Afsar Sheikh and Another

Vs

Soleman Bibi and Others

Civil Appeal No. 898 of 1968

(Y. V. Chandrachud, R. S. Sarkaria JJ)

06.11.1975

JUDGMENT

SARKARIA, J. -

1. This appeal by special leave is directed against a judgment, dated November 9, 1967, of the Patna High Court decreeing the plaintiff's suit after reversing the judgment of the Additional District Judge, Dumka.

2. One Ebad Sheikh, the predecessor-in-interest of the respondents herein, instituted a suit in the Court of Subordinate Judge at Pakur in 1960 for a declaration that the hiba-bil-ewaz, dated February 9, 1959, executed by him, was void and inoperative due to fraud and misrepresentation proceeding from the donee, Afsar Sheikh, original defendant No. 1 (appellant No. 1 herein). Ebad claimed a further declaration, confirming his possession over the suit lands which were the subject of the hiba. In the alternative, he prayed for possession thereof.

3. The plaintiff's case as laid in the plaint is, that he is an illiterate, simple villager, aged about 90 years. On April 2, 1957, one Saifuddin fraudulently got executed and registered a will, dated April 2, 1957, by the plaintiff in favour of the former and his wife in respect of the suit lands. When this fraud was discovered by the plaintiff, he brought it to the notice of Afsar appellant, a distant relation who was in his confidence and used to help him in cultivation of his lands. Afsar then on February 3, 1959, took the plaintiff to Pakur for execution and registration of a deed cancelling the will. A cancellation deed was drawn up and executed by the plaintiff, but it could not be presented for registration on that date on account of some delay. On February 9, 1959, Afsar again took the plaintiff to Pakur and represented that the cancellation deed which was prepared on February 3, 1959, had been misplaced and lost and consequently, it was necessary to execute a fresh deed of cancellation. With this misrepresentation, Afsar got executed and registered in his favour a hiba-bil-ewaz purporting to be a transfer of 12 1/2 bighas of land by the plaintiff. Thereafter Afsar sold some of the land which he had obtained under the hiba-bil-ewaz to defendant-appellant No. 2. This sale deed executed by Afsar was bogus and without consideration and did not confer any title or interest on the transferee.

4. In his written statement, Afsar defendant denied the allegations of fraud and misrepresentation. He averred that his grandmother was the sister of the plaintiff's mother. The defendant's father died when he was an infant. The plaintiff brought him up as a son. Since his very infancy, the defendant has been living with the plaintiff, managing his affairs and treating him as his father. The defendant further stated that the plaintiff has transferred 10 to 12 bighas of land to his natural son and an equal area to his second wife. Out of love and affection, the plaintiff conferred a similar benefit on the

defendant and voluntarily executed the hiba-bil-ewaz after receiving from the donee a dhoti as a symbolic consideration therefor. He denied that the plaintiff at the time of the gift was too old and infirm. According to him the plaintiff was not more than 75 years of age. He further averred that he was in possession of the suit lands ever since the execution of the hiba.

5. After considering the pleadings, the trial Court framed three issues. Issue No. 2 as recast on August 8, 1961, was as follows :

Is the hiba-bil-ewaz void and inoperative, having been fraudulently obtained by defendant first party, as alleged by the plaintiff ? Was it executed bona fide by the plaintiff out of his own free will and given effect to so as to confer valid title upon defendant first party with respect to the lands in suit ?

6. The trial Court found that there was no fraud or misrepresentation on the part of Afsar. It further held that the donee was in possession of the gifted lands ever since the gift. In the result, it dismissed the suit.

7. Aggrieved, the plaintiff preferred an appeal to the District Judge, who by his judgment, dated July 3, 1962, dismissed the same, and affirmed the findings of the trial Court.

