
(1969) 07 CAL CK 0012

In the Calcutta High Court

Case No : Appeal from Original Decree No. 135 of 1955

Basana Bala Mazumdar alias Basana Rani Mazumdar alias
Basana Bala Dey Hazra

APPELLANT

Vs

Tulsi Bala Dassi

RESPONDENT

Date of Decision : 02-07-1969

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 5 Rule 20
Evidence Act, 1872 — Section 111

Citation : (1969) 07 CAL CK 0012

Hon'ble Judges : Bagchi, J; Amaresh Roy, J

Bench : Division Bench

Advocate : Sudhir Kumar Bose and Harinarayan Mukherjee, for the
Appellant; Biswajit Ghose, on behalf of Bijoy Bhose, for the Respondent

Final Decision : Dismissed

Judgement

Bagchi, J.—The Plaintiff, Tulsibala Dasi, is the absolute owner of premises No. 104/12 Gopal Lal Tagore Road, Baranagar, District 24-Parganas. That property at one time was jointly owned in equal shares by the Plaintiff and her sister Ushabala Dasi, who died on March 2, 1948, leaving a Will dated September 27, 1947, disposing thereunder in favour of the Plaintiff, her undivided half share in the premises aforesaid. That Will was probated by the executor Ganesh Chandra Boral, who thereafter delivered possession of the bequeathed share of the premises to the Plaintiff. Thus, the Plaintiff became the full owner in possession of the entire premises in her absolute right. In the plaint she alleged, inter alia, that she was an illiterate pardanashin woman of weak intellect and was unable to transact business. The Defendant-Appellant Basanabala Majumdar alias Basana Rani Majumdar alias Basanabala Dey Hazra's natural father Bhubaneswar Dey Hazra was the paramour of the Plaintiff's sister Ushabala. Bhubaneswar Dey Hazra, the Defendant No. 2, as alleged in the plaint, had great influence and dominion over the Plaintiff after the death of Ushabala. Sometime in February 1949, when the Plaintiff was in a bad state of her health, Bhubaneswar. i.e.

Defendant No. 2, impressed upon the Plaintiff that it would be necessary for her to execute and register a document in favour of Bhubaneswar for the purpose of management of the property-in suit, i.e. the premises No. 104/12 Gopal Lal Tagore Road. Taking advantage of the Plaintiff's situation Bhubaneswar induced her to execute a document as desired by him purporting to be a power of attorney. The Plaintiff, knowing it to be a power of attorney, executed the said deed as represented to her by Bhubaneswar Hazra. She had no independent legal advice in the matter and Bhubaneswar Dey Hazra did everything in the matter of preparation, execution and registration of the impugned document without any reference to the Plaintiff. The Plaintiff, as alleged, being an illiterate pardanashin woman, did not at all understand what the document was for, except that it was a power of attorney as represented to her by the said Bhubaneswar Dey Hazra. The document was never explained to the Plaintiff and she executed the same under the influence, dominion-and dictation of Bhubaneswar Dey Hazra. In the middle of November" 1951, the Plaintiff wanted to raise a loan on the security of the house, which is the property-in-suit and then came to know for the first time from the certified copy of the impugned document that the document which Was purported to be a power of attorney was really a deed of settlement, by which the Plaintiff had allegedly conveyed the property-in-suit, i.e. the premises mentioned above by way of settlement in perpetuity unto the Defendant No. 1 Basanabala Dey Hazra absolutely on certain terms, reserving, to herself only a life estate in such property. Basanabala, Defendant No. 1, was impleaded as a minor in the suit, represented by her father and natural guardian Bhubaneswar Dey Hazra. During the pendency of the suit Basanabala attained majority (vide Order No. 19, dated June 1, 1953, in T.S. No. 155/55, Fifth Court, Subordinate Judge, Alipore). The Plaintiff alleged that Bhubaneswar Dey Hazra abusing the confidence and trust reposed on him by the Plaintiff and taking advantage of her illiteracy, ill health, weak intellect and his influence and dominion over the Plaintiff, had fraudulently obtained from the Plaintiff a deed of settlement of the property-in-suit in favour of his minor daughter, Defendant No. 1 Basanabala, by representing to the Plaintiff that the document was a power of attorney. She asserted in the plaint that she was never fond of Basanabala arid that never brought up her as her own daughter and that the Plaintiff's sister late Ushabala had never instructed the Plaintiff to make provision for Basanabala. The document impugned by the Plaintiff, as alleged by the Plaintiff, was brought about by Bhubaneswar Dey Hazra upon fraud, misrepresentation made to and exercise of undue influence and dominion over the Plaintiff in order to gain his selfish ends. The Plaintiff personally requested. Bhubaneswar to have the document cancelled to which Bhubaneswar did not listen. On December 3, 1951, a pleader's notice was sent per " registered post to the address of Bhubaneswar, in which the document was challenged, as invalid and void. Bhubaneswar gave his reply to the pleader's notice by a Solicitor's letter and correspondence then passed between the lawyers of the parties. The Plaintiff asserted that the deed of settlement was invalid, illegal, void and inoperative document and was not binding upon the Plaintiff. She asserted that

