

Dharman and Six ors. Vs. Marimuthu

Dharman and Six ors. Vs. Marimuthu

SooperKanoon Citation : sooperkanoon.com/822751

Court : Chennai

Decided On : Jul-02-1996

Reported in : 1996(2)CTC279

Judge : D. Raju, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 100 - Order 6, Rule 4;
[Contract Act, 1872](#) - Sections 16; [Evidence Act, 1872](#) - Sections 101 to 104;
[Transfer of Property Act, 1882](#) - Sections 122 and 126

Appeal No. : Second Appeal No. 744 of 1983

Appellant : Dharman and Six ors.

Respondent : Marimuthu

Advocate for Def. : A.K. Kumarasamy, Adv.

Advocate for Pet/Ap. : G. Subramaniam, Sr. Counsel for ;Prabhakar, Adv.

Disposition : Petition dismissed

Judgement :

ORDER

D. Raju, J.

1. Defendants 2 to 7 in O.S.No.338 of 1977 on the file of the Court of District Munsif, Ariyalur, who succeeded before the Trial Court, but lost before the First Appellate Court, are the appellants in the above second appeal. The suit came to be filed by the respondent/plaintiff for declaration of the plaintiff's title over the suit properties and for permanent injunction restraining the defendants from interfering with the peaceful possession of the suit properties by the plaintiff or in the alternative the relief of possession and future mesne profits and for costs. The plaintiff is the brother's son of the first defendant, who died pending suit. The second defendant is the son-in-law of the first defendant and the third and fourth defendants are the brothers of the plaintiff and the first defendant respectively. Defendants 5 to 7 are daughters of the first defendant, who were impleaded as the legal representatives of the deceased first defendant. The case of the plaintiff was that the first defendant executed a registered gift deed in his favour on 1.10.1977 marked as Ex.A-6 in respect of the suit properties, that the settlement came into force immediately and the plaintiff began cultivation of suit items 1 to 6, that subsequently, defendants 2 to 4 kidnaped the first defendant and caused the issuance of a notice with false allegations, marked as Ex.A-3, that the plaintiff issued a reply to the same, marked as Ex.A-5 and that the plaintiff's possession was sought to be disturbed by the defendants necessitating the filing of the suit for the reliefs referred to supra. It was also the plea of the plaintiff that the daughters of the first defendant neglected and were not maintaining the first defendant properly, that it was the plaintiff, who was taking care of him and maintaining him, that as a matter of fact, the plaintiff had spent Rs. 1,300 towards the medical expenses of the first defendant, who had no male issue as such and the document Ex.A-6 came to be executed out of love and affection, and in recognition of the help, assistance and services that were being rendered by the plaintiff. The first defendant was said to have also cancelled Ex.A-6 gift deed by a deed of revocation dated 25.11.77 marked as Ex.B-3. The case of the plaintiff was that the first defendant was in good and sound state of health when he executed the gift deed dated 1.10.1977. The written statement came to be filed by defendants 1 to 4 even when the first defendant was alive. It was contended therein that the settlement deed dt. 1.10.1977 is not true and it was not acted upon, that the plaintiff has not spent Rs. 1,300 towards medical expenses of the first defendant

as claimed, that the first defendant never treated the plaintiff as a male issue for him, that the allegation that the defendants have kidnapped the first defendant or was responsible for the issuance of notices as well as the execution of the deed of cancellation of the gift deed in plaintiffs favour was incorrect, that the notice sent by the first defendant contained true and correct facts as to what had happened and that the first defendant neither had any intention to execute any gift deed nor was possessed of the required mental condition or was in sound state of mind to know the contents of the settlement deed. 'the first defendant, it was further contended, was forced to put his thumb impression in a deed, that when he later attained consciousness, he came to know from the villagers about his having executed a gift deed and immediately thereafter he took action by issuing a notice and subsequently executing a cancellation deed. While claiming that the first defendant was sufficiently taken care of by the daughters and son-in-laws, it was also claimed that the first defendant had no justification or reason for executing a gift deed of all his properties in favour of the plaintiff disinheriting the daughters. Defendants 2 and 4 were contended to be unnecessary parties. On the above the defendants prayed that the suit should be dismissed as unwarranted.

2. On the above claims and counter claims, the suit came to be tried and both sides adduced oral and documentary evidence. After considering the materials on record, learned Trial Judge by his judgment and decree dated 27.9.1980 held that the plaintiff has failed to prove that the first defendant executed the settlement deed dt.1.10.1977 when he was in sound state of mind and out of his free will and he has not also produced any evidence to substantiate his claim of kidnapping of the first defendant by other defendants before issuing the Notice Ex.A-3 and effecting a cancellation of the gift deed in favour of the plaintiff. Learned Trial Judge after a careful analysis has chosen to view the evidence of P.W.I to be not acceptable, in contrast to the evidence of the defendants, which found favour of acceptance with the learned Trial Judge, but ultimately recorded a finding that the gift deed dated 1.10.1977 was not a true and valid document and it was neither binding upon the defendants nor was acted upon. The plaintiff was also held to be not entitled to protect his possession or recover possession. The plea that defendants 2 to 4 were unnecessary parties were rejected.