8. The plaintiff carried a second appeal to the High Court. The appeal was heard by a learned Single Judge who held that

the mere finding as given by the court below that the plaintiff in the present case had executed the document after knowing its contents, is not sufficient in law to throw out the plaintiff's case,

because in view of the allegation in the plaint

that defendant No. 1 was assisting him in the management of his property and that as a result thereof, the plaintiff had developed confidence in him, which, according to the plaintiff, was abused in getting the document dated February 9, 1959 executed by the plaintiff,

it was incumbent on the court below to find out whether the donee was in a position to dominate the will of the donor in giving advice. In the opinion of the learned Judge,

if the trial Court had come to the conclusion in favour of the allegations made by the plaintiff then the onus in that case would have shifted to defendant No. 1 to establish that he did not abuse his position and that the deed of hiba-bil-ewaz though unconscionable on the very face of it, was not brought about by any undue influence on his part.

By his judgment, dated October 16, 1963, he remanded the case to the District Judge "for a fresh hearing on the material already on the record" for recording findings as to whether Afsar had obtained the hiba-bil-ewaz by exercising undue influence over the plaintiff, whether consideration had been given for the hiba-bil-ewaz and whether the alleged donee had been in possession of the gifted lands.

9. After the remand, the Additional District Judge, Dumka by his judgment, dated June 18, 1965, again affirmed the findings of the trial Court. He further found that there was nothing to show that Afsar was in a position to dominate the will of the plaintiff or had got the hiba-bil-ewaz executed by exercising undue influence.

10. Against this judgment, dated June 18, 1965, of the Additional District Judge, the plaintiff, preferred a second appeal in the High Court. This appeal came up for hearing before another learned Judge who by his judgment, dated November 19, 1967, allowed the same and set aside the judgments of the courts below, on the ground that the written statement of the defendant contained a clear admission of intimate relationship between the parties indicative of the "possibility" of dominating the will of the plaintiff by defendant No. 1 and consequently the onus had shifted on the defendant to show that the plaintiff had access to independent advice. Since the defendant did not produce any evidence to show that he had refrained from dominating the will of the plaintiff in obtaining the hiba-bil-ewaz, "the plaintiff should have been taken to have proved that the document was vitiated by undue influence of defendant No. 1". The learned Judge did not, in terms, set aside the concurrent finding of the courts below on issue No. 2 relating to fraud and misrepresentation.

11. Against the judgment of the High Court, the defendants have come in appeal before us.

12. We have heard the learned Counsel on both sides and carefully scrutinised the record. We are of opinion that the judgment of the High Court cannot be upheld as it suffers from manifest errors.

13. The High Court has tried in second appeal to make out a new case for the plaintiff on the ground of undue influence which was neither pleaded adequately in the plaint, nor put in issue.

14. The specific case set up in the plaint was that the hiba-bil-ewaz in question was vitiated by fraud and misrepresentation practised by Afsar defendant. It was in that context it was stated in a general way that the plaintiff was a simple, illiterate man of 90 years, and had great confidence in Afsar, and "the parties used to help each other in respective cultivation". Apart from this general and nebulous allegation, no particulars of a plea of undue influence were pleaded. Even the near relationship between the plaintiff and Afsar was not disclosed. It was not particularised how Afsar was in a position to dominate the will of the plaintiff, in what manner he exercised that influence, how the influence, if any, used by Afsar over him was "undue", and how and in what circumstances the hiba-bil-ewaz was an 'unfair' or unconscionable transaction. In short, no material particulars showing that the transaction was vitiated by undue influence were pleaded. Rather, somewhat inconsistently with a plea of undue influence, it was alleged that the hiba was tainted by fraud, misrepresentation and deceit practised by Afsar.

15. While it is true that 'undue influence', 'fraud', 'misrepresentation' are cognate vices and may, in part, overlap in some cases, they are in law distinct categories, and are, in view of Order 6, Rule 4, read with Order 6, Rule 2, of the Code of Civil Procedure, required to be separately pleaded, with specificity, particularity and precision. A general allegation in the plain, that the plaintiff was a simple old man of ninety who had reposed great confidence in the defendant, was much too insufficient to amount to an averment of undue influence of which the High Court could take notice, particularly when no issue was claimed and no contention was raised on that point at any stage in the trial Court, or, in the first round, even before the first appellate Court.

16. The High Court has tried to spell out a plea of undue influence by referring to paragraph 7 of the written statement in which the defendant inter alia stated that he was

looked after and brought up by the plaintiff as his son and he became very much attached to the plaintiff and since his infancy till the middle of this year this defendant always lived with the plaintiff and used to treat him as his father, helped him and looked after all his affairs.

