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Court : Allahabad

Decided On : Sep-16-1997

Reported in : 1998(1)AWC476

Judge : D.C. Srivastava, J.

Acts : [Evidence Act, 1872](#) - Sections 111

Appeal No. : Second Appeal No. 1688 of 1979

Appellant : Hakimuddin

Respondent : Mohammad Anis, Representing Mst. Sabbirunnisan (Since Decd.)

Advocate for Def. : H.R. Misra, ;A.N. Misra, ;Pankaj Naqvi and ;G.N. Verma, Advs.

Advocate for Pet/Ap. : Brij Bhushan Paul and ;Haroon Ahmad, Advs.

Judgement :

D.C. Srivastava, J.

1. This is defendant's second appeal. Brief facts essential for disposal of this appeal are as under :

2. The deceased-plaintiff, Smt. Sabbirunnisan, filed a suit for cancellation of two sale-deeds dated 7.5.1960 and 4.6.1960 and also for recovery of possession of the subject-matter of sale-deeds and for recovery of Rs. 800 as damages. The allegations in the plaint were that by virtue of inheritance explained in the plaint the deceased-plaintiff. Smt. Sabbirunnisan held 13/48 share in the plots detailed in schedule 'A' and residential house detailed in schedule 'C' and half share in occupancy plots detailed in schedule 'E' of the plaint. Hakimuddin, the original defendant No. 1, was cousin of Mohammad Anls. He occasionally visited the village and resided with Sabbirunnisan. Sabbirunnisan was illiterate Pardanasin lady aged about 65 to 70 years. She had eye trouble. Hakimuddtn took her to Allahabad on the pretext that he will consult some eye specialist for the treatment of her eye trouble. She was brought by Hakimuddin to Allahabad where Hakimuddin represented her that in view of the change in law regarding agricultural land, she should obtain bhumidhari rights on sirdari plots. In the month of Jeth of 1960 Hakimuddin took her to court at Allahabad and obtained her thumb impression on a document representing that it was in connection with acquisition of bhumidhari rights. She being illiterate Pardanashin lady could not know about the contents of the document. About a month thereafter, it was again represented by Hakimuddin that a power-of-attorney should be executed by her in his favour and obtained another thumb impression on another document. These two documents were used for getting the two sale-deeds impugned executed by Sabbirunnisan. 15 days before the institution of the suit, standing crops of Sabbirunnisan over the plots were harvested by Hakimuddin. On enquiry he told that she had executed documents transferring her rights in the agricultural plots and residential house to him. She then after obtaining copies of the sale-deeds came to know that the sale-deeds dated 7.5.1960 and 4.6.1960 were got executed by practising fraud upon her and no consideration was paid and that the contents of the same were never read over and explained to her and that no independent legal advice or consultation was given to Sabbirunnisan. She remained in possession till Hakimuddin forcibly harvested the crop. Further it was alleged that the sale-deeds were in excess of the rights of Sabbirunnisan. She also claimed Rs. 800 as damages for causing damage to the standing crop.

3. The suit was resisted on the ground that the sale-deeds are valid and were executed by the deceased-plaintiff after understanding its contents. No fraud was practised on her and that the deceased-plaintiff was not a Pardanashin lady.

4. The trial court dismissed the suit observing that Sabbirunnisan failed to discharge the onus laid upon her and that she executed the two sale-deeds in her own rights.

5. An appeal was filed which was decided on 16.11.1961. The appeal was allowed and the case was remanded back to the trial court for framing preliminary issues and deciding the case in accordance with law. Against this order, first appeal from Order No. 59 of 1962 was filed in this Court which was allowed and the lower appellate court was directed to decide the appeal on merits. The order of remand was set aside by this Court. The appeal was again heard by the lower appellate court which allowed the same and cancelled the two sale-deeds and also granted decree for possession but refused to grant any decree for damages to the tune of Rs. 800. It is, therefore, this appeal.

6. No substantial questions of law were formulated in the memo of appeal nor any substantial question of law was formulated at the time of admission of the appeal.

7. The learned counsel for the respondent contended that all other findings except the question of onus of proof are the findings of fact which cannot be disturbed in this second appeal. The learned counsel for the appellant on the other hand contended that the lower appellate court has carved out a new case that the deceased-plaintiff was a Pardanashin and ignorant lady and that no such case was pleaded in the plaint. Hence, the findings of the lower appellate court are vitiated.

8. There is no merit in the contention that the lower appellate court has carved out a new case and it was never pleaded that the plaintiff was not illiterate and Pardanashin lady. In para 16 of the plaint, it is clearly alleged that the plaintiff was illiterate and Pardanashin woman. In para 16 of the written statement, it is admitted that the plaintiff was illiterate woman. It was not admitted that she was Pardanashin lady. In the plaint, her age is shown to be 65 years. This was not

denied though it has come in evidence that she was aged about 70 years. This minor difference does not render the deceased-plaintiff young lady on the date of execution of the sale-deed. Thus it is averred in the plaint that she was aged, illiterate and Pardanashin lady. It is also averred in the plaint that she had eye trouble on the date of the alleged execution of document and she was brought to Allahabad by Hakimuddin in connection with treatment. The lady who was going to execute sale-deeds was having eye trouble and as such she can be said to be physically infirm lady also for the purposes of fully understanding about the nature of the transaction.

