Subhas Chandra Das Mushib

Vs

Ganga Prosad Das Mushib and Ors.

Civil Appeal No. 617 of 1964

(J. M. Shelat, G. K. Mitter, K. N. Wanchoo JJ)

14.09.1966

JUDGMENT

MITTER, J.

This is an appeal from a judgment and decree of the High Court of Calcutta on a certificate granted by it reversing a decision of the Subordinate Judge of Bankura dismissing the plaintiff's suit for declaring that a deed of settlement (Nirupan Patra) executed by the plaintiff's father and the plaintiff's sister in favour of the plaintiff's brother's son registered on July 22, 1944 in respect of properties situate in village Lokepur was fraudulent, collusive and invalid and for cancellation of the said document. The Judges of the High Court proceeded on the basis that in the circumstances of the case and in view of the relationship of the parties the trial court should have made a presumption that the donee had influence over the donor and should have asked for proof from the respondents before the High Court that the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which would justify the court in holding that the gift was the result of a free exercise of the donor's will. The High Court went on to presume from the great age of the donor that his intelligence or understanding must have deteriorated with advancing years and consequently it was for the court to presume that he was under the influence of his younger son at the date of the gift. It was contended before us by the learned Additional Solicitor-General appearing for the appellant that the judgment of the High Court had proceeded on an entirely erroneous basis and that there was no sufficient pleading of undue influence nor was there any evidence adduced at the trial to make out a case of undue influence and in the vital issue raised before the learned Subordinate Judge the expression "undue influence" was not even used.

The main facts which have come out in the evidence are as follows. The plaintiff's father, Prasanna Kumar, owned certain lands in two villages, namely, Parbatipur and Lokepur, holding an eight annas share in each. The exact valuation of the properties is not known, but it would not be wrong to assume that the Lokepur properties, the subject-matter of the suit, were the more valuable ones. Prasanna Kumar died in January or February, 1948 when he was about 90 years of age. He had two sons, namely, Ganga Prosad, the plaintiff, and Balaram, the second defendant in the suit, besides a daughter Swarnalata, and an only grandson Subhas Chandra, who was the first defendant in the suit. Ganga Prosad had no son. He had served in the Medical School at Bankura from 1932 to 1934. Thereafter he worked as a contractor for one year. From November 1944 to 1948 he served in Searsole Raj Estate. The family consisted of Prasanna and his wife, their two sons and their wives, besides the grand-son Subhas Chandra and Prasanna's daughter Swarnalata who became a widow in her childhood and was residing with her parents. It appears that Balaram always lived with his father and was never employed elsewhere. According to the plaintiff's own evidence he was looking after the property of his father so long as he was at Bankura. The Lokepur properties were put to

auction in execution of a decree for arrears of rent and were purchased by Prasanna benami in the name of Swarnalata. The deed of gift shows that the transaction was entered into out of natural love and affection of the donor for the donee and for the respect and reverence which the grand-son bore to the grand-father. There is no direct evidence as to whether the plaintiff was present in Bankura at the time when this deed was computed and registered. It is the plaintiff's case that he was not. The suit was filed in 1952, more than eight years after the date of the transaction and more than four years after the death of Prasanna. There is a considerable body of evidence that in between 1944 and 1948 a number of settlements of different plots of land in village Lokepur had been effected by Balaram acting as the natural guardian of his son Subhas Chandra and in all of them the Nirupan Patra had been recited and in each case Prasanna had signed as an attesting witness. These settlements were made jointly with the other co-sharers of Prasanna. In 1947 the Municipal Commissioners of Bankura filed a suit against Prasanna for recovery of arrears of taxes. Prasanna filed his written statement in that suit stating that he had no interest in the property. After Prasanna's death the Municipal Commissioners did not serve the plaintiff with a writ of summons in the suit but obtained a decree only against Balaram ex parte. The plaintiff attended the funeral ceremony of his father in 1948, but he alleges that he never came to know of any of the settlements of land in Lokepur after 1944. He admitted never having paid any rent to the superior landlords and stated that he came to know about the deed of settlement some two years before the institution of the suit from his cousins none of whom were called as witnesses.

We may now proceed to consider what are the essential ingradients of undue influence and how a plaintiff who seeks relief on this ground should proceed to prove his case and when the defendant is called upon to show that the contract or gift was not induced by undue influence. The instant case is one of gift but it is well settled that the law as to undue influence is the same in the case of a gift inter vivos as in the case of a contract.