3. Aggrieved the plaintiff pursued the matter on appeal in A.S.No.61 of 1981 (originally A.S.No. 48 of 1981 on the file of the District Court, Trichirapalli) on the file of the Sub-Court, Ariyalur. Learned Subordinate Judge deviated from the conclusions arrived at by the learned Trial Judge and chose to believe the evidence of P.Ws. in preference to that of the D.Ws. and readily accepted the plea of the alleged kidnapping of the first defendant by the other defendants from the plaintiffs place. While observing that there is nothing unnatural about the evidence of P.Ws., the learned First Appellate Judge also held that the gift deed - Ex.A-6 came to be executed and that the first defendant had not reserved any right to revoke the gift deed marked as Ex.A-6. Learned First Appellate Judge held that Ex.B-3 the deed of cancellation was neither valid in law nor has any legal force and that therefore, the cancellation deed was illegal. Learned First Appellate Judge also held that there was no secrecy in the execution of Ex.A-6 and it was done publicly and in open without playing any fraud and that the first defendant was fully alive and aware of what he was doing. Possession was also found to be with the plaintiff of the suit schedule properties. Thus, learned First Appellate Judge by his judgment and decree dated 22.12.1981 set aside the judgment and decree of the learned Trial Judge and while allowing the appeal decreed the suit for declaration and injunction as prayed for.

4. While admitting the above second appeal, the learned Judge found the following substantial question of law to arise in the appeal for consideration of this Court:

'The main question that arises in the second appeal is whether the gift deed Ex.A-6 said to have been executed by the first defendant is revocable under Section 126 of the Transfer of Property Act as has been done by him under Ex.B-3 on the ground that the contract is rescindable under the appropriate provisions of the Contract Act?'

5. Mr. G. Subramaniam, learned Senior Counsel appearing for the appellant contended that mere registration of a gift deed is by itself of no consequence in law and the claimant under Ex.A-6 is bound to satisfy the court that the gift deed in question was duly executed voluntarily and dispel all or any of the suspicious circumstances in relation to the execution of the document. Argued the learned

Senior Counsel further that the Gift deed Ex.A-6 was a revocable one and that it is rescindable on all or any of the grounds on which a contract could be rescinded and as far as the case on hand is concerned, the lower Appellate Court committed a grave error in assuming and taking it for granted things unlike the learned Trial Judge, who has meticulously considered all the materials in their proper perspective objectively before rejecting the claim of the plaintiff and that the reasons assigned by the learned First Appellate Judge to disturb the well merited findings of the learned Trial Judge are arbitrary and proceeded on the basis of giving importance more to the procedure than the substance of reality in the matter and consequently the judgment of the learned First Appellate Judge is liable to be set aside. Per contra, Mr. A.K. Kumaraswamy, learned counsel appearing for the respondent/plaintiff, while adopting the reasoning of the learned First Appellate Judge as part of his argument and supporting the judgment of the First Appellate Court, also contended that the appreciation of evidence by the First Appellate Judge cannot be said to be vitiated or perverse and that therefore, there is no need or scope for interference in the judgment and decree of the First Appellate Court. Counsel appearing on both sides have not only taken me through the judgments of both the courts below in support of their respective stand points, but have invited my attention to some of the earlier judicial pronouncements touching the aspect and issues arising in the case and it will be useful to refer to those decisions before undertaking a consideration of the points involved in this case in the light of such principles.

6. In *Manickathammal and Ors. v. Nallasami Pillai and Ors.*, (1976) 89 LW 419 a Division Bench of this Court was dealing in the context of a suit for specific performance, the significance and the importance involved in the matter of proof relating to the making of a document. It was observed therein as follows:

'This is a very peculiar case in which the plaintiff is seeking for the equitable relief of specific performance basing his claim solely on the recitals in Ex.A-1. In construing deeds which speak by themselves, but which speech is likely to affect some parties to it, the court should take the precaution of seeing that the document is not only technically proved but the recitals therein are true. The Courts ought not to, as a matter of course, adopt the recitals as true if a genuine

doubt by reason of the circumstances and the evidence let in in this case arises and which would prompt the court to require a much better standard of proof of the recitals rather than accepting the recitals as such without any further expatiation of the same. In such cases where the courts are compelled to probe into the realities of the situation and the truth of the recitals the Courts jurisdiction to buttress such recitals has been recognised consistently by our Court and the Supreme Court. Such recitals may be telling and forcible but yet, they might require further proof for acceptance by a court of law.'