9. The learned counsel for the petitioner vehemently argued that it was never admitted that the deceased-plaintiff was ignorant lady. However, it is not borne out from the record that she was a clever lady. An old illiterate lady is to be treated and is to be given protection of Pardanashin lady, no matter, she was not observing strict Parda and went to court and appeared before the Sub-Registrar.

10. On the question of onus of proof, the trial court was certainly in error in holding that onus of proof that the sale-deeds were executed by practising fraud and were without consideration lay upon the deceased-plaintiff. The lower appellate court rightly placed the burden of proof on the defendant-respondent who was a beneficiary from the sale-deeds and who was claiming the same to be valid sale-deeds.

11. On the question of onus of proof. Section 111 of the Indian Evidence Act has to be taken into consideration. It provides that where there is a question of proof of good faith of a transaction between the parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence.

12. The onus of proof in such cases lies on the party who sets up and relies on the deed executed by Pardanasin lady to satisfy the court that it has been explained to and understood by her either before or after the execution of the same under the circumstances which established adoption of it with full knowledge and comprehension. The Supreme Court in the case of Mst. Kharbuja Kuer v. Jang Bahadur Rai : [1963]1SCR456 , has observed as follows :

'The burden of proof shall always rest upon the person who seeks to sustain a transaction entered into with a Pardanashin lady to establish that the said document was entered into by her after clearly understanding the nature of the transaction. It should be established that it was not her physical act but also her mental act. The burden can be discharged not only by proving that the document was explained to her and that she understood it but also by other evidence direct and circumstantial'.

13. The aforesaid protection is given to a lady who is not Pardanashin but is illiterate, weak and helpless. This protection cannot be restricted to the class of poor woman who is equally ignorant and is illiterate and is not Pardanashin. This Court in *Parasnath Rai and others v. Tileshra Kuar*, 1965 ALJ 1980, laid down as under:

'Rules regarding transactions by a Pardanashin lady are equally applicable to an illiterate and ignorant woman though she may not be a Pardanashin. It is not by reason of the Pardah itself that the law throws its protection round a Pardanashin lady but by reason of those disabilities which a life of seclusion lived by a Pardanashin lady gives rise to. and which are consequently presumed to exist in the case of such a lady. But the disabilities which make the protection necessary may arise from other causes as well. Old age, infirmity, ignorance, illiteracy, mental deficiency, inexperience and experience upon others, may by themselves create disabilities that may render the protection equally necessary. If, therefore, it is proved that a woman, although she is not a Pardanashin lady, suffers from the disabilities to which a Pardanashin lady is presumed to be subject, the validity and the binding nature of a deed executed by her have to be judged in the light of those very principles which are applied to a deed by a Pardanashin lady, where the plaintiff was illiterate and when she executed the deed in question she was not only more than 60 years old but was also hard of hearing and she was described by the defendants themselves as a foolish and rustic woman completely devoid of intelligence, and according to the finding of the lower appellate court she was correctly described as such, and besides the defendants stood in relation to her in a position of active confidence held that there could be no doubt that she was as much entitled to the protection of the law as a Pardanashin lady'.

14. In *Laxmi Narain and another v. Smt. Hubraja alias Barki*, 1989 (7) LCD 284, it was again laid down by this Court that same rule of protection as applicable to the transaction entered into by Pardanashin woman applies to illiterate and ignorant woman. The cases in : [1963]1SCR456 and AIR 1981 AH 222, were also referred in this case. It was further held in this case that burden of proof lies on a person who sets up the deed and relies upon it and he has to satisfy the court that the deed was explained to and was understood by the party executing it. On fact, the lower appellate court rightly held on the evidence on record that on 7.4.1960, the date of execution of the first sale deed, Smt. Sabbirunnisan was aged about 70 years and was illiterate lady having eye trouble. On these established facts. Sabbirunnisan was entitled to the protection which is normally afforded to a Pardanashin lady.

15. The protection afforded to a Pardanashin lady can be divided in two categories. In the first category of cases fall those cases where the person who seeks to hold the lady to the terms of her deed is one who stood towards her in a fiduciary character or in some relation of personal confidence. In the second category of cases are placed the persons who are absolute stranger to the executant of the deed. In *Mt. Izhar Fatma Bibi and others v. Mt. Ansar Fatma Bibi and others* : AIR1939 All348 , the following protection of law was laid down :

'The cases regarding Pardanashin ladies fall into two groups, namely, first, cases where the person who seeks to hold the lady to the terms of her deed is one who stood towards her in a fiduciary character or in some relation of personal confidence ; and secondly, cases where the person whose seeks to enforce the deed was an absolute stranger and dealt with her at arm's length. In the former class of cases, the court will act with great caution and will presume confidence put and influence exerted ; in the latter class of cases, the court will require the confidence and influence to be proved intrinsically. Where the person who seeks to hold the lady to the terms of the deed stands towards her in a relation of personal confidence, a very heavy burden lies on those who rely on the document, heavier than what the law would ordinarily lay on a person who was a stranger to the Pardanashin lady and who was dealing with her at arm's length.'