> Under s. 16(1) of the Indian Contract Act a contract is said to be induced by undue influence where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other. This shows that 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 ?
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> Sub-section (2) of the section is illustrative as to when a person is to considered to be in a position to dominate the will of another. These are inter alia (a) where the donee holds a real or apparent authority over the donor or where he stands in a fiduciary relation to the donor or (b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.
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> Sub-section (3) of the section throws the burden of proving that a contract was not induced by undue influence on the person benefiting by it when two factors are found against him, namely that he is in a position to dominate the will of another and the transaction appears on the face of it or on the evidence adduced to be unconscionable.

The three stages for consideration of a case of undue influence were expounded in the case of

Ragunath Prasad v. Sarju Prasad and others (51 I.A. 101.) in the following words :-

> "In the first place the relations between the parties to each other must be such that one is in a position to dominate the will of the other. Once that position is substantiated the second stage has been reached - namely, the issue whether the contract has been induced by undue influence. Upon the determination of this issue 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.
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> Error is almost sure to arise if the order of these propositions be changed. The unconscionableness of the bargain is not the first thing to be considered. The first thing to be considered is the relations of these parties. Were they such as to put one in a position to dominate the will of the other ?"

It must also be noted that merely because the parties were nearly related to each other no presumption of undue influence can arise. As was pointed out by the Judicial Committee of the Privy Council in Poosathurai v. Kappanna Chettiar and others (47 I.A. p. 1 at p. 3.) :-

> "It is a mistake (of which there are a good many traces in these proceedings) to treat undue influence as having been established by a proof of the relations of the parties having been such that the one naturally relied upon the other for advice, and the other was in a position to dominate the will of the first in giving it. Up to that point "influence" alone has been made out. Such influence may be used wisely, judiciously and helpfully. But whether by the law of India or the law of England, more than mere influence must be proved so as to render influence, in the language of the law, "undue".

The law in India as to undue influence as embodied in s. 16 of the Contract Act is based on the English Common Law as noted in the judgments of this Court in Ladli Prasad Jaiswal v. Karnal Distillery Co. Ltd. and ors ([1964] 1 S.C.R. 270 at 300.). According to Halsbury's Laws of England, Third Edition, Vol. 17 p. 673, Art. 1298, "where there is no relationship shown to exist from which undue influence is presumed, that influence must be proved". Article 1299, P. 674 of the same volume shows that "there is no presumption of imposition or fraud merely because a donor is old or of weak character". The nature of relations from the existence of which undue influence is presumed is considered at pages 678 to 681 of the same volume. The learned author notes at p. 679 that "there is no presumption of undue influence in the case of a gift to a son, grandson, or son-in-law, although made during the donor's illness and a few days before his death". Generally speaking the relation of solicitor and client, trustee and cestui que trust, spiritual adviser and devotee, medical attendant and patient, parent and child are those in which such a presumption arises. Section 16(2) of the Contract Act shows that such a situation can arise wherever the donee stands in a fiduciary relationship to the donor or holds a real or apparent authority over him.

Before, however, a court is called upon to examine whether undue influence was exercised or not, it must scrutinise the pleadings to find out that such a case has been made out and that full particulars of undue influence have been given as in the case of fraud. See Order 6, Rule 4 of the Code of Civil Procedure. This aspect of the pleading was also given great stress in the case of Ladli Prasad Jaiswal ([1964] 1 S.C.R. 270 at 300.) above referred to. In that case it was observed at p. 295) :

> "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."

In the light of the above, it appears to us that there was no sufficient pleading of undue influence at all in the plaint. The relevant portion of paragraph 4 of the plaint is as follows :-

> "The plaintiff's father along with defendant No. 3 (the sister) on the advice of defendant No. 2 (the brother Balaram) without the knowledge of the plaintiff got a collusive Nirupan Patra executed regarding the said property on the 6th Sraban 1351 B.S. corresponding to 22nd July, 1944 in the name of the defendant No. 1 son of defendant No. 2 and had it registered - and the plaintiff recently on 13th June, 1952 last, has come to know of the same through reports from the people... Moreover, the plaintiff's father being 90 years old at the time of execution of the said Nirupan Patra and being subject to senile decay in consequence thereof, he was devoid of the power of discrimination between good and evil. Hence he not having sound disposing mind had no power to execute the said deed of Nirupan Patra in favour of the defendant No. 1 being in possession of his senses and he did not execute the same in good faith voluntarily and out of his free will. The plaintiff recently on 13th June 1952 last came to learn that defendant No. 2 taking advantage of the absence of the plaintiff and exercising undue influence upon him and having won over the defendant No. 3 also by holding out temptation and by misleading and exercising undue influence upon her got the said fraudulent deed of Nirupan Patra executed in favour of the defendant No. 1, his son living in joint mess with him."

