

their father Vaijai, since deceased, in favour of defendant no.1, fraudulently, by deceit and undue influence because of old age and infirmity of the deceased and who was living with the defendants. The suit was dismissed. The appellate court allowed the appeal holding that the defendants had failed to discharge their burden of being in a position to dominate the will of the deceased by undue influence. The High Court reversed the order of the first appellate court and restored the dismissal of the suit.

3. Learned counsel for the appellant submitted that the deceased was old, infirm, bedridden and sick for approximately the last 8 to 10 years. His mental faculties were also impaired. He was therefore entirely dependent on the original defendants who were therefore in a position to exercise undue influence over him. The deceased expired on 21.04.1971 within ten months of the execution of the sale deed. The witnesses to the sale deed were related to defendant no.2. It had not been established that full consideration had been paid. Defendant no.1 had no source of income to pay the purchase price. The wife of the deceased has not been examined as witness. The defendants did not lead the evidence of the Sub-Registrar who

had registered the sale deed. The deceased had not sold any land to third persons in the year 1968 as contended by the defendants.

4. Learned counsel for the respondent/defendants submitted that under Section 101 of the Evidence Act, 1872 the initial onus lay on the plaintiffs by establishing a prima facie case for undue influence and only then the onus would shift to them. The necessary pleadings in respect of the same were completely lacking. The First Appellate Court wrongly shifted the burden upon the respondents. The deceased may have been old and infirm, but he was not deprived of his mental faculties so as not to know the nature of documents executed by him. He was alive approximately for ten months after the execution of the deed, but never questioned the same. The deceased had executed another sale deed two years earlier in 1968, Exhibit 10 in favour of third persons which has not been questioned by the appellant. It establishes that the deceased was not in a condition where undue influence could be exercised over him. There can be no presumptions merely on account of his old age. DW-1 was a witness to the sale deed and was present at the time of registration. The deceased admitted before the sub-

registrar having received a sum of Rs.2,000/- earlier and Rs.4,000/- was paid at the time of registration. The Sub-Registrar has not recorded any adverse inferences about the condition or capacity of the deceased at the time of registration. A registered instrument will carry a presumption about its correctness unless rebutted.

5. Reliance in support of the submissions was placed on **Anil Rishi vs. Gurbaksh Singh**, (2006) 5 SCC 558, **Jamila Begum (D) thr. L.Rs. vs. Shami Mohd. (D) thr. L.Rs. and ors.**, (2019) 2 SCC 727, **Bishundeo Narain and Ors. vs. Seogeni Rai and Jagernath**, 1951 SCR 548, **Subhas Chandra Das Mushib vs. Ganga Prosad Das Mushib and Ors.**, 1967 (1) SCR 331 and **Krishna Mohan Kul alias Nani Charan Kul and anr. vs. Patima Maity and ors.**, (2004) 9 SCC 468.

6. We have considered the submissions on behalf of the parties. The primary question for our consideration is the physical condition of the deceased and his capacity to execute the sale deed. The

second question for our consideration is if the original defendants nos.1 and 2 exercised undue influence over the deceased in having the sale deed executed in favour of defendant no.1 because of the physical infirmity of the deceased on account of his old age.

7. Section 14 of the Indian Contract Act, 1872 defines 'free consent' as follows:

“14. 'Free consent' defined – Consent is said to be free when it is not caused by –

(1) xxxxx

(2) Undue influence, as defined in section 16,...

Section 16 defines 'undue influence' as follows:

“16. 'Undue influence' defined—

(1) 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.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another—

(a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; 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.

(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall be upon the person in a position to dominate the will of the other.

Nothing in the sub-section shall affect the provisions of section 111 of the Indian Evidence Act, 1872 (1 of 1872).”

8. Section 111 of the Indian Evidence Act, 1872, explains good faith in transactions as follows:

“111. Proof of good faith in transactions where one party is in relation of active confidence.—Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence.”

9. The deceased undisputedly was over 80 years and above in age. The plaintiff pleaded that by reason of age and sickness, the deceased was unable to move and walk, with deteriorated eye sight due to cataract. The mental capacity of the deceased was impaired. The Advanced Law Lexicon by P.Ramanatha Aiyar, third edition reprint, 2009 defines impairment in relation to a human being as

total or partial loss of a body function, total or partial loss of a part of the body, malfunction of a part of the body and malfunction or disfigurement of a part of the body. Except for a bald statement in the plaint that the deceased was mentally impaired there is no evidence whatsoever of his mental status. There can be no presumption with regard to the same only because of old age to equate it with complete loss of mental faculties by senility or dementia. Ageing is a process which affects individuals differently at distinguishable ages. The sale deed executed by the deceased in favour of one Babu Ram and Munshi Lal two years earlier in 1968 has not been assailed by the appellant on the ground that the deceased was devoid of the power of reasoning, because of mental impairment. There is no evidence of any such rapid deterioration in the condition of the deceased in these two years.