the document did not affect in any way the Plaintiff's right, title and interest in the entire property-in-suit. She prayed for a decree upon a declaration that the alleged deed of settlement dated February 16, 1949, was invalid, illegal, void and inoperative and not binding upon the Plaintiff and that the Plaintiff was the absolute owner of the property-in-suit and for other incidental reliefs. On May 19, 1952, Kumari Basanabala Dey Hazra was impleaded as minor represented by her father and natural guardian. Bhubaneswar Dey Hazra filed a written statement. By a petition filed on May 22, 1953 (vide Order No. 18), the Plaintiff prayed for amendment of the plaint by adding Bhubaneswar Dey Hazra as Defendant No. 2 and for describing minor Basanabala as major. On June 1, 1953 (vide Order No 19) the amendments, as prayed for, were allowed. So, minor Basanabala, who filed written statement on May 19, 1952, came in the record as major on and from June 1, 1953. Summons on Defendant No. 2 could not be served and was ordered to be served under Order 5, Rule 20 of the Code of Civil Procedure. The summons on Defendant No. 2 Bhubaneswar Dey Hazra was, however, served under Order 5, Rule 20 of the Code of Civil Procedure, but he did not appear on the date fixed in the suit (vide Order No. 24 dated August 25, 1953). On November 19, 1953, the Defendant No. 2 appeared and prayed for time for filing a written statement. On December 4, 1953, Defendant No. 2 Bhubaneswar Dey Hazra filed his written statement (vide Order No. 27).

2. Basanabala, the Defendant No. 1, denied all the material allegations in the plaint. She supported the deed of settlement as being valid and operative in law.

3. The Defendant No. 2 denied in his written "statement that the Plaintiff was a pardanashin lady and a woman of weak intellect. He asserted that he never exercised nor had he any occasion to exercise any influence and dominion over the Plaintiff as alleged. He asserted in para. 10 of the written statement that the property-in-suit was purchased with the money of the Defendant in the name of his mistress Ushabala on March 10, 1951. The Defendant allowed Ushabala to deal with the property in any way she liked and did not object to her making a Will in favour of the Plaintiff. The Plaintiff loved Defendant No. 1, daughter of the Defendant No. 2, very dearly and treated her as her own daughter. The Plaintiff having no issue of her own expressed her desire often that the Defendant No. 1 would get the property-in-suit and with this end in view the Plaintiff herself sought the advice and help of an eminent Solicitor Shri C.C. Dey and had a deed of settlement drawn by the said Solicitor. The Defendant never impressed the Plaintiff to execute and register a document in his favour for the purpose of management as alleged and the Plaintiff was never under the influence and dominion of the Defendant. The Defendant did not take advantage of the Plaintiff's illiteracy etc. as alleged in the plaint. The Defendant asserts that the Plaintiff, an intelligent and active woman, running her own business and looking after her own affairs herself, had independent legal advice of an eminent Solicitor and executed the deed of settlement on February 16, 1949, in favour of herself for life reserving her right of residence, management etc. and after her death the Defendant No. 1, then an unmarried minor girl, would get the property-in-suit

absolutely. The Defendant acquired no claim or interest in the property-in-suit. The Plaintiff knew the contents of this deed of settlement and understood the same as the contents were explained to her by the Solicitor. The story of power of attorney had been invented by some designing persons for illegal gain. The Defendant denied having had ever practised any fraud as alleged by the Plaintiff. He further asserted that the deed of settlement was not brought about by the Defendant by fraud, misrepresentation and by exercising undue influence and dominion over the Plaintiff as alleged. The Plaintiff voluntarily, with full consciousness of her own rights and the effects of the settlement on her rights and property, executed the deed of settlement. The Defendant affirmed that the deed of settlement was a valid document and was binding on the Plaintiff.

4. Upon the pleadings the learned Subordinate Judge framed the following issues:

- (1) Is the suit maintainable in its present form?
- (2) Is the Plaintiff entitled to a declaration that the alleged deed of settlement dated 16th February, 1949, is invalid, illegal, void, inoperative and not binding upon the Plaintiff and that the Plaintiff is the absolute owner of the property-in-suit?
- (3) Did the Plaintiff love the Defendant as her own daughter? Did she execute the deed of settlement out of love and affection for her?
- (4) Was the execution of the deed of settlement of the property-in-suit brought about by the father of the Defendant by fraud, misrepresentation, undue influence and coercion?
- (5) Is the Plaintiff entitled to costs?
- (6) To what further relief the Plaintiff is entitled?

5. The Plaintiff as P.W. 1 and one Manmatha Nath Roy as P.W. 2 deposed on behalf of the Plaintiff. Shri Chandi Charan Dey, a Solicitor of the High Court at Calcutta, deposed as D.W. 1 for the Defendant, while Bhubaneswar Dey, Defendant No. 2, deposed as D.W. 2. Basanabala did not board the witness-box to support any of her allegations in the written statement. The issue No. (1) was not pressed and the learned Subordinate Judge found that there was no defect in the frame of the suit. The learned Subordinate Judge then took up issues Nos. (2) to (6) for joint consideration.