It will at once be noted from the above that the two portions of the extracts from paragraph 4 are in conflict with each other. According to the first portion the plaintiff's father Prasanna colluded with his sister on the advice of his brother to execute the deed of gift. The word "collusion" means a secret agreement for illegal purposes or a conspiracy. The use of the word "collusion" suggests that Prasanna knew what he was about and that he did it secretly or fraudulently with the object of depriving the plaintiff. According to the second portion of the extract, Prasanna, because of his old age, was subject to senile decay and could not discriminate between good and evil. This hardly fits in with the case of collusion which implies that a man does something evil designedly. There is no suggestion in this paragraph of the plaint that Prasanna was under the domination of Balaram and that Balaram exercised his power over Prasanna to get the document executed and registered by Prasanna. It will be remembered that nominally the property stood in the name of the sister who was also a party to the document and according to the extract quoted above Balaram had exercised undue influence over her also.

The above allegations were generally denied in the written statements of the 1st and the 2nd defendants. It was asserted in paragraph 12 of the written statement of the first defendant that "Prasanna Kumar Mushib was a man endowed with particular wisdom and knowledge of worldly affairs and was a man of independent spirit and had a fertile brain. It was not possible for anyone to exercise any influence upon him... Up to the time of his death he himself was active and strong and had a sound brain also... Of his own accord in good faith and considering the surrounding circumstances and defendant No. 1 being a bright jewel of the family and out of profound affection for him, he voluntarily, in good faith and being urged by his affection towards this defendant has made a gift of the properties in suit to this defendant by way of family settlement."

The only issue out of seven which were framed by the learned Subordinate Judge at the trial of the suit which has any bearing on this point is issue No. 5. This reads :-

> "Is the deed of gift by the grandfather to defendant No. 1 valid and true : If so, is the suit maintainable without setting aside the deed of gift ?"

It will be noted at once that even the expression "undue influence" was not used in the issue. There was no issue as to whether the grandfather was a person of unsound mind and whether he was under the domination of the second defendant.

At the trial several witnesses were examined by the plaintiff for the purpose of showing that Prasanna was a person of unsound mind at the time when when he executed the deed of gift. We have been taken through the evidence on this point and we fully agree with the judgment of the learned Subordinate Judge who was "unable to hold that Prasanna was a man of unsound mind when he executed Ex. G or that he was not aware of the fact of transfer". The plaintiff's only statement in examination in chief was that his father was not of sound mind for 10 or 12 years from before his death. Is it to be believed that he did not know about the Nirupan Patra until four years after the death of his father ? This statement of his can hardly be true because the Nirupan Patra does not stand by itself, but was given effect to in several deeds of settlement which came out in evidence at the trial. There was evidence before the Subordinate Judge to show that Prasanna had filed a written statement in money suit No. 217 of 1948 filed by the Municipal Commissioners of Bankura, that he was not in possession of the holding. The learned Subordinate Judge, in our opinion, rightly came to the conclusion that the document of settlement executed after the deed of gift and Prasanna's written statement in the suit by the Municipal Commissioners showed that Prasanna was fully aware of the fact that he had transferred the property to defendant No. 1.

Unfortunately, however, the learned Judges of the High Court accepted the contention put forward on behalf of the plaintiff-appellant that the onus was upon the contesting defendants to prove that the deed in question was intelligently executed by Prasanna with full knowledge of its contents. The learned Judges referred to the circumstances, (a) the deed of gift was a complete departure from the course of normal inheritance, (b) Prasanna was a very old man at the time of the alleged deed of gift and (c) the plaintiff was away from the family house at or about this time and concluded therefrom that "these being the circumstances under which the deed was executed, the court below should have made a presumption that the donee had influence over the donor and the court below should have asked for proof from the respondents that the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which would justify the court in holding that the gift was the result of a free exercise of the donor's will. They further went on to add :-

> "This aged man was becoming older from day to day and we may take it for granted that his intelligence or understanding did not improve with age but it must have deteriorated with the advancing years. If, therefore, the Court can presume, as it should presume, that he was under the influence of his younger son at the date of the gift then the Court will also presume that this influence must have continued till the death of Prasanna."

It will be noted that the High Court did not come to a finding that Balaram was in a position to dominate the will of his father (Subhas his son being only about 14 years of age at the date of the deed of gift). Nor did the High Court find that the transaction was an unconscionable one. The

learned Judges made presumptions which mere neither warranted by law nor supported by facts. Indeed, it appears to us that the learned Judges reached the third stage referred to in the case of Raghu Nath Prasad v. Sarju Prasad (51 I.A. 101.) completely overlooking the first two stages.