7. In Sayyaparaju Surayya v. Koiurs Kondamma, : AIR1950 Mad239 a Division Bench of this Court held that an admission by the executant of a document of having affixed his or her thumb impression does not amount to admission of execution. It was held' therein by the Division Bench as hereunder:

'The admission required, therefore, is admission of the execution of the document. It may be a sale-deed, it may be a mortgage deed. It is not enough for the person, who is the ostensible executant, to admit his signature on a paper on which, it may be, the document is ultimately engrossed. The identity of the papers on which the signature occurs is not sufficient. If a man says that he signed a blank paper on the representation that it was required for presenting a petition, as in the present case or if a man signs a completed document on the representation that his signature or thumb impressions is required as an attesting witness, that admission of the signature or thumb impression in those circumstances cannot be construed to be an admission of the execution of the document. Far from its being an admission, it is a clear and unambiguous denial of the execution of the document. He must admit, in order to attract the provisions of Section 35(I), that he signed the document, viz. a sale-deed or a mortgage deed or a lease deed, as the case may be. Some light is thrown on this question by the observations of the Privy Council in Puranchand Nahatta v. Monmothonath Mukherji, 55 Cal.532 : A.I.R.1928 P.C.38. No doubt the question which their Lordships of the Judicial Committee were considering was different from the question now before us. But their Lordships were defining the expression 'person executing' in the Act, and it is pointed out that the expression is not identical with the 'person signing'. 'They mean' to quote the words of their Lordships at p.537 'something more, namely, the

person who by a valid execution enters into obligation under the instrument.' The admission of execution, therefore, must amount to an admission that the person admitting entered into an obligation under the instrument; in other words, that he had executed the document, signed it as a sale deed, mortgage deed or a lease deed, as the case may be.'

It was reiterated further therein by advertng to an earlier Full Bench judgment reported in Guruviah v. Venkatarathinam, I.L.R. 1947 Mad 833, that the mere fact that the signature on the document was admitted is not to be treated as execution of the document so as to make it the imperative duty on the part of the Registrar to register the same and the admission of signature cannot be taken to be either conclusive or as constituting admission of execution of the document.

8. In Chennupati Venkatasubbamma v. Nelluri Narayanaswami, 1954 (I) M.L.J 194 it was held by a learned single Judge of this Court that the fact that a deed of gift was executed and registered would not make it irrevocable if in fact there was no acceptance by the donee either before registration but after execution or even after registration. Learned Senior Counsel for the appellant wanted to impress his stand point by advertng to the observation that there should be evidence of positive conduct of accepting the deed as valid. In Inche Noriah Binte Mohamed Tahir v. Shaik Allie Bin Omar Bin Abdullah Bahashuan, AIR. 1929 P.C. 3 where the donor was an old woman, unable to leave the house, relying entirely upon the donee, her nephew, for everything even for her food and clothes and had no knowledge of her own affairs, so that she was totally and completely in the donee's hands, such relationship between the donor and donee was considered sufficient to raise the presumption of the influence of the donee over the donor and to render it incumbent upon him to prove that the gift was the spontaneous act of the donor acting under circumstances which enabled her to exercise an independent will. Their Lordships observed further that it is necessary for the donee to prove that the gift was the result of the free exercise of independent will and the most obvious way to prove this is by establishing that the gift was made after the nature and effect of the transaction had been fully explained to the donor by some independent and qualified person so completely as to satisfy the court that the donor was acting independently of any influence from the donee and with the full

appreciation of what he was doing and that in cases where there are no other circumstances this may be the only means by which the donee can rebut the presumption. It was further observed therein as hereunder:

'In the present case their Lordships do not doubt that Mr. Aitken acted in good faith, but he seems to have received a good deal of his information from the respondent; he was not made aware of the material fact that the property which was being given away constituted practically the whole estate of the donor, and he certainly does not seem to have brought home to her mind the consequences to herself of what she was doing, or the fact that she could more prudently, and equally effectively, have benefited the donee without undue risk to herself by retaining the property in her own possession during her life and bestowing it upon him by her will. In their Lordships' view the facts proved by the respondent are not sufficient to rebut the presumption of undue influence which is raised by the relationship proved to have been in existence between the parties; and they regard it as most important from the point of view of public policy to maintain the rule of law which has been laid down and to insist that a gift made under circumstances which give rise to the presumption must be set aside unless the donee is able to satisfy the Court of facts sufficient to rebut the presumption.'

