

(2015) 03 KAR CK 0042

In the Karnataka High Court

Case No : Regular First Appeal No. 1821 of 2013

G.L. Chandrashekar

APPELLANT

Vs

C.R. Anilkumar and Others

RESPONDENT

Date of Decision : 17-03-2015

Acts Referred:

Contract Act, 1872 — Section 16, 17
Evidence Act, 1872 — Section 111, 27
Transfer of Property Act, 1882 — Section 48

Citation : (2015) 03 KAR CK 0042

Hon'ble Judges : Anand Byrareddy, J.

Bench : Single Bench

**Advocate : Vivek Reddy, Senior Advocate for Chandrashekar C. Chansapur,
Advocates for the Respondent**

Final Decision : Allowed

Judgement

Anand Byrareddy, J.—This appeal is by the defendant, in the suit.

2. The parties are referred to by their rank, before the trial court, for the sake of convenience.

3. The first plaintiff was the adopted son of the second plaintiff The first defendant was the husband of the biological sister of the first plaintiff The second defendant was the sister of the first plaintiff The suit was filed seeking the relief of declaration that plaintiff No. 1 was the owner of the property described in the Schedule to the plaint. The plaintiff had also sought a declaration that an agreement of sale dated 18.12.1996, said to have been executed by the second plaintiff in favour of the first defendant and the General Power of Attorney dated 27.2.1998 executed by the second plaintiff in favour of the second defendant, as well as the sale deed dated 25.10.2002, said to have been executed by the second defendant in favour of the first defendant, was fraudulent and not binding on the plaintiffs. The plaintiffs also sought recovery of possession of the suit properties and for damages for use and occupation, of the same, at the rate of

Rs. 5,500/- per month.

The suit was originally brought by the first plaintiff seeking ejectment of the defendant, on the basis of a gift deed said to have been executed by the second plaintiff in favour of the first plaintiff. As the title of the first plaintiff was disputed by the defendants, the second plaintiff was impleaded.

It was the case of the first plaintiff that he was the owner of the suit property under a registered gift deed dated 16.2.2004, said to have been executed by the second plaintiff. The second plaintiff is said to have purchased the property from one Jadara Muniyamma, under a registered sale deed dated 12.9.1980.

According to the first plaintiff, the second plaintiff is the second wife of one G. Ramaswamy @ Rangaswamappa, who is said to have died on 11.12.1983. One Lakshmiddevamma @ Mahalakshamma was said to be the first wife of Rangaswamy. Rangaswamy is not seen to have had any children of his own, hence plaintiff No. 1 is claimed to have been adopted by Rangaswamy.

One Radhakrishna C, was said to be the biological father of plaintiff No. 1. Radhakrishna was said to be the brother of plaintiff No. 2. It is stated that by virtue of the fact that defendant No. 2 was her niece, plaintiff No. 2 is said to have permitted her and her husband, defendant No. 1, to reside along with her. It is claimed that defendant No. 1 was an engineer by profession and since plaintiff No. 2 was an illiterate woman, she had placed trust and faith in the defendants in managing her affairs and had entrusted them with her all, including monies and other valuables apart from documents to her immovable properties. There were said to be several court cases pertaining to her immovable properties, which defendant No. 1 was following up on her behalf. It is alleged that during the said period, it was the usual practice to obtain the signatures of Plaintiff No. 2 on blank papers, on the pretext that the papers were required for preparation of documents to be filed in the pending cases, and she was not in a position to move about freely and in order to save time, signatures were obtained on blank papers to be used later before the court, in those pending cases. It is asserted that plaintiff No. 2 had no reason to doubt the bona fides of the defendants. It is also alleged that defendant was also managing the financial affairs of plaintiff No. 2 and it was a common practice for him to obtain her signatures on blank cheque leaves.

The plaintiffs asserted that the possession of the suit schedule property by the defendants was permissive possession and they could not claim any contractual or other right. It is alleged that since defendant No. 2 started claiming that she had been adopted by the late husband of plaintiff No. 2, a legal notice is said to have been issued to defendant No. 2 and her husband, defendant No. 1, to vacate the suit schedule premises. It is said that the defendants had replied to claim that plaintiff No. 2 had executed an agreement of sale, dated 18.12.1996 in favour of defendant No. 1, agreeing to sell the suit property and had received a sum of Rs. 25,000/- and had put the defendants in possession of the property

on the same day. It was also contended that plaintiff No. 2 had executed a general power of attorney dated 27.2.1998, in favour of defendant No. 2, authorizing her to deal with the suit property. And it was pursuant to the same that a sale deed had been executed by defendant No. 2, on behalf of plaintiff No. 2, in favour of defendant No. 1, as on 25.10.2002.

The plaintiffs had vehemently disputed the execution of the agreement of sale and the general power of attorney in favour of the defendants, as claimed above. It was further pointed out that fearing the misuse of blank papers that may have been signed by plaintiff No. 2, a public notice is said to have been issued in a Kannada daily newspaper, dated 4.9.2002, warning the general public not to transact with the defendants in respect of the suit property. Though the defendants are said to have reacted to the notice by issuing a reply to the plaintiffs, significantly, there was no mention of, either the alleged agreement of sale or the general power of attorney. The plaintiffs therefore sought to challenge the sale deed dated 25.10.2002, in respect of the suit property in favour of defendant No. 1. The plaintiffs have also claimed damages for use and occupation of the suit property by the defendants.

