Lakhan Sao (Deceased) Now Throughhis ... vs Dharamu Chaudhary on 20 February, 1991

Equivalent citations: 1991 SCR (1) 544, 1991 SCC (3) 331, 1991 AIR SCW 588, 1991 (3) SCC 331, (1991) 1 LJR 854, (1991) 1 SCR 544 (SC), 1991 ALL CJ 2 887, (1991) 17 ALL LR 363, (1991) 1 CURCC 586, (1991) CIVILCOURTC 343, (1991) 1 GUJ LH 288, (1991) 1 LANDLR 537, 1991 UJ(SC) 1 409, (1991) 1 ALL RENTCAS 521, (1991) 1 JT 639 (SC)

Author: M. Fathima Beevi

Bench: M. Fathima Beevi, B.C. Ray

PETITIONER:
LAKHAN SAO (DECEASED) NOW THROUGHHIS LEGAL HEIRS

Vs.

RESPONDENT:
DHARAMU CHAUDHARY

DATE OF JUDGMENT20/02/1991

BENCH:
FATHIMA BEEVI, M. (J)
BENCH:
FATHIMA BEEVI, M. (J)
RAY, B.C. (J)

CITATION:
1991 SCR (1) 544 1991 SCC (3) 331
JT 1991 (1) 639 1991 SCALE (1)240

ACT:
Code of Civil Procedure, 1908: Suit for declaration of title and possession-Burden to prove title is on the plaintiff-But when both plaintiff and defendant tender evidence the question of burden of proof is not important-Court can consider the entire evidence on record.

HEADNOTE:
The respondent-plaintiff instituted a suit against the appellant-defendant for declaration of title and possession of the suit properties on the basis of a sale-deed dated February 10, 1964 executed in his favour by Mrs. T. The

appellant-defendant also asserted his title and possession under an earlier deed dated February 14, 1959 executed by Mrs. T in his favour. The respondent contended that the deed of 1959 in favour of the defendant was sham and without any consideration. The Trial Court decreed the suit and the decree was confirmed in appeal. The High Court set aside the decree and remanded the case to the first appellate court stating that the burden to prove that the 1959 deed was sham was on the plaintiff. After the remand, the first appellate court considered the evidence adduced by both sides and upheld the plaintiff's title and confirmed the decree of the trial court. The second appeal filed against the judgment was dismissed in limine by the High Court.

In defendant's appeal to this court it was contended that inspite of specific direction by the High Court in the order of remand that the burden to prove that 1959 deed was sham was on the plaintiff, no fresh evidence was tendered by the plaintiff to discharge the burden and the appellate court proceeded to examine the evidence tendered by the defendant and rejected the same; hence the appellate court committed an error in disposing the appeal which gave rise to a substantial question of law and the High Court failed to exercise its jurisdiction under Section 100 CPC in dismissing the second appeal in limine.

Dismissing the appeal, this Court

HELD: 1. It is always open to the defendant not to lead any evidence where the onus is upon the plaintiff but after having gone into

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evidence, he cannot ask the court not to look at and act on it. The question of burden of proof at the end of case when both parties have tendered evidence is not of any great importance and the court has to come to a decision on a consideration of all materials. [515H; 516A]

2. In the suit based on title the burden was undoubtedly on the plaintiff to prove such title. When the plaintiff assailed the earlier deed executed by his vendor in respect of the same land it was for him to establish that it was a Farzi Kebala and sham transaction unsupported by consideration. But in examining the question whether the plaintiff had succeeded in proving the negative fact it was open to the court to consider the entire evidence on record when both the parties have tendered evidence and no part of the evidence could be left out. The plaintiff proceeded on the basis that the deed executed by his vendor in 1959 was sham unsupported by consideration and it never came into operation thereby pleading the necessary facts in support of his title. Evidence was tendered to prove what has alleged. To counter the claim, the defendants have asserted that the consideration was paid under the deed and counter evidence was tendered. The entire evidence was fully apprecited by the Appellate Court and the findings recorded. Thus the Appellate Court recorded definite findings on a clear

analysis of the entire evidence and the findings are fully supported by the evidence on record. Therefore, no error had been committed by the learned Judge in his approach. [597C-D; 599B-C]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1440 of 1986.