10. The deceased on account of his advanced age may have been old and infirm with a deteriorating eye sight, and unable to move freely. There is no credible evidence that he was bed ridden. Hardness of hearing by old age cannot be equated with deafness. The plaintiff, despite being the son of the deceased, except for bald

statement in the plaint, has not led any evidence in support of his averments. It is an undisputed fact that the deceased appeared before the sub-registrar for registration. It demolishes the entire case of the plaintiff that the deceased was bed ridden. He had put his thumb impression in presence of the sub-registrar after the sale deed had been read over and explained to him. The deceased had acknowledged receipt of the entire consideration in presence of the sub-registrar only after which the deed was executed and registered. The wife of the deceased had accompanied him to the office of the sub-registrar. The sale deed being a registered instrument, there shall be a presumption in favour of the defendants. The onus for rebuttal lay on the plaintiff which he failed to discharge. Notwithstanding the finding of enmity between PW-2 and PW-3 with original defendant no.2, the First Appellate Court erred in relying upon these two witnesses by holding that they were independent witnesses and convincing. DW-1, though related was a witness to the sale deed. His evidence in support of the events before the sub-registrar therefore has to be accepted. The plaintiff could have led evidence in rebuttal of the sub-registrar but he did not do so.

11. That leads us to the question of undue influence. The pleadings in the plaint are completely bereft of any details or circumstances with regard to the nature, manner or kind of undue influence exercised by the original defendants over the deceased. A mere bald statement has been made attributed to the infirmity of the deceased. We have already held that the deceased was not completely physically and mentally incapacitated. There can be no doubt that the original defendants were in a fiduciary relationship with the deceased. Their conduct in looking after the deceased and his wife in old age may have influenced the thinking of the deceased. But that *per se* cannot lead to the only irresistible conclusion that the original defendants were therefore in a position to dominate the will of the deceased or that the sale deed executed was unconscionable. The onus would shift upon the original defendants under Section 16 of the Contract Act read with Section 111 of the Evidence Act, as held in **Anil Rishi vs. Gurbaksh Singh** (supra), only after the plaintiff would have established a prima facie case. The wife of the deceased was living with him and had

accompanied him to the office of the sub-registrar. The plaintiff has not pleaded or led any evidence that the wife of the deceased was also completely dominated by the original defendants. In every cast, creed, religion and civilized society, looking after the elders of the family is considered a sacred and pious duty. Nonetheless, today it has become a matter of serious concern. The Parliament taking note of the same enacted the Maintenance and Welfare of Parents and Senior Citizens Act, 2007. We are of the considered opinion, in the changing times and social mores, that to straightway infer undue influence merely because a sibling was looking after the family elder, is an extreme proposition which cannot be countenanced in absence of sufficient and adequate evidence. Any other interpretation by inferring a reverse burden of proof straightway, on those who were taking care of the elders, as having exercised undue influence can lead to very undesirable consequences. It may not necessarily lead to neglect, but can certainly create doubts and apprehensions leading to lack of full and proper care under the fear of allegations with regard to exercise of undue influence. Law and life run together. If certain members of the family are looking after the elderly and others by choice or by

compulsion of vocation are unable to do so, there is bound to be more affinity between the elder members of the family with those who are looking after them day to day.

12. In ***Bishundeo Narain*** (supra) it was observed as follows:

“We turn next to the questions of undue influence and coercion. Now it is to be observed that these have not been separately pleaded. It is true they may overlap in part in some cases but they are separate and separable categories in law and must be separately pleaded.

It is also to be observed that no proper particulars have been furnished. Now if there is one rule which is better established than any other, it is that in cases of fraud, undue influence and coercion, the parties pleading it must set forth full particulars and the case can only be decided on the particulars as laid. There can be no departure from them in evidence. General allegations are insufficient even to amount to an averment of fraud of which any court ought to take notice however strong the language in which they are couched may be, and the same applies to undue influence and coercion.”

13. In ***Subhas Chandra*** (supra), distinguishing between influence and undue influence, it was observed as follows:

“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 :-

"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"."

14. In ***Subhas Chandra*** (supra), it was further observed that there was no presumption of imposition merely because a donor was old and weak. Mere close relation also was insufficient to presume undue influence, observing as follows:

“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 SCR 270 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."

15. **Krishna Mohan (supra)** is distinguishable on its own fact. The executant was undisputably over 100 years of age. The witnesses proved that he was paralytic and virtually bedridden. None of the witnesses could substantiate that the executant had put his thumb impression.

16. The first appellate court, completely erred in appreciation of the facts and evidence in the case. There can be no application of the law sans the facts of a case. The primary ingredients of the law need to be first established by proper pleading supported by relevant evidence. Cases cannot be decided on assumptions or presumptions. We do not think that the present calls for exercise of any discretionary jurisdiction under Article 136 of the Constitution as a fourth court of appeal. In **Pritam Singh** (supra) it was observed:

“9. ...Generally speaking, this Court will not grant special leave, unless it is shown that exceptional and special circumstances exist, that substantial and grave injustice has been done and that the case in question presents features of sufficient gravity to warrant a review of the decision appealed against. Since the present case does not in our opinion fulfil any of these conditions, we cannot interfere with the decision of the High Court, and the appeal must be dismissed.”

17. On a consideration of the entirety of the matter we find no reason to interfere with the concurrent findings arrived at by two courts. The appeal is dismissed. There shall be no order as to costs.

.....J.
[NAVIN SINHA]

.....J.
[INDIRA BANERJEE]

NEW DELHI
SEPTEMBER 11, 2019.