A case very similar to the instant one came up for consideration before the Judicial Committee of the Privy Council in Ismail Mussaiee Mookerdum v. Hafiz Boo (33 I.A. 88.). There one Khaja Boo, a Mahomedan woman, who died at the age of 90 years entered into the impugned transactions when she was nearly 80. At that time she had an only son, the plaintiff in the suit, and the defendant respondent, her daughter. It came out in evidence that she was on terms of bitter hostility with her son and much litigation had taken place between them. The daughter was a married woman whose husband resided in Rangoon, but she herself was living with her mother at Rander. The result of the impugned transactions was that the daughter Hafiz Boo became possessed of nearly the whole of her mother's Rangoon properties or their proceeds. The son alleged in the paint that at the time of the occurrence the mother was suffering from dementia and was not in a fit state of mind to execute contracts or to manage her affairs and was until July 1888 (she having died in the year 1900) residing with the daughter and was completely under her domination and control. Before the learned Trial Judge a large mass of evidence was given directed to the question of Khaja Boo's mental capacity in 1889. The learned Judge found that the plaintiff had failed to show that his mother was of unsound mind in 1889. The Court of Appeal came to the same conclusion. The learned Trial Judge, however, came to the conclusion that Khaja Boo at the period in question was entirely under the control and domination of her daughter and that the latter had unscrupulously used her power over her mother in order to get her mother's property into her own hands and that the whole proceedings ought to be avoided on the ground of undue influence. This finding was, however, reversed in appeal.

The Judicial Committee took the view that the question of undue influence was never properly before the court at all. No such case was set up in the pleadings. The nearest approach to it was in the passage of the plaint already cited in which it was said that Khaja Boo was entirely under the domination and control of her daughter; but that is only said incidentally in connection with the allegation of mental incapacity which allegation formed the real case of the plaintiff. And accordingly when the issues were settled there was a clear issue as to Khaja Boo being of unsound mind in 1889, but none with regard to undue influence.

The Board therefore concluded that the question of undue influence was dismissed and considered not upon evidence given with reference to that question, but upon evidence called for a totally different purpose.

It will be noted that in this case no issue was raised of Prasanna having been of unsound mind at the date of the deed of gift and, as already noted, no issue was raised on undue influence at all. It is true that some evidence was adduced on the point as to whether Prasanna was of sound mind in the year 1944, but that was wholly negatived by the learned Subordinate Judge and his finding was not upset in appeal except by way of presumption which does not arise in law.

It is pertinent also to note the observation of the Judicial Committee in the above case at p. 94 :-

> "The mere relation of daughter to mother, of course, in itself suggests nothing in the way of special influence or control. The evidence seems to their Lordships quite insufficient to establish any general case of domination on the part of the daughter, and subjection of the mother, such as to lead to a presumption against any transaction

> between the two. With regard to the actual transactions in question, there is no evidence whatever of undue influence brought to bear upon them."

The same remarks may justly be made of the pleading and the evidence adduced in this case.

There was practically no evidence about the domination of Balaram over Prasanna at the time of the execution of the deed of gift or even thereafter. Prasanna, according to the evidence, seems to have been a person who was taking an active interest in the management of the property even shortly before his death. The circumstances obtaining in the family in the year 1944 do not show that the impugned transaction was of such a nature as to shock ones conscience. The plaintiff had no son. For a good many years before 1944 he had been making a living elsewhere. According to his own admission in cross-examination, he owned a jungle in his own right (the area being given by the defendant as 80 bighas) and was therefore possessed of separate property in which his brother or nephew had no interest. There were other joint properties in the village of Parbatipur which were not the subject-matter of the deed of gift. It may be that they were not as valuable as the Lokepur properties. The circumstance that a grand-father made a gift of a portion of his properties to his only grandson a few years before his death is not on the face of it an unconscionable transaction. Moreover, we cannot lose sight of the fact that if Balaram was exercising undue influence over his father he did not go to the length of having the deed of gift in his own name. In this he was certainly acting very unwisely because it was not out of the range of possibility that Subhas after attaining majority might have nothing to do with his father.

Once we come to the conclusion that the presumptions made by the learned Judges of the High Court were not warranted by law and that they did not take a view of the evidence adduced at the trial different from that of the Subordinate Judge on the facts of this case we must hold that the whole approach of the learned Judges of the High Court was wrong and as such their decision cannot be upheld.

The learned Additional Solicitor-General also wanted to argue that the suit was defective, because the plaintiff was out of possession and had not asked for a decree for possession in his plaint as he was bound to do if he was asking for a declaration of title to the property. It is to be noted that we did not think it necessary to go into this question and did not allow him to place the evidence on this point before us as we were of the view that the case of undue influence had not been sufficiently alleged either on the pleadings or substantiated on the evidence adduced.

The result is that the appeal is allowed, the judgment and decree of the High Court set aside and that of the trial court restored. The respondents must pay to the appellant costs throughout.

G.C.

Appeal allowed.

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