This paragraph, according to the learned Judge, contains

a clear admission of the intimate relationship between the two indicative of the position of dominating the will of the plaintiff by defendant No. 1.

17. We are, with due respect, unable to appreciate this antic construction put on the defendant's pleading. All that has been said in the written statement is that the relationship subsisting between the plaintiff and the defendant was marked by love and affection, and was akin to that of father and son. Normally, in such paternal relationship, the father, and not the son, is in a position of dominating influence. The defendants' pleading could not be reasonably construed as an admission, direct or inferential, of the fact that he was in a position to dominate the will of the plaintiff. In spelling out a plea of undue influence for the plaintiff by an 'inverted' construction of the defendants' pleading, the High Court overlooked the principle conveyed by the maxim secundum allegata et probata, that the plaintiff could succeed only by what he had alleged and proved. He could not be allowed to travel beyond what was pleaded by him and put in issue. On his failure to prove his case as alleged, the court could not conjure up a new case for him by stretching his pleading and reading into it something which was not there, nor in issue, with the aid of an extraneous document. Thus considered, the High Court was in error when by its judgment, dated October 16, 1963, it remanded the case to the first appellate Court with a direction to determine the question of undue influence "on material already on record".

18. Be that as it may, the High Court was not competent, in second appeal, to reverse the finding of fact recorded, after the remand, by the first appellate Court, to the effect that Afsar was not in a position to dominate the will of the plaintiff, and he did not exercise any undue influence on the plaintiff to obtain the hiba-bil-ewaz, which was voluntarily executed by the plaintiff after understanding its contents and effect.

19. The scope of the powers of the High Court to interfere in second appeal with judgments and decrees of courts below is indicated in Sections 100, 101, and 103 of the Code of Civil Procedure. Broadly, the effect of Sections 100 and 101, read together, is that a second appeal is competent only on the ground of an error in law or procedure, and not merely on the ground of an error on a question of fact. The High Court has no jurisdiction to entertain a second appeal on the "ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be" (Smt. Durga Choudhrani v. Jawahar Singh (17 IA 122 : ILR 18 Cal 23 (PC))). Section 103 enables the High Court in second appeal, where the evidence on the record is sufficient, to determine an issue of fact necessary for the disposal of the appeal only -

> (a) if the lower appellate Court has not determined that issue of fact, or
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> (b) if it has determined that issue wrongly by reason of any illegality, omission, error or defect such as is referred to in sub-section (1) of Section 100.

20. It is well settled that a question whether a person was in a position to dominate the will of another and procured a certain deed by undue influence, is a question of fact, and a finding thereon is a finding of fact, and if arrived at fairly, in accordance with the procedure prescribed, is not liable to be reopened in second appeal (Satgur Prasad v. Har Narain Das (59 IA 147 : AIR 1932 PC 89); Ladli Prasad Jaiswal v. Karnal Distillery Co. Ltd. ((1964) 1 SCR 270 : AIR 1963 SC 1279)).

21. Bearing in mind the provisions of Section 103 read with Section 100(1), the further question to

be considered is : Was the finding of the first appellate Court on the point of undue influence vitiated by an illegality, omission, error or defect such as is referred to in Section 100(1) ? For reasons to be stated presently, the answer to this question must be in the negative.

22. The law as to undue influence in the case of a gift inter vivos is the same as in the case of a contract. It is embodied in Section 16 of the Indian Contract Act. Sub-section (1) of Section 16 defines 'undue influence' in general terms. It provides that to constitute 'undue influence' two basic elements must be cumulatively present. First, the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other. Second, the party in dominant position uses that position to obtain an unfair advantage over the other. Both these conditions must be pleaded with particularly and proved by the person seeking to avoid the transaction.

23. In view of this sub-section, the court trying a case of undue influence of the kind before us, must, to start with, consider two things, 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 ? (Subhas Chandra v. Ganga Prasad ((1967) 1 SCR 331, 334 : AIR 1967 SC 878).