9. The decision in *K. Varadhan v. Pattammal (died) and Ors.*, 1992 (2) L W 209 is one of wherein a Division Bench of this Court while dealing with a challenge made to a deed executed by an illiterate woman, who could not act without help, by merely affixing her thumb impression, held that the onus lies heavily upon the person claiming benefit under a document to show that there had been no fraud or undue influence or coercion, or misrepresentation. In *MST. Sethani v. Bhana*, A.I.R.1993 S.C. 956 the Apex Court was considering a challenge to the sale deed said to have been executed by a tribal woman, who was old, illiterate and blind, in favour of her relative with whom she was living till her death and was dependent on him and it was held therein by their Lordships of the Apex Court as hereunder:

'4. We have heard learned counsel for the parties. The facts are so glaring, still the onus to prove the issue has been over emphasised. It is true that the initial onus to prove undue influence was on the plaintiff-appellant, but the onus, in the facts and

circumstances of the case, was easily discharged. It is the respondent who had obtained the sale deed in his favour way back on 1.4.1963 by a registered sale deed, which saw the light at a late stage of the trial. From the certified copy thereof it was evident that no consideration passed at the time of the sale. Nobody from the registration office was examined to explain the sale. No evidence was led by the respondent to discharge the onus that the sale deed was executed under no undue influence, even though the vendor was old, blind, illiterate and tribal woman totally at the mercy of the respondent, with whom she was living till her death. The parties were so situated that Bhana- respondent was in a position to dominate the will of Putlibai and was in a position to obtain any unfair advantage over her. It is also in evidence that Putlibai was dependent on the respondent. The trial Court had given cogent reasons to come to the finding that the sale deed was vitiated on account of the condition in which Putlibai was put due to her relationship with Bhana- respondent, as well as the manner and nature of the transaction. The High Court, in our view, erroneously took the view that the plaintiff-appellant was unable to discharge the onus that the transaction was as a result of undue influence. There was no cogent reason to come to that view and more so to upset the well reasoned finding recorded by the trial Court. Therefore, opting for the view of the trial Court, we reverse the finding that the sale deed was executed by the mother of the appellant under undue influence of the respondent who took advantage of the helplessness of the old widow of his brother. The advantage thus obtained by him must thus be returned.'

10. In *Sher Singh and Ors. v. Pirthi Singh and Ors.*, : AIR1975 All259 learned single Judge of the Allahabad High Court had an occasion to consider an appeal arising out of a suit filed for cancellation of a deed of gift executed by an illiterate, rustic villager aged about 80/90 years physically infirm and mentally in distress with none to look after him after the death of his wife and the marriage of his two daughters except his nearest relatives who looked after his daily needs and managed his cultivation, in whose favour the gift came to be made depriving him of all his transferable properties during his lifetime. The learned Judge analysed the situation in the context of the principles to be kept in view in dealing with such a challenge in the following terms:

'6. Section 16 of the Indian Contract Act incorporates the principles relating to undue influence. As pointed out by the Supreme Court in *Ladli Prasad Jaiswal v. The Karnal Distillery Co. Ltd.*, : [1964]1SCR270 the doctrine of undue influence under the common law was evolved by the Court in England for granting protection against transactions procured by the exercise of insidious forms of influence spiritual and temporal. The doctrine applies to acts of bounty as well as to other transactions in which one party by exercising his position of dominance obtains an unfair advantage over another. The Indian Contract Act is founded substantially on the rules of English common law. Sub- Section (1) of Section 16 of the Contract Act lays down the principle in general terms. By sub-section (2) a person is deemed to be in a position to dominate the will of another if the conditions set out therein are fulfilled. Sub-section (3) lays down the conditions for raising a rebuttable presumption that a transaction is procured by the exercise of undue influence the reason for the rule in the third sub-section is that a person who has obtained an advantage over another by dominating his will, may also remain in a position to suppress the requisite evidence in support of the plea of undue influence. In the present case, as observed earlier, the plaintiff was an illiterate, rustic villager aged about 80/90 years, physically infirm and mentally in distress. He had none to look after him after the death of his wife and the marriage of his two daughters. The defendants were his nearest relations who at one time formed a joint family. They looked after his daily needs and managed his cultivation. They were obviously in a position to dominate his will. It was, therefore, for the defendants to establish to the satisfaction of the court that the gift deed had been obtained without exercising undue influence. The law did not require the plaintiff to establish positively that in fact the deed had been obtained by exercising undue influence and in that view of the matter the plaintiff could not be expected to set out in detail the elements undue influence in the plaint. It was enough to point out that the defendants were in a position to dominate his will and that they obtained an unfair advantage by using that position. The plaintiff has led undisputed and unassailable evidence to establish the aforesaid facts and the same position emerges from the stand taken by the defendants. The transaction in question is unconscionable on the face of it. Under the impugned deed the plaintiff was deprived of all his transferable properties during his lifetime. Moreover, there

appears to be no apparent reason to impel the plaintiff to deprive his daughters and their sons the right to inherit the properties after his death. In such a situation the burden lay on the defendants to rebut the presumption and to establish by cogent evidence that the confidence was not abused and the transaction was not induced by undue influence and the gift deed was executed under circumstances which enabled the donor to exercise an independent will. The defendants have miserably failed to discharge the burden cast on them. It appears from the testimony of Sher Singh himself, who is the solitary witness in support of the defence case, that the document was not prepared at the instance of the plaintiff. The scribe has not been examined who could depose whether he prepared the document on the instructions of the plaintiff or was directed to do so by the defendants. Sher Singh admitted that he collected all the details of the Bhumidhari plots.