6. Exhibit A is a deed of settlement. By this document the Plaintiff settled the suit property to herself for life and after her death to the Defendant No. 1 Basanabala absolutely, subject to the condition that in case there was no male line of the Defendant No. 1; in that event the property settled would be utilised for the location of a girls' school to perpetuate the memory of the sister of the Plaintiff Ushabala. The document, Ex. A, is in English language. The parties to the document are Tulsibala, the settlor and beneficiary and Kumari Basanabala Dey Hazra, the other beneficiary. It is dated February 16, 1949. In the preamble of

the document Kumari Basanabala Dey Hazra, described as daughter of Bhubaneswar Dey, has not been described as a minor. The settlor beneficiary is Tulsibala while Kumari Basanabala, the other beneficiary under the deed of settlement, was in the last paragraph but one of the deed, Ex. A, mentioned as being represented by her father and natural guardian Bhubaneswar Dey Hazra being the acceptor of the settlement made in favour of Kumri Basanabala. Here also the word "minor" has not been used before the name of Kumari Basanabala Dey Hazra. Tulsibala gave her two thumb impressions at p. 5 of the document Ex. A. Bhubaneswar signed the name of Kumari Basanabala describing her as minor and describing him, being the signatory to the document, as the father-guardian of Kumari Basanabala Dey Hazra (minor). The witnesses to the execution of the document are (p. 5 of Ex. A) Rajani Kanta Pal, Sukumar Dutta and Provat Chandra Dey Sirkar. There is an endorsement in English at p. 5 of the document under the signature of C.C. Dey, Solicitor, High Court at Calcutta, reading as "explained by me to all the executants who are known to me." Learned Judge, relying on the evidence of Defendant No. 2 Bhubaneswar, Dey Hazra, held that Bhubaneswar was in a position of active confidence of the Plaintiff and as such, onus lay on the Defendant No. 2 to prove the good faith of the transaction under Ex. A. Then the learned Judge found in his judgment that the Plaintiff was an illiterate woman but not pardanashin and was a woman o? the town. Then the learned Judge relied on the two decisions in the case of Chinta v. Bhalku 51 C.L.J. 465 and of AIR 1931 69 (Nagpur) holding that the rule regarding transaction by pardanashin applied equally to illiterate woman, though not pardanashin. Thereafter, the learned Judge observed that although the donor Plaintiff was not a pardanashin woman in the strict sense, the provisions of Section of the Indian 111 Evidence Act applied since it was proved that the transferee was in the active confidence of the transferor. The learned Judge found that in the present case, though the real beneficiary appeared to be the Defendant No. 1 Basanabala, everything relating to the transaction on her behalf was done by the Defendant No. 2 Bhubaneswar Dey, Hazra. So, the learned Judge had cast the onus of establishing the validity of the transaction under Ex. A and its binding effect in law on the Plaintiff. The learned Judge found no evidence to prove that the Defendant No. 2 actually looked after the Plaintiff's property after the execution of Ex. A by the Plaintiff. Upon those findings the learned Judge observed : "In spite of these findings if cannot be held that the document was executed by her with knowledge of the terms and contents thereof." Considering the evidence of D.W. 1, the Solicitor and of the Defendant No. 2, the learned Judge could not accept the evidence of D.W. 1 who drafted Ex. A. The learned Judge, while commenting on the evidence of D.W. 1 Solicitor, observed in his judgment that the evidence of the Solicitor was practically of no help to the Defendant. The learned Judge disbelieved D.W. 1 and held that the Plaintiff had not known D.W. 1 and that the D.W. 1 acted in the matter of the transaction relating to Ex. A under the instruction of the Defendants. The learned Judge disbelieved the evidence of Defendant No. 2 who came to say that the Plaintiff voluntarily executed Ex. A with full knowledge of its contents since the

Defendant No. 2, D.W. 2, was a highly interested witness. The learned Judge found that the Defendant No. 2 was highly interested in the matter of getting Ex. A executed and registered by the Plaintiff in favour of the Defendant No. 1 who was a minor daughter of the Defendant No. 2 and unmarried at the time when Ex. A came into existence. The learned Judge quoted relevant portion of the recitals in Ex. A wherein it has been stated that Ushabala had brought up Kumari Basanabala Dey Hazra as her own daughter, but before her death she did not make any provision for the said Basanabala and instructed the Plaintiff to make provision for Basanabala. The learned Judge also quoted other portions of the recitals from Ex. A wherein it is stated that the Plaintiff herself was very fond of Basanabala and treated her as her own daughter and in consequence thereof the Plaintiff was desirous of making provisions for Basanabala by executing a deed of settlement. In the context of the recitals quoted from Ex. A, the learned Judge discussed the evidence of Defendant No. 2 (D.W. 2). From the evidence of Defendant No. 2 (D.W. 2), the learned Judge found that the Defendant No. 1 Basanabala was not brought up by Ushabala and Ushabala never desired to make any provision for the Defendant No. 1, nor instructed the Plaintiff to make any provision for Basanabala after Ushabala's death. Considering the evidence of the Plaintiff and of the Defendant No. 2, the learned Judge held that the Plaintiff was not fond of Ushabala and never treated her as her own daughter as has been recited in Ex. A. So, the learned Judge observed in his judgment. "Thus the reason given in Ex. A for the Plaintiff's settling the property with Defendant No. 1 appears to be unfounded and the transaction was without any consideration." Ushabala died in March 1948. The Plaintiff obtained probate of Ushabala's Will on January 27, 1949. Exhibit A came into existence on February 16, 1949. The Defendant No. 2 who asserted in the written statement that the property was purchased with his own money for his mistress Ushabala was given up at the trial. The learned Judge observed that the Defendant No. 2 had an intention to be the owner of the property and for that end obtained Ex. A from the Plaintiff in the name of his minor daughter (Defendant No. 1) as the beneficiary. Since there was no reason why the Plaintiff would be so eager to divest herself of her interest of the property shortly after she became the full owner thereof on taking of probate of Ushabala's Will, the learned Judge found that the Defendants failed to prove the good faith in the transaction which they were required by law to prove. He repelled the defence contention to the effect that non-examination of Rajani Kanta Pal, one of the attesting witnesses to the execution of Ex. A for whom hazira was filed for the Plaintiff at the date of the trial was sufficient to prove that the document, Ex. A, was a genuine transaction and that the Plaintiff had executed it with full knowledge of its contents. The learned Judge found also that the onus was on the Defendants to prove good faith in the transaction which they failed to discharge where for the onus was not shifted on to the Plaintiff and that the Plaintiff was not required to examine any witness to prove that the document was obtained from her by misrepresentation or fraud or that she had executed without its contents having been read over and explained to her.

