

Ballo Vs. Paras Ram

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Court : Himachal Pradesh

Decided On : Jun-03-1971

Reported in : AIR1972HP33

Judge : M.H. Beg, C.J.

Acts : [Transfer of Property Act, 1882](#) - Section 126; ;[Code of Civil Procedure \(CPC\) , 1908](#) - Order 6, Rule 4; ;[Contract Act, 1872](#) - Sections 16(1), 16(3) and 19A; ;[Evidence Act, 1872](#) - Section 111

Appeal No. : Second Appeal No. 92 of 1968

Appellant : Ballo

Respondent : Paras Ram

Advocate for Def. : P.N. Nag and; R.S. Phul, Advs.

Advocate for Pet/Ap. : Chhabil Dass and; D.P. Sud, Advs.

Judgement :

M.H. Beg, C.J.

1. This is a plaintiffs second appeal directed against the concurring judgments of the Courts below dismissing his suit brought for setting aside a deed of gift dated 14th July, 1964 in favour of the defendant-respondent Paras Ram. The plaintiff's counsel had put forward a case for the cancellation of the gift-deed quite

inartistically in paragraph 3 of the plaint as follows:--

'The defendant who is a cunning and mischievous person brought the plaintiff, who is a simple and old person aged 70 years, under his undue influence, for some time and by making misrepresentations, deceived and defrauded him. The defendant told the plaintiff that he would manage his property and that for this purpose, he should execute a general power of attorney (Mukhtiarnama) and due to this deception he got a document executed and attested and registered, of which a copy is marked as Ex. D-1.'

In paragraph 4 of the plaint he stated:--

'After some time, the plaintiff learnt that the document which had been executed was a gift-deed for the whole of his property, but this was executed by fraud. Undue influence, and misrepresentation and pressure which is entirely illegal and is liable to be set aside.'

2. It is clear from these pleadings that the plaintiff had not given particulars of the undue influence although he alleged that there was some influence and pressure brought to bear upon him and that he was too old and simple an individual to be able to resist that pressure. After that, the plaintiff went on to allege that actually he was defrauded by misrepresentations made by the defendant.

3. The defendant, while denying these allegations, stated in para 5 of the written statement:--

'The defendant's sons had turned out the plaintiff from his house so that he was living in the house of the defendant and there he was being looked after during his ill-health and the defendant was serving the plaintiff in every respect and feeding him and clothing him and setting him treated so that, out of his own desire or free will, the plaintiff executed a gift-deed in favour of the defendant which is quite valid and correct and is not liable to be set aside. Moreover, the defendant has spent considerable amount on the illness of the plaintiff and is maintaining him and looking after him so that under the conditions of the gift, and according to the custom and law the gift-deed is not revocable.'

4. It is clear from the above-mentioned paragraph that there was a gift-deed which was alleged to have been executed without pressure of any kind upon the plaintiff. The statement that the defendant's sons had driven out the plaintiff from his house could only be interpreted, in the light of the evidence on behalf of the defendant himself, as meaning that the sons of the plaintiff himself had done that. It was however, clear that the defendant alleged that the plaintiff was in an ailing and helpless condition and that he had been looked after and cared for by the defendant. The natural inference would be that the plaintiff would be highly obliged and would be under his influence. The result is that what the pleadings of the plaintiff lack in particulars about the undue influence was supplied by the pleadings of the defendant. Nevertheless, the Courts below seemed to have been misled by the confusing nature of the pleadings. The trial court framed the following common issue No. 3 on the pleas of fraud and undue influence:--

'Issue No. 3: Whether the gift-deed was obtained by the defendant by fraud and under undue influence, if so, its effect?'

5. The trial Court considered cases cited on the question of fraud and came to the conclusion that the plaintiff's evidence about execution of the gift-deed as a result of the misrepresentation was not believable. The only chance witness produced by the plaintiff to show that the defendant had made the misrepresentation that the plaintiff should execute a general power of attorney was not considered worthy of reliance. The trial Court, although purporting to try the issue of undue influence also, did not consider its requirements at all. It did not determine whether the defendant was in a position to dominate the will of the plaintiff so as to be able to induce him to execute a gift-deed in accordance with his wishes if he had so desired. Although the plaintiff has alleged a pressure on his mind at the time of the executing of the gift-deed, the nature of this pressure was not investigated by the trial Court.

6. It is evident, from an examination of the gift-deed itself, that the plaintiff was asserting, his helplessness and inability to manage the property. He was also acknowledging his debt to the defendant for having looked after him and stated therein that he was under a great obligation to the defendant. Moreover, it was

held by both the Courts below that one of the sons of the plaintiff was deaf and dumb and another had deserted him and could not look after him. In these circumstances an old and ailing man could very well have been induced, with a very slight misrepresentation, to knowingly execute a gift-deed of the kind under consideration here.