It appears doubtful if the document was read over and explained to the plaintiff before registration. Sher Singh admitted in his cross-examination that the document was read over only once when the scribe took it from the registration office after it had been registered. The defendants did not examine Budh Singh and Tika Singh, the two attesting witnesses, who had been cited as witnesses and were even present in court when the plaintiff's Sher Singh examined himself. Tika Singh was present in court even on the next day. The failure to examine these witnesses, who according to Sher Singh were present when the document was scribed and had accompanied Pirthi Singh to the registration Office where the document was registered, creates serious doubts about the bona fide of the transaction. Their examination may not have been necessary to prove due attestation of the document but it was certainly necessary to rebut the presumption and explain the circumstances in which the gift deed came into existence. The statement of Sher Singh is not sufficient to discharge the burden which lay on the defendants. His testimony to the effect that the idea of executing a gift deed in favour of the defendants was initiated by the plaintiff himself and it was outcome of his own free will has been rightly rejected as he does not appear to be a truthful witness. In his anxiety to show that he was a totally disinterested and innocent person he went to the extent of stating that he was not even aware that the daughters were the legal heirs of the plaintiff and that he did understand what was

meant by 'Washiyatnama' and 'Hibbanama'. The defendants took a prominent part in the execution of the gift deed. They collected all the material details of the Bhumidhari plots, purchased the stamps and appear to have got the document scribed under their instruction. The plaintiff due to his physical and mental infirmities remained unaware and ignorant of the consequences of the act which he was induced or misled to perform. Being a simple illiterate villager, he was left with no will or mind of his own due to extreme old age and serious physical ailments which made him totally dependent on others and the defendants took advantage of his helplessness and got the gift deed executed in their favour.'

11. In *Ladli Parshad Jaiswal v. The Karnal Distillery Co. Ltd. and Ors.*, : [1964]1SCR270 the Apex Court while dealing with a plea of undue influence operating as a vitiating circumstance of a document held as hercunder:

'A transaction may be vitiated on account of undue influence where the relations between the parties are such that one of them is in a position to dominate the will of the other and he uses his position to obtain an unfair advantage over the other. It is manifest that both the conditions have ordinarily to be established by the person seeking to avoid the transaction; he has to prove that the other party to a transaction was in a position to dominate his will and that the other party had obtained an unfair advantage by using that position. Clause (2) lays down a special presumption that a person is deemed to be in a position to dominate the will of another where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other or where he enters into a transaction with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress. Where it is proved that a person is in a position to dominate the will of another (such proof being furnished either by evidence or by the presumption arising under Sub-section(2) and he enters into a transaction with that other person which on the face of it or on the evidence adduced, appears to be unconscionable the burden of proving that the transaction was not induced by undue influence lies upon the person in a position to dominate the will of the other. But sub- section (3) has manifestly a limited application the presumption will only arise if it is established by evidence that the party who had obtained the benefit of a transaction was in a position to dominate the will of the

other and that the transaction is shown to be unconscionable. If either of these two conditions is not fulfilled the presumption of undue influence will not arise and burden will not shift.'

12. In *Lakshmi Amma and Anr. v. Talengala Narayana Bhatta and Anr.*, : AIR 1970 SC1367 the Supreme Court was considering an appeal which arose out of a suit challenging a deed of settlement of the executant his entire property in favour of one of the grandsons to the exclusion of his own issues and other grand children. Their Lordships of the Apex Court noticed the salient features of the settlement and the ultimate conclusions arrived at in the following terms:

'5. The first noticeable feature is that the deed of settlement on the face of it was an unnatural and unconscionable document. Narasimha Bhatt made negligible provision for his wife who was his third wife, the first two having died before he married her, She was left mainly to the mercy of respondent No. 1. Admittedly there was a residential house and no provision was made regarding her right to reside in that house till her death. Apparently there was no reason why he should have left nothing to his two daughters or to his other grand-children and given his entire estate to only one grandson namely respondent No.1.'