7. Upon those findings the learned Judge decreed the suit declaring that the deed of settlement dated February 16, 1949, was invalid, void and inoperative and not binding upon the Plaintiff. The Plaintiff's absolute ownership of the property-in-suit was also affirmed.

8. Being aggrieved by the judgment and decree passed by the learned Subordinate Judge, Basanabala Majumdar alias Basana Rani Majumdar alias Basanabala Dey Hazra came up with this appeal which was resisted by the Plaintiff-Respondent Tulsibala Dasi.

9. The Learned Counsel for the Appellants first contended that the learned Judge in the Court below erred in law relying on Section 111 of the Indian Evidence Act by shifting the onus of proving good faith in the transaction under Ex. A on the Defendants-Appellants holding that the Defendant No. 2 Bhubaneswar was in a position of active confidence to the Plaintiff. He further contended that the learned Judge should have accepted the evidence of the Defendant No. 2, D.W. 2 and the Solicitor (D.W. 1) and should have held that everything relating to the transaction under Ex. A was done by the Plaintiff under the advice of the Defendant No. 1, the Solicitor and that the document, Ex. A, was executed by the Plaintiff out of her own will upon independent advice obtained from the Solicitor (D.W. 1) who had read over and explained the contents of the document Ex. A to the Plaintiff who, before executing the document understood its implication so far as it related to her interest in the property disposed of by the document, Ex. A. The Learned Counsel pointed out that the Plaintiff failed to prove that she was ill at or about the time of execution of Ex. A and that, the Defendant requested the Plaintiff to execute an ammuktearnama. Accordingly, Learned Counsel contended that the learned Judge in the Court below should have held that the document, Ex. A, was executed by the Plaintiff with the knowledge of its true nature and contents thereof. The Learned Counsel urged that as the Plaintiff was not a pardanashin lady, according to the finding of the learned Judge in the Court below, she was not entitled to the protection of law as may be availed of by a pardanashin lady.

10. The Plaintiff is a woman of the town. She is illiterate. Those facts, as found by the learned Judge, are uncontroverted.

11. In 89 Ind. Cas. 649 (Privy Council) which was a case relating to a married, illiterate and childless pardanashin woman who purported to execute a deed on wakfnama, which she challenged as void, inoperative and not binding on her, Lord Sumner expressed himself as follows:

Again, the question arises how the state of the settlor's mind is to be proved. That the parties to prove it are the parties who set up and rely on the deed is clear. They must satisfy the Court that the deed has been explained to and understood by the party thus under disability, either before execution or after it under circumstances which establish adoption of it with full knowledge and comprehension. Further, the whole doctrine involves the view that mere

execution by such a person, although unaccompanied by duress, protest or obvious signs of misunderstanding or want of comprehension, is in itself no real proof of a true understanding mind in the executant.

12. Relying on the principles established by the decisions in the cases of Kali Baksh Singh v. Ram Gopal Singh L.R. 41 IndAp 23 (P.C.), Sajjad Hussain v. Wazir Ali Khan L.R. 39 I.A. 156 (P.C.) and Hodges v. Delhi and London Bank Ltd. L.R. 27 IndAp 168 (P.C.), a Division Bench of this Court in Sm. Sonia Parshini Vs. Sheikh Moula Baksha, dealing with the case of a Santal woman who used to work in a mill and was not strictly a pardanashin woman, their Lordships observed:

The mere fact that the Appellant made a living as a mill-hand did not necessarily imply that her deficiencies on account of illiteracy and ignorance were supplied and she was competent to transact business with normal skill and care.

So, in the case of an illiterate and ignorant woman, though not strictly pardanashin, as Sm. Sonia Parshini was, their Lordships expressed themselves in these terms Supra p. 19:

Where ignorance and illiteracy are proved exposing the woman concerned to the danger and the risk of an unfair deal it would, we think, be a perversion of the rule to deny in such case the protection, despite the helplessness of her state, merely on the grounds that she is not strictly pardanashin.