7. The lower appellate Court had also considered the question of fraud primarily. It did however, examine the question of the state of the plaintiff's mind at the time of the execution of the gift-deed, and held that the gift-deed was willingly executed according to the evidence given, particularly of a lawyer Shri Santosh Kumar (D. W. 1), produced by the defendant. The question of willing execution of a deed of gift, so that it was, to all appearances, not induced by misrepresentation, is distinct and separate from the question whether the deed resulted from the exercise of undue influence. The question of apparent willingness at the time of execution of deed is distinct and separate from the question of position to dominate the will so as to make it appear that the donor had consented.

8. It appears that several authorities, on the question of undue influence, were placed by the lower appellate Court. There were:--

(1) *Mandarupalli Mastanamma v. Ganguri Adinarayana*, AIR 1966 Andh Pra 104 where it was held that:--

'The matters which are usually relevant in appraising the proof where a gift is impeached on the ground of undue influence were explained by Lord Macnaghten in *Mahomed Buksh Khan v Hosseini Bibi*, (1888) ILR 15 Cal 684 (PC) at PP. 698 to 700 to be (1) whether the transaction is a righteous transaction, that is, whether it is a thing which is a right minded person might be expected to do; (2) whether it was an improvident act, that is to say, whether it shows so much improvidence as to suggest the idea that the donor was not master of himself and not in a state of mind to weigh what he was doing; (3) whether it was a matter requiring a legal adviser, and, (4) whether the intention of making the gift originated with the donor. (2) *Bhola Ram Lieri v. Peari Devi*, AIR 1962 Pat 168, where the requirements of undue influence as contemplated by Section 16 of the Contract Act (1872) were explained. It was emphasised that the capacity of donee to dominate the will of

donor must be investigated and the nature of the transaction, whether it was unconscionable or not after examining whether as natural heirs were excluded or not, should be determined in order to arrive at the conclusion whether a presumption arose that the donee was in a position to dominate the will of the donor. After proving such facts, the burden shifted on to the donee to establish that the transaction was free from undue influence.

(3) *Debi Prasad v. Chhotey Lal*, AIR 1966 All 438 where the principles underlying Section 16 (3) of the Contract Act and the nature of unconscionable transactions, as distinguished from merely a foolish transactions, were discussed.

(4) *Ladli Parshad Jaiswal v. Karnal Distillery Co. Ltd. Karnal*, AIR 1963 SC 1279 where it was held:--'The doctrine of undue influence Under the common law was evolved by the Courts 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 enactment is founded substantially on the Rules of English common law. The first Sub-section of Section 16 lays down the principle in general terms. By Sub-section (2) a presumption arises that a person shall be 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.'

9. This case is particularly important inasmuch as it shows that, although, the findings properly given on a issue of undue influence may be factual, yet, where the Rule that a party should provide particulars of a plea of undue influence is ignored and the Court does not itself examine the pleadings in order to clarify them or insist upon particulars before determining the issue of undue influence, the findings of fact may be vitiated and capable of being interfered with in second appeal. The Supreme Court said:--

'Order 6, Rule 4, Civil P. C. provides that in all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms in the Appendix, particulars (with dates and items if necessary) shall be stated in the pleading. The reason of the Rule is obvious. A plea that a transaction is vitiated because of undue influence of the other party thereto, gives notice merely that one or more of a variety of insidious forms of influence were brought to bear upon the party pleading undue influence, and by exercising such influence an unfair advantage was obtained over him by the other. But the object of a pleading is to bring the parties to a trial by concentrating their attention on the matter in dispute, so as to narrow the controversy to precise issues, and to give notice to the parties of the nature of testimony required on either side in support of their respective cases. A vague or general plea can never serve this purpose; the party pleading must therefore be required to plead the precise nature of the influence exercised, the manner of use of the influence, and the unfair advantage obtained by the other. The Rule has been evolved with a view to narrow the issue and protect the party charged with improper conduct from being taken by surprise. A plea of undue influence must, to serve that dual purpose, be precise and all necessary particulars in support of the plea must be embodied in the pleading; if the particulars stated in the pleading are not sufficient and specific the Court should, before proceeding with the trial of the suit, insist upon the particulars, which give adequate notice to the other side of the case intended to be set up.'

10. The Privy Council had held, in *Satgur Prasad v. Har Narain Das*, AIR 1932 PC 89, that-

'In a suit for setting aside a deed on the ground that it was procured by undue influence and fraud, the finding as to undue influence and fraud is a finding of pure fact.'

It has to be remembered that, as held in *Sheikh Rahmat Ilahi v. Mohammad Hayat Khan*, AIR 1943 PC 208 by the Privy Council, the failure of the Courts below to investigate and to come to a finding upon a basic question of fact constitutes an

error in law. The Privy Council had observed:--

'Their Lordships had occasion to point out in 46 Ind App 140 = (AIR 1919 PC 29). *Damusa v. Abdul Samad*, that where the Courts below had misconceived the real question of fact they had to try, there was an error of law on which a second appeal lay; and, their Lordships can see no difference in principle between a failure to appreciate and determine the real question of fact to be tried and a failure to appreciate and determine a question of fact which vitally affects the issue stated in the case. In either case the failure is a failure in the duty imposed by law upon the Court and the question whether there has been such a failure must, in their Lordships' opinion, be a question of law.'