In *Nagubai Ammal and Ors. v. B. Shama Rao and Ors.*, : [1956]1SCR451 the absence of a specific plea on a point and the consequences flowing from the same came to be dealt with and their Lordships of the Apex Court held as follows:

'(11) the question of *Us pendens* was raised by the plaintiff at the very commencement of the trial on 8.8.1947 when he went into the witness-box and filed in his examination-in- chief Exhibit J series, relating to the maintenance suits, the decree passed therein and the proceedings in execution thereof, including the purchase by Devamma. This evidence is relevant only with reference to the plea of *lis pendens*, and it is significant that no objection was raised by the defendants to its reception. Nay, more.

On 13.3.1947 they cross-examined the plaintiff on the collusive character of the proceedings in Exhibit J series, and filed documents in proof of it. The trial went on thereafter for nearly three months, the defendants adduced their evidence, and the

hearing was concluded on 2.6.1947. In the argument before the District Judge, far from objecting to the plea of lis pendens being permitted to be raised, the defendants argued the question on its merits, and sought a decision on the evidence that the proceedings were collusive in character, with a view to avoid the operation of Section 52, T.P.Act.

We are satisfied that the defendants went to trial with full knowledge that the question of lis pendens was in issue, had ample opportunity to adduce their evidence thereon, and fully availed themselves of the same, and that, in the circumstances, the absence of specific pleading on the question was a mere irregularity, which resulted in no prejudice to them.',

13. In Ramaswami Jadayya Gounder (died) and Anr. v. V.T. Elaiya Pillai and Anr., (1972) 85 L.W. 164 Kailasam, J. as the learned Judge then was, held that in a case where the plea of the executant of a document was that he was an illiterate and that apart from putting his signature, he does not know to read or write the burden was heavily on the plaintiff to prove. In S. Rathnam Naidu and Anr. v. Kanni Ammal and Ors., 85 L.W.P. 372 learned Single Judge of this court also took a similar view on the burden of proof on a donee. In Sreedhara Pai and Ors. v. Damodara Naicken Siva Naiken, 1980 (2) Kerala Series 41 Khalid, J. as the learned Judge then was, while dealing with a gift deed, which contained an unnatural disposition observed as hereunder:

'17. I may in passing refer to another submission made by the plaintiffs' counsel that the gift deed is unnatural. The document does not give any reason why the donor should have excluded all his heirs in preference of the donee for the conferment of this benefit to him. In the absence of any acceptable reasons, the document has to fail for the reason that it is unnatural. In support of this plaintiffs' counsel relied upon the decision of the Supreme Court in Lakshmi Amma v. T. Narayana : AIR 1970 SC1367 . There the Supreme court was considering a deed of Settlement by which the entire property was settled in favour of one of the grandsons to the exclusion of his own issues and other grandchildren and making a very negligible provision for his third wife the other two wives having predeceased him. The Supreme Court held that:

'The dispositions which were made by Ext.B3, as already pointed out before, were altogether unnatural and no valid reason or explanation has been given why Narasimha Bhatta should have given everything to respondent 1 and even deprived himself of the right to deal with the property as an owner during his life-time. All these facts and circumstances raised a grave suspicion as to the genuineness of the execution of the document Ext.B-3 and it was for respondent 1 to dispel the same.'

Here, the unnaturalness is more. All the grandsons who are heirs have been excluded. The donee is the brother's son who is not an heir. There is no explanation nor any valid reason given why the legal heirs have been excluded. This circumstance, fortifies the conclusion that the donor would not have executed the document.'

14. Mr. A.K.Kumarasamy, learned counsel appearing for the plaintiff/respondent has adverted to some other decisions of which Vannathi Valappil Janaki and Ors. v. Puthiya Purayil Paru and Ors., : AIR1986 Ker110 is one where, the learned Single Judge of the Kerala High Court has held that when a gift deed shown to have been accepted by the donee and they are in possession of the property the fact that after making the gift the donors felt that it was a folly or imprudence or want of foresight on their part to have executed the deed of gift will not clothe them with power of revocation of the gift. In coming to such a conclusion, the learned Judge has applied the principles laid down in Allcard v. Skinner, 1887 (36) Ch D 145 wherein it was held that Courts of equity of folly, imprudence or want of foresight on the donors and the Courts have always repudiated any such jurisdiction. In Afsar Shaikh and Anr. v. Soleman Bibi and Ors., : [1976]2SCR327 the Apex Court, while observing that the law as to undue influence in the case of a gift inter vivos is the same as in the case of a contract is embodied in Section 16 of the Contract Act, emphasised about the necessity for a separate pleading about undue influence and of the view that a general allegation in the plaint that the plaintiff was a simple old man of ninety who has reposed great confidence in the defendant was much too insufficient to amount to an averment of undue influence. It was also further considered in the said decision the scope of appellate powers under Section 100 C.P.C. and it was held that the question as to whether a person

is in a position to dominate the will of another and procured a certain deed by undue influence, is a question of fact, which cannot be reopened in second appeal if decided in accordance with the prescribed procedure.