13. We most respectfully agree with and accept the above observations of the Division Bench of this Court. The Plaintiff, though a woman of the town, is an ignorant and illiterate woman and is not a strictly pardanashin woman. She is, however, entitled to the protection due to her disability of illiteracy and ignorance. Accordingly, the onus rested entirely on Defendants-Appellants who had set up and relied on Ex. A to satisfy the Court that the deed, Ex. A, had been read over, explained to and understood by the Plaintiff-Respondent with the full knowledge and effect of the transaction over her absolute interest in the property, covered by Ex. A. Thus the rule in Farid-un-nisa's case Supra was extended to an illiterate and ignorant woman who was not strictly pardanashin in Sonia Parshini's case L.R. 39 I.A. 156 (P.C.). We respectfully accept and apply the principles in Sonia Parshini's case since, in this case, the Plaintiff-Respondent is an illiterate and ignorant but not a strictly pardanashin woman. Therefore, apart from the provisions of Section 111 of the Indian Evidence Act, the burden lay on the Defendants-Appellants who set up and rely on Ex. A to satisfy the Court upon evidence as held in Farid-un-nisa's case as well as in Sonia Parshini's case that Ex. A had been read over, explained to and understood by the Plaintiff who was under the disability of being an illiterate and ignorant woman, though not pardanashin strictly so called, but entitled under the law, protection available to a woman who transfers her properties to her disadvantage, when she has not the usual means of fully understanding the nature and effect of what she is doing. The disability of an illiterate and an ignorant woman, though not strictly pardanashin; makes her dependent upon or

subject her to the influence of others even though nothing in the nature of deception or coercion may have occurred. This is part of the law relating to personal capacity to make binding transfers or settlements of property of any kind. Independent legal advice is not in itself essential. If the scheme and the substance of the deed, Ex. A, were themselves originally and clearly conceived and desired by the Plaintiff-Respondent, i.e. the settlor and were then substantially embodied in Ex. A, i.e. the deed, there would be nothing further to be gained by independent advice. The contention of the Defendants-Appellants was that D.W. 1, a Solicitor, gave independent advice to the Plaintiff in the matter of making and execution of Ex. A while the Solicitor acted for the Plaintiff in that behalf. Assuming that the D.W. 1, the Solicitor, gave independent advice to the Plaintiff as alleged, it is to be found whether the scheme and substance of the deed, Ex. A, were themselves originally and clearly conceived and desired by, the Plaintiff, the settlor and were then substantially embodied in the deed as in Ex. A. In Ex. A, relevant recitals quoted by the learned Judge in his judgment indicate the origin of the deed. Ushabala brought up Kumari Basanabala as her own daughter, but before her death she did not make any provision for the said Kumari Basanabala but instructed the settlor to make provision for the said Kumari Basanabala. The Plaintiff herself was very much fond of Basanabala and treated her as her own daughter. So, the Plaintiff was desirous of making provision for Basanabala by executing a deed of settlement of the premises in dispute (vide p. 2 of Ex. A). The deed was drafted by D.W. 1. He gave advice to the Plaintiff to execute the deed for reasons set forth at p. 2 of the deed (Ex. A). If the reasons are false, the scheme and the substance of the entire deed (Ex. A) must be false. In that event the independent advice of the Solicitor would be of no avail to the Defendants-Appellants. D.W. 2, Bhubaneswar, in examination-in-chief said that the Plaintiff and his mistress Ushabala had great affection for the Defendant No. 1, daughter of the Defendant No. 2. The Plaintiff told Defendant No. 2 that she would settle the suit property with the Defendant No. 1. In cross-examination the Defendant No. 2 had to admit that the Defendant No. 1 never stayed with the Plaintiff and her sister who lived in the suit premises where prostitutes live. Occasionally the Defendant No. 2 (D.W. 2) used to take the Defendant No. 1, when she was aged 8/9 years, to the house of the Plaintiff. So, it is clear from the evidence of Defendant No. 2 (D.W. 2) that the Plaintiff and Ushabala never brought up Defendant No. 1 Basanabala as her " daughter and the Plaintiff and Ushabala could have, therefore, no occasion to be very fond of the Defendant No. 1. The Defendant No. 2 (D.W. 2) did not say in his examination-in-chief that Ushabala brought up Defendant No. 1 as her own daughter and instructed the Plaintiff to make provision for Basanabala as she could not make any provision for her before she died. So, the recitals in Ex. A relating to the scheme for making the settlement have been proved by the evidence of D.W. 2 (Defendant No. 2) to be false in our view. If the recitals in Ex. A (p. 2) mentioned above would have been the scheme of the Plaintiff and if, according to the Plaintiff's own scheme, such recitals had been set forth in Ex. A, then as observed by Lord Sumner in *Farid-un-nisa's* case *Supra* there would be

no question of any independent advice coming from D.W. 1, the Solicitor. If the Solicitor advised in terms of the recitals in Ex. A (p. 2) to make the settlement in favour of the Defendant No. 1, the evidence adduced by D.W. 2 clearly falsified any such advice as to such scheme for making the settlement as embodied in the recitals in Ex. A (p. 2) as mentioned above. Therefore, neither the scheme nor the substance of the disposition under Ex. A originated from the Plaintiff-Respondent.