11. In my opinion, the defects pointed out in *Sheikh Rahmat Ilahi's* case, AIR 1943 PC 208 (*supra*) exist in the determination of the issue of undue influence clearly raised by the pleadings of the parties. It is true that the plaintiff had set out his plea in a manner which was confusing. But, as pointed out by the Supreme Court, in *Ladli Parshad Jaiswal's* case. AIR 1963 SC 1279 (*supra*), it was the duty of the trial Court to clarify the pleadings by obtaining statements from parties or their counsel under Order 1, Rule 10, Civil P. C.. and by calling for particulars. The trial Court should also have framed a separate issue on undue influence.

12. The above-mentioned authorities, as well as the case of *Inche Noriah Binte Mohamed Tahir v. Shaik Allie Bin Omar Bin Abdullah Bahashuan*, AIR 1929 PC 3, which has been cited by learned counsel for the appellant, indicate what facts call for investigation in a case of undue influence. A reference to the Kerr on the 'Law of Fraud and Mistake' (Seventh Edition) (pages 177 to 241) shows the relationship between fraud and undue influence. It is true that some kinds of fraud may co-exist with undue influence. A definition of fraud in Section 17 of the Contract Act shows that it may consist either of active suggestion of what is false or of concealment or omission in cases where there may be a duty to speak. Undue influence may, however, also exist quite independently of fraud. Requirements of undue influence are separately given in Section 16 of the Contract Act. These would be applicable in the case of a gift-deed such as the one under consideration here where it was alleged and shown by the defendant that the gift was made to maintain the

plaintiff.

13. The matters to be investigated before a satisfactory decision on the plea of the undue influence can be given are as follows:--

(1) Was the defendant, due to his past relations, both temporal and spiritual, and his treatment of the plaintiff, in a position to dominate the will of the plaintiff?

In considering this question, the matters stated by the defendant himself and other facts stated in the gift-deed ought to have been taken into consideration. There is, however, no determination by either of two Courts below of this question.

(2) Whether the transaction appears, on the face of it, to be unconscionable?

In considering this question, such facts as the income of the property gifted and the amounts to be spent by the defendant on the plaintiff's maintenance or support, the value of the property gifted set against the value of the benefit which the plaintiff was expected to derive from the defendant's undertaking, the circumstances and reasons for the exclusion, of the sons from any benefaction, the question whether the plaintiff had really any other property or not, have to be carefully examined before the gift-deed could be held to be reasonable or improvident to the degree of being unconscionable.

14. It is true that the lower appellate Court had considered some of the last mentioned questions. For example it held, on a bare perusal of the gift-deed, that the plaintiff had other property. It, however, ignored the admission of the defendant that the plaintiff had no other land or house. If the statement of the defendant was correct, it meant that the statement in the gift-deed, that the plaintiff had other property, was false. If that statement was false, it may indicate that it was put in at the instance of somebody else. The defendant was shown to have had the aid of a lawyer. The plaintiff, on the other hand, was not shown to have been aided by any lawyer at all. Such facts ought to have been examined from the angle required in examining a case of undue influence falling within the purview of Section 16 of the Contract Act as pointed out in the cases cited above. The question to be decided was whether the inequality of positions of the parties and the disproportion

between advantages and disadvantages of the transaction were so great as to shock the conscience of the Court.

15. As I am satisfied that both the Courts below have not really determined the question of undue influence from the correct angle and have not appreciated the true tests for determining such an issue, and, as they also seem to have misplaced the burden of proof after the admissions made by the defendant, the judgments and decrees of the Courts below must be and are hereby set aside. The trial Court ought to have framed a separate issue on undue influence, after calling upon the plaintiff to supply necessary particulars so as to afford the defendant an opportunity to meet them. Accordingly, I direct that a separate issue shall be framed on the question of undue influence by the trial Court, after calling upon the plaintiff to supply the particulars of undue influence. Both the parties should be given an opportunity to amend their pleadings and to lead evidence on the real questions in issue which, unfortunately, were not tried.

16. Learned counsel for the plaintiff-appellant has stated that the plea of fraud in the execution of the gift-deed is given up In view of the findings of the two Courts below. This issue will, therefore, not be tried now. The only Issue that will be tried now will be the issue whether the gift-deed was executed as a result of Undue influence as explained above. As already explained, the burden of proving the absence of undue influence will rest upon the defendant if it is established by the evidence in the case that the defendant was in a position to dominate his will and that the transaction was unconscionable. Each party can, of course, rely upon admissions made by its adversary which are better than other kinds of evidence. It follows that even if the plaintiff willingly executed the gift-deed, the deed must be set aside if it was shown to have been induced either by the actually proved or presumed exercise of undue influence upon the plaintiff. The exercise of undue influence could be presumed, until the presumption is rebutted by the proof of requirements found in Section 16 of the Contract Act for raising the presumption.

17. This case is remanded to the trial Court for retrial, according to law, as explained above, and the directions given above. The costs will follow the result.