16. The lower appellate court has rightly placed the deceased-plaintiff in the first category because the defendant. Hakimuddin was son of Abdul Majid, real brother of Vakil Ahmad with whom daughter of Smt. Sabbirunnisan was married. It is in the evidence that he used to come and stay with Sabbirunnisan. He took her to Allahabad on the pretext of providing eye treatment to her. He was thus in fiduciary position to dominate the will of Sabbirunnisan. Under these circumstances, heavy burden lay upon Hakimuddin that the impugned transactions were fair and Smt. Sabbirunnisan executed the sale-deeds out of her free will understanding the effect and import of the transaction. A Division Bench of this Court in *Daya Shanker v. Smt. Bachi and others* : AIR1982 All376 , has laid down that:

'The law presumes, prima facie, in favour of the deeds being duly executed. So ordinarily the person who challenges the validity of a transaction on the ground of fraud, undue influence etc. and charges his opponent with bad faith has to discharge the burden of proof which rests on him. But the major exception to this rule is that the initial burden would not shift to the party who challenges the transaction and will instead be cast on the person who relies on such deed if a relationship of 'active confidence' or fiduciary relationship subsists between the contracting parties, such as guardian and ward, agent and principal, doctor and patient, spiritual adviser and disciple, trustee and cestui qui trust etc. The probability of dominating over the will of another party arises either directly from the very nature of the relationship existing between the parties or sometimes from a peculiar handicap or disability from which the other party suffers.'

17. The lower appellate court after giving due consideration to the evidence on record and circumstances of the case rightly concluded that Hakimuddin failed to establish the above onus of proof. If this is so, then the allegations of fraud, etc. need not have been proved by the deceased-plaintiff. In *Parasnath Rai's case* (supra), it was observed as under :

'It is not necessary to ascertain whether fraud, misrepresentation or undue influence has been established when it has been found that a deed executed by a Pardanashin lady has not been executed by her voluntarily and after appreciating

the nature and import of the transaction, and the latter finding alone is sufficient for holding that the deed is not binding on her and it conveyed no title.'

18. The lower appellate court has from the evidence on record and circumstances of the case rightly concluded that onus of proof was not discharged by Hakimuddin and those findings of fact cannot be disturbed in this second appeal.

19. The learned counsel for the appellant vehemently urged that passing of consideration of Rs. 500 before the Sub-Registrar was proved and endorsement of the Sub-Registrar on the back of the sale-deeds is sufficient proof that one of the sale-deeds was executed for consideration. However, the endorsement of Sub-Registrar on the sale-deed is not conclusive and it can be rebutted and has been rebutted by the deceased-plaintiff from the evidence that no doubt Rs. 500 were paid before the Sub-Registrar but the moment she came out of the office of the Sub-Registrar, the said money was taken back by Hakimuddin. This is insufficient rebuttal of the presumption of endorsement of the Sub-Registrar. The lower appellate court has rightly taken into consideration the facts and circumstances that in the absence of immediate need of money, Sabbirunnisan should not have sold her residential house and entire agricultural plots just within a period of one month by executing two sale-deeds. It also rightly found that Mohammad Anis, who was living with Sabbirunnisan was never consulted regarding the two sale-deeds. It also rightly considered the fact that marginal witnesses of sale-deeds were not examined except Baldeo whose evidence was found unworthy of reliance and has been found to be highly interested witness. It is also strange that no near relations of the executant accompanied her at the time of execution of the two sale-deeds. Mohammad Anis was kept out of the picture. There was also no evidence to establish that the sale-deeds were read over and explained to Sabbirunnisan who executed the same after knowing and understanding the contents and nature of transactions and also its consequence that she was going to be deprived of her residential house as well as her residential plots. Consequently, the two impugned sale-deeds were liable to be cancelled and were rightly cancelled by the lower appellate court.

20. The decree for possession was also rightly granted. If Sabbirunnisan was forcibly dispossessed by Hakimuddin on the basis of the impugned sale-deeds, she was liable to get back possession of the subject-matter of the sale-deeds.

21. The lower appellate court refused to pass a decree for damages amounting to Rs. 800. Since nothing was urged on this point and no cross-objection was filed, this part of the decree of the lower appellate court also requires no interference.

22. In the result, the appeal has no merit and is bound to fall. Since the deceased-plaintiff filed the suit as an indigent person (in forma pauperis), the respondent Mohammad Anis, who claims through the deceased-plaintiff will get the cost of this appeal from the appellant.

23. The appeal is accordingly dismissed with cost.