trial Court has also recorded finding that they also went to receive remaining 20% compensation. They filed objection before Collector after receiving notice of Collector under Section 9 of Act, 1894 and claimed compensation @ Rs. 400/- per square yard. All these facts, in our view, justify that plaintiff-appellants themselves were contesting for higher compensation after receiving estimated one. These all circumstances were very relevant to throw light on the case set up by plaintiffs. There is neither any evidence on record nor otherwise, from which it can safely be inferred that there was any interest or right to receive compensation available on 9.2.1994 which could have been transferred by plaintiff-appellants to defendant-respondents. Moreover, when they themselves claimed compensation @ Rs. 400/- per square yard, would have agreed to give up such contest on meager consideration of Rs. 60,000/- is highly improbable unless there is some reason. Second question in the entirety in discussion, we find it justified to return in favour of appellants.

33. In view of the findings recorded by this Court, questions 1 and 2 have to be

answered in favour of appellants and question 3 has to be answered against defendant-respondents.

34. In view of above discussion, judgement and decree impugned in this appeal, cannot be sustained.

35. Appeal is accordingly allowed. The judgement and decree, dated 16.9.1998 and 29.9.1998 respectively, passed by Sri Devendra Kumar Jain, XIIth Additional District Judge, Ghaziabad in Original Suit No. 48 of 1996 read with Land Acquisition Reference under Section 30 of Act, 1894 are hereby set aside. The suit is decreed by holding that sale deed dated 9.2.1994 is void and nullity. The LAR is answered in favour of appellants.

36. The appellants shall also be entitled to costs through out.