From the Judgment and Order dated 30.11.1985 of the Patna High Court in Second Appeal No. 129 of 1983.

Ranjan Diwvedi, A.N. Bardiar and R.S. Sharma for the Appellants.

D. Goburdhan and D.N. Goburdhan for the Respondent. The Judgment of the Court was delivered by FATHIMA BEEVI, J. The plaintiff-respondent instituted the suit for possession of the land in Khata No. 19 in village Gauripur in 1968 claiming title under Ex. 2 sale deed dated February 10, 1964 executed in his favour by Mst. Tetri, the widow of Chhathu Sah, the original owner. Mst. Tetri had earlier executed Ex. 2-A sale deed on February 14, 1959 in favour of her brother's son Lakhan Sao for a consideration of Rs.600. She cancelled this deed on July 31, 1962 before transferring the property in favour of the respondent. By proceeding dated 11.7.1963 obtained mutation in her name and paid rent on 18.7.1963. The dispute, however, arose over possession of the land between the respondent and Lakhan Sao that led to proceedings under section 145, Cr. P.C. By the order dated March 4, 1966, Lakhan Sao and his brother Gulab Sao the appellants herein were put in possession. The present suit was thereafter instituted by the respondent for declaration of this title and possession.

The respondent alleged that the deed of 1959 in favour of Lakhan sao was a Farzi Kebala executed without consideration and was not operative and the respondent had acquired valid title under the transfer in his favour. The suit was resisted denying plaintiff's title and asserting that the title and possession passed under the deed of 1959. The Trial Court decreed the suit and the decree was confirmed in appeal. The High Court set aside the decree and remanded the case to the first appellate court pointing out that the burden to prove that the document of 1959 was farzi in character and remained inoperative clearly lay on the plaintiff and the finding of the first appellate court was vitiated by erroneous conception of law. After the remand, the appeal was disposed of by the Additional District Judge by judgment dated January 31, 1983 upholding the plaintiff's title and confirming the decree of the Trial court. The second appeal filed against that judgment was dismissed in limine by the High Court on 30.11.1985. This appeal by special leave is directed against that judgment of the High Court.

Shri Ranjan Dwivedi, learned counsel for the appellants, maintained that the first appellate court committed the same error as was pointed out by the High Court earlier in disposing of the appeal and the error thus committed has given rise to a substantial question of law and the High Court failed to exercise the jurisdiction under section 100, C.P.C., in dismissing the appeal in limine. The

original defendant died and his legal representatives are the appellants before this Court. It was submitted that the Additional District Judge had approached the question as to whether the impugned deed of 1959 is a sham and inoperative transaction by casting the burden on the defendant, in spite of the specific direction in the order of remand. No fresh evidence had been tendered by the plaintiff to discharge the burden of proving that no consideration passed under the document and that the document was inoperative. The Court proceeded to examine the evidence tendered by the defendant to arrive at the conclusion and has found fault with the defendant for not proving that consideration passed and the transaction has come into operation. This approach, according to the learned counsel, has vitiated the finding and resulted in miscarriage of justice. The submission is that the lower appellate court has discussed the evidence tendered by the defendant and rejected the same. The respondent's learned counsel pointed out that the lower appellate court had properly appreciated the evidence applying the correct law as to the burden of proof. The findings recorded are on the appreciation of the facts and evidence of the case and no question of law did arise and therefore the second appeal has been rightly dismissed.