15. In the decision reported in *Subhas Chandra Das Mushib v. Ganga Prosad Das Mushib and Ors.*, : [1967]1SCR331 also the Supreme Court had the occasion to deal with the manner of consideration required in a challenge to a gift document on the basis of undue influence. The principles as found capsulated in Headnote B & C are as follows:

'(B) Contract Act (1872), Section 16 - Proof of undue influence - Three consecutive stages for consideration - No presumption of undue influence can arise merely because parties were nearly related to each other or merely because donor was old or of weak character - Relation in which such presumption arises indicated A.F.O.D.No.193 of 1954, D/-12.8.1960 (Cal), Reversed.

The Court trying a case of undue influence must consider two things to start with, namely, (1) are the relations between the donor and the donee such that the donee is in a position to dominate the will of the donor, and (2) has the donee used that position to obtain an unfair advantage over the donor? Upon the determination of these issues a third point emerges, which is that of the onus probandi. If the transaction appears to be unconscionable, then the burden of proving that the contract was not induced by undue influence is to lie upon the person who was in a position to dominate the will of the other.

Merely because the parties were nearly related to each other or merely because the donor was old or of weak character, no presumption of undue influence can arise. Generally speaking the relations of solicitor and client, trustee and cestui quo trust, spiritual adviser and devotee, medical attendant and patient, parent and child are those in which such a presumption arises.

(C) Civil P.C.(1908), Order 6 Rule 4 and 2, Order 7, Rule 1 - Plea of undue influence - Court must scrutinise pleadings to find out that a plea has been made out and that full particulars thereof have been given before examining whether undue influence was exercised or not. : [1964]1SCR270 and (1906) 33 Ind App 86

(PC), Rel .on.'

16. I have carefully considered the submissions of the learned counsel appearing on either side, in the light of the various decisions and the principles laid down therein, which were relied upon by the learned counsel appearing on either side with great force and pursuant. As against the submission of the learned counsel for the respondent that the factual issues which were arrived at by the learned First Appellate Judge on an appreciation of the evidence on record do not call for any interference in the above Second Appeal within the parameters laid down under Section 100 of the Code of Civil Procedure. Learned Senior Counsel for the appellants placed reliance upon a recent decision of the Apex Court in *Surain Singh (dead) By Lrs, and Ors. v. Mehenga (dead) by LRS.* : [1996]1SCR1152 to contend that though normally the High Court might not interfere with the findings recorded by the First Appellate Court in view of the diverse views recorded by the Trial Court and Appellate Court, there could be no impediment for this Court and that as a matter of fact it would be necessary even for the High Court while dealing with a second appeal to advert to all the material evidence and relevant circumstances to ensure whether the findings recorded though of fact, was based on legally acceptable evidence and deserves to be interfered or allowed to stand undisturbed.

17. The various decisions referred to above would go to show that if on the face of the document and the nature of the transaction covered by the document appears to be either unconscionable or unnatural one, the burden of proving that the transaction was not induced by undue influence was considered uniformly to rest with the beneficiary under the document. That apart, the various decisions noticed also point out sufficiently indicating as to what type of circumstances present in a particular or given case could be taken to provide the necessary indicia or test to form an opinion about the unnatural or unconscionable character of the transaction. In the case on hand the contents of the gift deed in question and the consequences that may be brought about if the gift under Ex.A-1 is sustained and enforced are to be analysed in the light of the principles referred to above. Some of the admitted facts and stark realities flowing there from cannot escape the attention of any judicial forum dealing with any issue before it objectively and

judiciously.

The materials on record would go to show in this case at any rate, that the deceased first defendant had three daughters, who were married and have their own children, that the plaintiff is only the brother's son of the first defendant who executed the gift deed that the plaintiff had another brother and the first defendant also had a brother and that even as admitted in the very plaint itself the deceased first defendant was an inpatient in the Ariyalur Government Hospital from 22.9.77 and the plaintiff himself claims to have spent about Rs. 1,300 towards the first defendant's medical expenses, though it is not stated by him as to when he became alright or what his ailment was and when he got discharged from the hospital. Further a perusal of the gift deed Ex.A-6 would go to show that it is not only cryptic but makes no mention of the daughters or about the so called misunderstandings between the first defendant and his daughters or furnish any reasons for disinheriting completely his daughters and grand children. It is not also in dispute that the properties which were the subject matter of the Gift under Ex.A-6 are the only and the entire or totality of the properties owned and possessed by the first defendant and in spite of the same there is not even any recital incorporating any clause reserving any right for himself during his lifetime or any provision in the gift deed to revoke the same, if the plaintiff fails to take care of him. Though normally, courts do not concern itself with a man making even an improvident gift or effecting a disposition of the property in a way that no right-minded person would be disposed to do so, such factors or circumstances appended with the execution of a gift may furnish a clue or serve as a pointer to the fact that the donor either did not intend it or that it was an unconscionable and unnatural transaction and in such circumstances the beneficiary under such transaction is bound in law to clear such suspicions or explain about the existence of some valid or other reason for such a disposition being made. It is in such circumstances, the Apex Court also on more than one occasion observed that if the transaction appears to be unconscionable, then the burden of proving that the contract was not induced by undue influence lies heavily upon the beneficiary under the document, who was in a position to dominate the will of the other. In the case on hand, apart from the unreasonable nature of the gift as disclosed from the contents of the document and also from the facts and circumstances of the case,