14. The Solicitor, D.W. 1, at p. 5 of Ex. A recorded : "explained" by me to all the executants who are known to me." It is not stated in the endorsement as above in Ex. A that the Solicitor read over and explained the document, Ex. A, written in English language with several intricate legal" terms and expressions. It is not in the endorsement as above in Ex. A that the document was read over line by line and explained in Bengali to the Plaintiff nor it is recorded-in the endorsement as above that the Plaintiff understood the nature and contents of the document read over and explained to her in Bengali. D.W. 1, Solicitor Dey, in his examination-in-chief said : "It was stamped and then executed at my residence by the Plaintiff. I explained the document to Plaintiff and Defendant No. 2 before Plaintiff put her T.I. Plaintiff put her T.I. after expressing that she had understood the contents of the document as settlor and as beneficiary.

15. The Plaintiff in her examination-in-chief said that it was the Defendant No. 2 who took him to the house of a Solicitor whose name as Defendant No. 2 told her as Chandi Babu. The Defendant No. 2 told Plaintiff that Chandi Babu would prepare the ammuaktearnama which the Plaintiff agreed to execute upon being requested by the Defendant No. 2 for his effectively managing the Plaintiff's house, portions of which were in occupation of tenants, for and on behalf of the Plaintiff. She stated that Chandi Babu did not read over the document to her before taking thumb impression on it. She further stated that the Defendant No. 2 paid the cost of writing and registration of the document since he used to realise rent from her tenants and had money with him. She further stated that the Defendant No. 2 paid the fees of Chandi Babu. As regards of fees paid to Chandi Babu for incurring expenses for making and registration of the deed there was no cross-examination of the Plaintiff. In cross-examination D.W. 1 said that he had no independent recollection regarding the details of any transaction with the Plaintiff regarding the execution of the disputed document. The Plaintiff said that document was prepared by D.W. 1 without the knowledge of the Plaintiff and was executed by the Plaintiff at the residence of D.W. 1. In cross-lamination, D.W. 1 indulged in unbelievable stories. His transaction with the Plaintiff regarding the making of Ex. A and its draft had been entered in his day-book. Regarding fees received from the Defendant No. 2, D.W. 1 made entries in his account books. There was a draft of Ex. A. That draft was not endorsed as approved by the Plaintiff. The document, Ex. A, does not show who drafted it. D.W. 1 said that the Plaintiff first visited his office and instructed him to draw up the deed, Ex. A, a month before its execution. That fact will appear from D.W. 1's day-book. As regards instruction for drawing up of Ex. A given by the Plaintiff to D.W. 1, the

Solicitor, the Solicitor said in cross-examination : "She told me that she would reserve life interest in the property and after her death Defendant No. 1 will get it."

16. The cash book and the day-book of the Solicitor were neither produced nor proved by the Defendants, so-also the draft of Ex. A. The recitals at p. 2 of Ex. A, as mentioned above, set forth by D.W. 1 in Ex. A were proved by evidence to be false. The recitals in Ex. A (p. 4) in Clause 2, beginning from the words "subject to the condition that in case there be no male issue in the male line of the said Kumari Basanabala Dey Hazra, then in that case only the said premises No. 104/12 Gopal Lal Tagore Road, Baranagar, shall be utilised for the location of a girl school to perpetuate the memory of the said Ushabala Dasi for benefit of the girls of the locality" right upto the said girl school were set forth in Ex. A by D.W. 1, as his evidence shows, without any instruction from the Plaintiff. A letter was written by D.W. 1 asking the Plaintiff to come to his office. The copy of the letter might be in the copybook in the office of D.W. 1 as deposed to by him. All these documents would have corroborated D.W. 1 as to what he had stated in his cross-examination. The D.W. 2 actually paid-the cost of making and registration of Ex. A to D.W. 1. The endorsement at p. 5 on Ex. A, made by D.W. 1 and the evidence adduced by D.W. 1 convince us that Ex. A was drafted and was given final shape by D.W. 1 at the instance of the Defendant No. 2. The endorsement on Ex. A does not contain the words "read over", but only contains the word "explained". A document like Ex. A written in English was required to be read over and explained in Bengali to the Plaintiff in order that the Plaintiff could fully comprehend the nature of the transaction under Ex. A and its effect on her interest in the property covered by Ex. A. D.W. 1 said in his examination-in-chief that he explained the document, Ex. A, to the Plaintiff who gave out that they understood the contents of the document before putting her thumb impression on it in token of its execution. The endorsement, subscribed by D.W. 1 on p. 5 of Ex. A does not show that the document was read over and explained in Bengali by D.W. 1 to the Plaintiff and that the Plaintiff understood what was read over and explained to her in Bengali as appearing in Ex. A, written in English. Exhibit A, as the recitals show, contains several technical terms of law. The recitals at p. 2 of Ex. A, relating to the scheme for making Ex. A, have been proved to be false. The disposition part in Ex. A, p. 5, Clause 2, excerpts from which have been quoted, had been set forth in Ex. A by D.W. 1 without any instruction from the Plaintiff, evident from what D.W. 1 deposed as has been quoted from his deposition earlier in this judgment. How a document in English, before execution by a person, suffering from a disability like that of the Plaintiff is to be read over and explained, when the document relates to disposition of the executant's property, suffering from a disability as that of the Plaintiff and prima facie affects her disadvantageous, was laid down in Farid-un-nisa's case Supra, p. 209 in these terms:

Evidence to establish such comprehension is most obviously found in proof that the deed was read over to the settlor and where necessary, explained. If it is in a

language which she does not understand, it must, of course, be translated and it is to be remembered that the clearness of the meaning of the deed will suffer in the process. The extent and character of the explanation required must depend on the circumstances of each case. Length, intricacy, the number and complexity of the dispositions, or the unfamiliarity of the subject-matter are all reasons for requiring an increased amount and efficiency of explanation.