24. Sub-section (2) of Section 16 is illustrative as to when a person is considered to be in a position to dominate the will of the other. It gives three illustrations of such a position, which adapted to the facts of the present case, would be : (a) whether the donee holds a real or apparent authority over the donor, (b) whether he stands in a fiduciary relation to the donor, or (c) whether he makes the transaction with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress.

25. Sub-section (3) contains a rule of evidence. According to this rule, if a person seeking to avoid a transaction on the ground of undue influence proves -

> (a) that the party who had obtained the benefit was, at the material time, in a position to dominate the will of the other conferring the benefit, and
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> (b) that the transaction is unconscionable,
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> the burden shifts on the party benefiting by the transaction to show that it was not induced by undue influence. If either of these two conditions is not established the burden will not shift. As shall be discussed presently, in the instant case the first condition had not been established and consequently, the burden never shifted on the defendant.

26. In Subhas Chandra's case (supra), this Court quoted with approval the observations of the Privy Council in Raghunath Prasad v. Sarju Prasad (51 IA 101 : AIR 1924 PC 60) which expounded three stages for consideration of a case of undue influence. It was pointed out that the first thing to be considered is, whether the plaintiff or the party seeking relief on the ground of undue influence has proved that the relations between the parties to each other are such that one is in a position to dominate the will of the other. Upto this point, 'influence' alone has been made reached - namely, the issue whether the transaction has been induced by undue influence. That is to say, it is not sufficient for the person seeking the relief to show that the relations of the parties have 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. "More than mere influence must be proved so as to render influence in the language of the law, 'undue'" (Poosathurai v. Kappanna Chettiar (47 IA 1 : AIR 1920 PC 65)). Upon a determination of the issue at the second stage, a third point emerges, which is of the onus probandi. If the transaction appears to be unconscionable, then the burden of proving that it was not induced by undue influence is to lie upon the person who was in a position to dominate the will of the other.

27. "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 the parties. Were they such as to put one in a position to dominate the will of the other."

28. In the present case the High Court did not consider the propositions in the order indicated above, and this led to a wrong decision.

29. In the case before us, after a careful examination of the evidence of record, the first appellate Court found the points, to be considered at the first two stages, against the plaintiff. It held that although the relationship between the donor and the donee was intimate, like that of father and son characterised by mutual cordiality and affection, the donee was not in a position to dominate the will of the donor. No less a witness than the donor himself, as RW 10, emphatically maintained in cross-examination :

Afsar worked sometimes as my labourer on wages and I don't understand what confidence has got to do with it.

He intransigently refused to concede even the stark fact - which was otherwise found fully established - that he had brought up Afsar as a son from his very infancy and the latter used to look after the former's lands.

30. Thus, even the slender shred in the plaint from which the High Court tried to spell out a whole pattern of fiduciary relationship between the parties and a position of dominant influence for Afsar, was torn and destroyed by the plaintiff himself in the witness-stand.

31. In the context of the first-stage consideration, the District Judge found on the basis of the evidence on record, that although the plaintiff was an old man - and he had intentionally, far overstated his age - yet he was quite fit to look after his affairs. On this point, the District Judge accepted the version of the plaintiff's own witness (PW 7), which was to the effect, that the plaintiff himself yokes the bullocks, and unaided by anybody else, ploughs his lands. In the face of such evidence, the District Judge was right in holding that Ebad plaintiff, though old, was physically fit to carry on his affairs. There was no evidence to show that the mental capacity of the donor was temporarily or permanently affected or enfeebled by old age or other cause, so that he could not understand the nature of deed or the effect and consequences of its execution. The mere fact that he was illiterate and old, was no proof of such mental incapacity. None of the circumstances mentioned in sub-section (2) of Section 16, had been proved from which an inference could be drawn that the donee was in a position to dominate the will of the donor.

32. The failure of the plaintiff to prove this element of 'undue influence', which was to be considered at the first stage, would itself led to the collapse of the whole ground of "undue influence".

33. Assuming for the sake of argument that the hiba-bil-ewaz was induced by influence of Afsar, in whom the former reposed confidence such as a father does in his son, then also it had not been proved that such influence was 'undue'. As a rule

there is no presumption of undue influence in the case of a gift to a son . . . although made during the donor's illness and a few days before his death. (Halsbury's Laws of England, 3rd Ed., Vol. 17, p. 674).