the reaction of the 1st defendant on coming to know of the whole affair, would show that the first defendant who executed the gift on 1.10.1977 has issued a notice through his counsel on 17.11.1977 resiling from the transaction giving out the circumstances under which such a document came to be executed, followed by the execution of a registered deed of cancellation on 25.11.1977 of the Gift deed dt. 1.10.1977. If the conglomeration of all these vital facts and important events are kept in the background of consideration as to whether the plaintiff has successfully substantiated the fact that the gift of the immovable property has been made 'voluntarily' the inevitable could be, in my view, only in the negative as has been found by the learned Trial Judge. The learned Trial Judge was prepared to give due weight to the indifferent condition of health of the executant in the light of the admissions in the plaint itself, the evidence tendered by the defendants as also some of the admissions made by the P.Ws. themselves that a person of the age and the condition of health of the deceased first defendant could not have had a sound disposing state of mind and free will when the gift deed in question was executed. This finding of fact recorded by the learned Trial Judge has not been properly met by the learned First Appellate Judge before it could be disturbed and on the other hand, learned First Appellate Judge revelled in picking up holes and lapses in the evidence in an artificial manner unmindful of the practicalities of the situation and allowed assumptions triggered out of mere conjectures to overtake an objective adjudication to come to a conclusion that the first defendant was not only hale and healthy, but had the required sound disposing state of mind. Learned First Appellate Judge has also, in my view, miserably failed to keep into account the unnatural nature of the disposition and total absence of any reasons in the document for completely disinheriting all the daughters without even making any mention of the existence of such daughters and their heirs who would all figure as class-I heirs under the law of Succession. Thus, the method of dealing and manner of consideration of the materials on record by the learned First Appellate Judge, in my view, is grossly inadequate and thoroughly unsatisfactory and cannot have the approval of this Court, even in dealing with the same as a second Appellate Court, particularly, when the contra view and conclusions expressed by the learned Trial Judge appears to be more reasonable and convincing and conform to the legal norms and rational standards of adjudication

for being readily accepted, in my view, on an over-all consideration of both the Judgments, learned First Appellate Judge in my view has failed to properly come into the grips of the relevant and vital aspects of the case as also the findings recorded by the learned Trial Judge and the reasons assigned therefor. The principles uniformly laid down in the decisions of Court as noticed above, have been totally ignored and by passed in the consideration by the first appellate judge. The fact that the Written Statement did not contain a positive accusation of any undue influence having been played by the plaintiff upon the deceased first defendant cannot be blown out of proportion in the tenth of the very admissions contained in the plaint about certain facts which would go to show beyond doubt if at all, only the dominating position in which the plaintiff was placed viz. the first defendant rather than going to exculpate the plaintiff from the charge of having exercised such undue influence. It is not the specific mention of the very word undue influence that really matters but the existence of the relevant facts in the case pleaded and proved that is only relevant and sufficient. As noticed earlier, the beneficiary under document of the nature under consideration in this case with an unreasonable and unconscionable disposition is obliged not only to substantiate that the deed of gift was executed voluntarily but also without any undue influence having been practised upon the donor. If the question to be considered is as to whether the plaintiff has succeeded in such an effort, which is essential and which becomes necessary for the plaintiff/donee in this case to convince the court before he is allowed to retain the benefit of the transaction, the answer, in my view, has to be in the negative as held by the learned Trial Judge. In view of the above, I consider it more appropriate among the two judgments of the learned Trial Judge and that of the learned First Appellate Judge to opt for the view, and conclusions and findings arrived at and recorded by the learned Trial Judge, which are more convincing, acceptable and keeping in tune with the settled proposition of law in the context of a peculiar case of the nature under consideration in this case. Consequently I am unable to agree with the learned counsel for the respondent no case has been made out in this appeal for interference at the instance of the defendants.

18. For all the reasons stated above, I allow the second appeal by setting aside the judgment and decree of the learned First Appellate Judge and restore the

judgment and decree of the learned Trial Judge. But in the circumstances of the case, there will be no order as to costs.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com