In the suit based on title the burden was undoubtedly on the plaintiff to prove such title. When the plaintiff has assailed the earlier deed executed by his vendor in respect of the same land it was for the plaintiff to establish that it was Farzi Kebala and sham transaction unsupported by consideration. The learned Additional District Judge has proceeded to consider how far this onus which lay heavily on the plaintiff had been discharged. He referred to the various tests that have been laid down in order to ascertain that a particular deed is a Farzi Kebala. He considered the relationship between the parties, the evidence relating to the custody of the document, passing of consideration, motive and possession. It was found that Lakhan Sao and his brother Gulab Sao were closely related to Tetri, that Ex. 2-A sale deed was in the custody of Tetri and it had been produced in Court by the plaintiff. On the evidence, it was found hat the stamp paper for the document was purchased by the vendor and there was clear indication that the vendee did not take part in the preparation of the document. He inforred this fact from the circumstance that incorrect particulars had been incorporated in the deed. He rejected the contention that the documents were surreptitiously obtained by the plaintiff and his vendor. It was noticed that even after the execution of the deed, Tetri was continued to be in possession. She moved the authorities for recording her name in Jamabandi and she had paid the rent. Regarding the motive for the execution of the deed, it was noticed that Mst. Tetri had debts and the deed was executed to cover the property from the reach of the creditors and without consideration. The learned Additional District Judge considered the evidence relating to the consideration. He referred to the evidence of PW-8, the attesting witness and PW-14 the plaintiff. These witness stated that nothing had been paid as consideration. As per the recital in the deed an amount of Rs. 500 was a prior payment and Rs.100 was paid in cash at the time of execu-

tion. The learned Judge noticed that there was no specific statement regarding the payment of any part of the consideration in cash. The vendor was dead. Lakhan Sao, the defendant, avoided the witness box. The evidence of the parties to the document was not therefore on record. Gulab Sao, the brother of Lakhan Sao, was examined as DW-11. His evidence was analysed and was found to be discrepant. The learned Judge on a consideration of evidence on both sides found that the evidence on the point of payment of consideration by appellant Lakhan Sao is far from satisfactory and the

evidence of the appellants is unworthy of credit. Motive was found to be satisfactorily established as the existence of debts to some creditors was admitted. On the question of possession, the learned Judge scrutinised the evidence and found that Tetri was in possession even after execution of Ex. 2-A. Having found these ingredients in favour of the plaintiff, the learned Judge concluded that Ex. 2-A executed by Tetri on 14.2.1959 was only Farzi Kebala without any consideration and it created no title and possession to the appellant.

The findings are essentially findings of fact. If, however, the appellants succeed in showing that in recording the findings of fact, the court had proceeded on a wrong conception of law as to onus, the correctness of the findings has necessarily to be examined. The only point that has been stressed before us is that lower appellate court has wrongly proceeded on the basis that onus shifted to the defendant to prove the passing of consideration and that the evidence did not establish that fact. It was maintained that the onus did not shift as the burden was entirely on the plaintiff to prove the fact that document was inoperative and no consideration did pass thereunder. We have point out earlier that the High Court has set aside the earlier decree pointing out the error committed by the lower appellate court. This observation made by the High Court has been kept in mind by the Additional District Judge in disposing of the appeal thereafter. The learned Judge has considered the question of burden on the plaintiff to establish that there had been no consideration. In examining the question whether the plaintiff had succeeded in proving the negative fact it was open to the court to consider the entire evidence on record when both the parties have tendered evidence and no part of the evidence could be left out. On a consideration of the whole evidence, the Court has concluded that there had passed consideration. This finding cannot, therefore, be said to be vitiated.

It is always open to the defendant not to lead any evidence where the onus is upon the plaintiff but after having gone into evidence, he cannot ask the court not to look at and act on it. The question of burden of proof at the end of case when both parties have tendered evidence is not of any great importance and the court has to come to a decision on a consideration of all material.

In the present case, the plaintiff proceeded on the basis that the deed executed by his vendor in 1959 was sham unsupported by consideration and it never came into operation thereby pleading the necessary facts in support of his title. Evidence was tendered to prove what has been alleged. To counter the claim, the defendants have asserted that the consideration was paid under the deed and counter evidence was tendered. The entire evidence was fully appreciated by the Court and the findings have been recorded. We do not agree that any error had been committed by the learned Judge in his approach. He recorded definite findings on a clear analysis of the entire evidence and the findings are fully supported by the evidence on record. We do not therefore see any merit in the appeal which is accordingly dismissed. No costs.

T.N.A. Appeal dismissed.