34. The District Judge has held (as per his judgment dated dated June 18, 1965) that the plaintiff executed the hiba-bil-ewaz of his own free will after understanding the contents of the deed.

35. Indeed, the evidence of the deed-writer, DW 6, who knew Ebad for about 5 years previously, was to the effect, that he had scribed the deed (hiba-bil-ewaz) according to Ebad's instructions in the presence of the attesting witnesses. DW 6 then read out the contents of the deed to Ebad, who accepted the same to the correct and then thumb-marked it. This account of the witness was not challenged in cross-examination.

36. DW 7 is an attesting witness of the deed. He was the Sarpanch of Birkiti Gram Panchayat. He had come to the Registration Office at Pakur on that day in connection with his own business. He was known to Ebad. According to the witness, it was Ebad, the donor - and not the donee - who had requested the witness to attest the deed. The witness stated that it was Ebad who told him that he was gifting 12 1/2 bighas of land to Afsar in token consideration of a dhoti given by the latter. The witness corroborated the scribe, that the deed had been drawn up according to the instructions given by Ebad.

37. The first two courts have concurrently found that these witnesses are respectable, independent and disinterested persons, and their evidence is entirely creditworthy. They also accepted the evidence of DW 3, DW 4 and DW 5 regarding the giving of dhoti as consideration for the hiba by the donee to the donor.

38. PW 4 was another deed-writer who had scribed the cancellation deed (Ex. 1), admittedly executed by the plaintiff on February 3, 1959 to revoke the will. The plaintiff's case was that on February 3, 1959, it was Afsar who took him to Pakur and got the cancellation deed executed, and took hold of that deed, and thereafter by a misrepresentation that the deed had been lost, got on February 9, 1959, the hiba-bil-ewaz executed. The core of this story was gouged out by the plaintiff's own witness, PW 4, who had scribed the cancellation deed. PW 4 did not swear to the presence of Afsar defendant on February 3, 1959 at Pakur when the cancellation deed, Ex. 1, was written and executed. In view of this, the first appellate Court was right in holding, in concurrence with the trial Court, that Afsar never accompanied Ebad to Pakur on February 3, 1959, and he not having come into possession of the cancellation deed, no occasion for him arose to induce by misrepresentation or undue influence the execution of the hiba-bil-ewaz in question.

39. The first appellate Court further came to the conclusion that this gift was acted upon by the parties, the donee entered into possession of the gifted land, that the plaintiff's natural son Moktul who since long, before the gift, had been living separately from him, started residing with the plaintiff, and, according to the plaintiff's own admission, Moktul, sometime prior to the suit which has been filed about one year after the execution of the hiba convened a panchayat in the mosque, to consider why the land should be given to defendant No. 1, and since then the trouble arose which led to the institution of the suit.

40. In short, the District Judge who was the final court of fact, after a survey of the entire evidence on record, found that Afsar was not in a position to dominate the will of Ebad Sheikh and that the execution of the hiba-bil-ewaz was not induced by undue influence.

41. We have discussed the evidence of the important witnesses in some detail to show that on the material on record, the finding of the first appellate Court to the effect that the plaintiff had failed to prove that defendant No. 1 was in a position to dominate his will, was not wrong or unreasonable. In any case, it did not suffer from any "illegality, omission, error or defect such as is referred to in sub-section (1) of Section 100". It was a finding of fact and the High Court in second appeal, had no jurisdiction to interfere with the same, even if it appeared to be erroneous to the High Court, the error not being of a kind indicted in Section 100(1).

42. Since the plaintiff had failed to substantiate the first element essential to the proof of undue influence, the High Court was wrong in holding that the burden had shifted on the defendant to show that the hiba-bil-ewaz was not induced by undue influence.

43. For these reasons we allow the appeal, set aside the judgment of the High Court and dismiss the suit, but, in the circumstances of the case, leave the parties to bear their own costs throughout. The appellant shall be entitled to possession and to mesne profits calculated from the date of dispossession to the date of restoration of possession.

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