17. The evidence of D.W. 1, as we have assessed, eloquently speaks of utter violation of the principle established by the decision in Farid-un-nisa's case as to the manner in which and extent to which the reading over and explaining an English document of the like of Ex. A must extend. The document, Ex. A, is a lengthy and an intricate document covering a complex disposition. The D.W. 1 never said, nor did he endorse on Ex. A, that he had translated Ex. A in Bengali line by line and explained the meaning of the terms of the disposition, in Bengali to the Plaintiff. The document Ex. A itself, on the face of it, acts disadvantageous to the Plaintiff. She attempted to raise a loan as she said on the security of property covered by Ex. A. As by Ex. A she had only life interest, she could not raise any loan on the security of the property covered by Ex. A. According to the Plaintiff, her scheme was to execute an ammuksarnama in favour of the Defendant No. 2 in order that on the basis of ammuksarnama the Defendant No. 2 could realise rent from the tenants of the house of the Plaintiff on behalf of the Plaintiff, as was represented to the Plaintiff by the Defendant No. 2. According to her, she had no scheme for making any disposition as that under Ex. A. D.W. 2 (Defendant No. 2) said that he never asked the Plaintiff to execute any ammuksarnama and that the Plaintiff herself managed her own property and that, according to the Plaintiff's instruction, D.W. 1 drafted Ex. A which the Plaintiff executed out of her own volition. We have already observed that the recitals at pp. 2 and 4 of Ex. A which cover the scheme for disposition of the property covered by Ex. A are false. So, the scheme of disposition under Ex. A was not the Plaintiff's scheme but of the Defendants, particularly of D.W. 2 (Defendant No. 2) and was set forth in the recitals of Ex. A by D.W. 1, the Solicitor. Accordingly, Ex. A did not represent the scheme of the Plaintiff, but it represented the scheme of the Defendants. Without being instructed by the Plaintiff, it is D.W. 1, the Solicitor, who had set forth the scheme of disposition in Ex. A and the circumstances, appearing in evidence, lead to one and only one conclusion that the Defendants instructed the Solicitor, D.W. 1, to set forth all those that were recited in Ex. A without the instruction from and behind the knowledge of the Plaintiff-Respondent.

18. The Defendant No. 2, D.W. 2, in his examination-in-chief did not say who paid the cost of making and registration of Ex. A. D.W. 2 in cross-examination said : "I did not pay any amount as cost for Ex. A....I handed over some money to D.W. 1 as asked by the Plaintiff. I do not remember the amounts. D.W. 1 gave me receipts for these payments." The receipts were not produced and proved. Wherefrom D.W. 2 got the money? The Plaintiff said that D.W. 2 used to manage the house of the Plaintiff by realising rent from the tenants. The Plaintiff said that

the Defendant No. 2 paid the cost for writing and registration of Ex. A as he used to realise rent from her tenants and had money with him. D.W. 1, Solicitor, said in cross-examination : "Plaintiff paid my fees for the disputed document. Defendant No. 2 paid it actually, as asked by Plaintiff, after the execution of the document."

The evidence of the Plaintiff and D.Ws. 1 and 2 lead us to conclude that D.W. 2, by realising rent from the Plaintiff's tenants, had money with him which he paid to D.W. 1 for defraying the cost of making and registration of Ex. A and for fees of D.W. 1. From the evidence adduced by D.Ws. 1 and 2, we are of the view that D.W. 1, the Solicitor, was instructed by D.W. 2 and none else to make Ex. A. Exhibit A was neither read over in Bengali nor explained in Bengali by D.W. 1 before the Plaintiff had put her thumb impression on Ex. "A". D.W. 1, a Solicitor, could never therefore be an adviser, far less an independent adviser to the Plaintiff. D.W. 1 drafted Ex. A with recitals as in pp. 2 and 4 of Ex. A which have been proved by the evidence adduced by D.W. 2 to be false. If D.W. 1 as a Solicitor for the Plaintiff had prepared the draft of Ex. A and participated in the making and execution of Ex. A by the Plaintiff, we hold that he acted without instruction from the Plaintiff and did not act as an independent adviser to the Plaintiff. That the Plaintiff was D.W. 1's client would have appeared from the day-book of D.W. 1. As to the existence of that day-book of D.W. 1, D.W. 2 (Defendant No. 2) had means of knowledge since it is D.W. 2 who made payments to D.W. 1 for defraying the expenses for making and registration of Ex. A. The amount received by D.W. 1 as a Solicitor for the Plaintiff in the matter of making and execution of Ex. A would have appeared from D.W. 1's account book as he said. So, the documentary evidence, the day-book and the account book of D.W. 1 would have proved that he (D.W. 1), under the instruction of the Plaintiff, acted in the matter of making and execution of Ex. A. The D.W. 1 read over in Bengali and explained in Bengali the contents of Ex. A to the Plaintiff before she had given her thumb impression on Ex. A ought to have been proved by the Defendants by examining the witnesses to the execution of Ex. A, such as, Sukumar, Provat and Rajani. Sukumar and Provat were not cited as witnesses by the Defendants. Rajani was cited as a witness by the Plaintiff-Respondent. His hazira was filed in Court on the date of the trial. So, Rajani was available to the Defendants on the date of the trial and the Defendants upon whom the burden of satisfying the Court as to the due execution of Ex. A and as to the reading over and explaining of Ex. A to the Plaintiff in Bengali by D.W. 1 before its execution rested, could have easily examined Rajani as their witness. The Plaintiff had no burden to prove that she executed Ex. A after it had been read over and explained to her in Bengali by D.W. 1. She attacked the Ex. A denying that it contained her scheme of disposition and asserted that the Defendants, particularly Defendant No. 2, managed to create the document, Ex. A, behind the back of the Plaintiff to whom it was never read over and explained by anybody before execution. The argument advanced for the Defendants-Appellants that it was the duty of the Plaintiff-Respondent to examine Rajani as her witness could

not, therefore, impress us. Rajani was available in Court on the date of trial and the Defendants-Appellants were duty bound to examine Rajani as their witness to support their contentions. In Farid-un-nisa's case Supra, p. 209 Lord Sumner observed:

Again, the question arises how the state of the settlor's mind is to be proved. That the parties to prove it are the parties who set up and rely on the deed is clear. They must satisfy the Court that the deed has been explained to and understood by the party....

So, the burden in the language of the privy council was upon the Defendants-Appellants to satisfy the Court that the Ex. A was read over and explained to the Plaintiff in Bengali and was understood by her before she had executed the same. The Plaintiff had no burden to prove even though she might have cited Rajani as a witness and did not examine him as a witness on her behalf. The other witnesses, whose names appear in Ex. A, were required to be summoned by the Defendants-Appellants and those witnesses should have been examined by the Defendants-Appellants as their witnesses, more so, when the evidence of D.W. 2, Defendant No. 2, as we have found, falsifies the recitals at pp. 2 and 4 of Ex. A. The Plaintiff's failure to examine Rajani whose hazira was filed before the Court at the date of hearing of the suit would be of; no moment in a case like this. The burden of establishing that; Ex. A had been drafted and made according to the scheme and instruction of the Plaintiff, read over and explained to her in Bengali and clearly understood by her before she had executed the same, rested solely on the Defendants-Appellants. In Farid-un-nisa's case Supra the Privy Council pointed out that a woman, like the Plaintiff who suffers from such disabilities as being illiterate and ignorant (but not strictly pardanashin Indian woman), is subject to the influence of others, even though nothing in the nature of deception or coercion may have occurred. It matters not in a case like this, whether in between the Plaintiff and the Defendant No. 2 Bhubaneswar Dey Hazra, a fiduciary relationship was there so as to attract the doctrine as laid down in Section 111 of the Indian Evidence Act. The transaction under Ex. A falls within the rule of law as laid down in Farid-un-nisa's case Supra and Sonia Parshini's case Supra already referred to. The Plaintiff is an illiterate and an ignorant woman of the town but not strictly pardanashin. D.W. 2 had much intimate association with the Plaintiff whose sister late Ushabala was in Defendant No. 2's keeping till her death. Between the Plaintiff and the Defendant No. 2 association was so close that the Defendant No. 2 called the Plaintiff Didi while the Plaintiff called the Defendant No. 2 Chotakarta. Neither of them was in any way related either by blood or by marriage. The Plaintiff and her sister were prostitutes by profession. The Defendant No. 2 used to hob-nob with both of them. At the relevant time when Ex. 1 came into existence, the Plaintiff was suffering from a disability relating to her capacity to make any disposition of her property as under Ex. A. The Plaintiff's disability, as the Privy Council in Farid-un-nisa's case Supra observed, made her a prey to the influence of Defendant No. 2. The Defendant No. 2 did everything in the matter of making, execution and

registration of Ex. A since the disposition under Ex. A was in favour of Defendant No. 1, daughter of the Defendant No. 2. The scheme of disposition under Ex. A was disadvantageous to the Plaintiff's interest in the property covered by Ex. A. Therefore, the Defendants-Appellants were required to establish that Ex. A was born out of the scheme of the Plaintiff, that Ex. A after being typed and made ready for execution was translated in Bengali as and when read over and explained to the Plaintiff, that the Plaintiff understood each and every item of recitals in Ex. A and the effect of disposition under Ex. A over her interest in the property covered by Ex. A and that after understanding the nature and implication of the disposition and its effect on her interest in the property, covered by Ex. A, the Plaintiff executed Ex. A. The burden of establishing all those facts lay entirely on the Defendants-Appellants which they failed to discharge as was rightly found by the Court below. This is not a case falling within the ambit of the doctrine laid down in Section 111 of the Indian Evidence Act. The present is a case that falls within the rule of law as laid down in Farid-un-nisa's case Supra and Sonia Parshini's case Supra already discussed. From that aspect of the Case, we hold that the judgment and decree passed by the learned Subordinate Judge must be confirmed and the appeal must be dismissed.

19. Accordingly, the appeal is dismissed with costs to the Respondents.

Amaresh Roy, J.

20. I agree.