The defendants having entered appearance had filed their written statement. The claim of plaintiff No. 1 that he had acquired the suit property under a gift deed dated 16.2.2004 was denied, however, the property having been acquired by plaintiff No. 2, under a sale deed dated 12.9.1980 was admitted. The alleged gift deed, claimed by plaintiff No. 1, was dismissed as a fabricated document, created only to defeat the title to the property of defendant No. 1. And denied that the plaintiffs were entitled to any of the reliefs prayed for. It was also contended that the present suit was filed only as a counter to a prior suit instituted by defendant No. 2, in OS 8909/2003, before the City Civil Court, Bangalore, seeking a declaration that she was the adopted daughter of Rangaswamy, the deceased husband of plaintiff No. 2.

The trial court had framed the following issues on the basis of the above pleadings:

- "1. Whether the plaintiffs prove that the sale deed executed by the defendant No. 2 in favour of defendant No. 1 on 25.10.2002 is based on fraudulent power of attorney?
2. Whether the plaintiff No. 1 proves his title over the suit schedule property?
3. Whether the plaintiffs are entitled to possession, damages and mesne profits as prayed for?
4. What decree or order?

ADDITIONAL ISSUES:

1. Whether the plaintiffs determined the market value of the suit schedule property correctly and paid sufficient Court fee?

2. Whether the defendants No. 1 and 2 prove that the suit is not maintainable as pleaded by them under their written statement?"

Issues Nos. 1 to 3 and the additional issue No. 1 were answered in the affirmative and the suit was decreed as prayed for. It is that judgment which is under challenge.

4. On an examination of the material on record with reference to the pleadings of the parties, the trial court has found that the parties were closely related was not in dispute. In that, the first plaintiff was the natural brother of the second defendant. The first defendant, who is the husband of the second defendant, was incidentally the maternal uncle of both the first plaintiff and the second defendant. The second plaintiff was the paternal aunt of the first plaintiff and the second defendant. Therefore, the court has concluded that the defendants being in possession of the suit property was not unusual. It was also on record that the first defendant was actively assisting the second defendant in managing her property and financial affairs.

It is then found as a fact that the second plaintiff had validly terminated the General power of Attorney, on the basis of which the second defendant is shown to have executed a sale deed, dated 25.10.2002, Exhibit P-27 in favour of the first defendant. This, the trial court has held with reference to Exhibit P-5, a public notice published in a daily newspaper, as on 4.9.2002. The trial court has found that the defendants had acknowledged the said notice by having published a reply notice through a daily newspaper dated 15.9.2002, Exhibit D-15.

The trial court has accepted the case of the plaintiffs that the first defendant was a retired Warrant Officer, in the Indian Air Force and an Engineer by qualification and that he wielded much influence over the second plaintiff, who was an uneducated, helpless widow, who was old and infirm. In managing her affairs, the trial court has opined, the first defendant must certainly have obtained blank signed documents from time to time - on the pretext of the same being required for purposes of several pending cases instituted against her tenants and that the same had been misused by the defendants in creating false documents in effecting the sale transaction aforesaid.

The trial court has held that this is further fortified by the fact that the agreement of sale set up by the defendants, dated 18.12.1996, Exhibit D-26, indicated the consideration as Rs. 25,000/- and that the entire amount was paid. However, the sale deed was not executed pursuant to the same by plaintiff No. 2, nor did the first defendant seek the execution of the same. The trial court has doubted the existence of the documents, as there is no mention of the same in the reply notice issued by the defendant, as aforesaid.

It is also found by the trial court that the first defendant had failed to prove that the sale consideration of Rs. 2 lakh under the sale deed is not shown to have been paid to the second plaintiff And that the first defendant had not placed atleast his income tax returns for the corresponding year, in which he had

incurred the expense. The court has thus drawn an adverse inference against the defendants.

In so far as the defence of the defendants that though the second plaintiff had complained to the police that they had stolen the original documents pertaining to the suit property, that there was a statement made by the second plaintiff before the police that she had indeed executed an agreement of sale and a general power of attorney, has been dismissed by the trial court as irrelevant on the footing - that such a statement cannot be treated as a confession made by her.

The trial court has concluded that the plaintiffs have committed fraud as contemplated under Section 17 of the Indian Contract Act, 1872 (Hereinafter referred to as the "Contract Act", for brevity). In coming to such a conclusion, the court below has held that a perusal of Exhibits D-25 and D-26 were typewritten on the same day and using the same machine.

The trial court has also concluded that though the initial burden of proving the issue No. 1 lay on the plaintiffs, having regard to the circumstance that the transaction is vitiated on account of undue influence and fraud - the burden shifted on the defendants and that they had failed to establish their case.

In so far as Issue No. 2 is concerned, the trial court has held that since the plaintiffs were able to establish that the sale deed dated 25.10.2002 was void, the second plaintiff would continue to be the owner of the suit property and that she having executed a registered gift deed in favour of the first plaintiff, who is shown to be her adopted son, he would be construed as the owner of the property. The property being the original streedan property of the second plaintiff, her right to deal with the same was unquestionable and has held the said issue in favour of the plaintiffs.

The contention of the plaintiffs that the defendants were in permissive possession only on account of the close relationship and not by virtue of any formal documents, as sought to be claimed by the defendants, has been accepted and it is held that the defendants would be liable to compensate the plaintiffs by way of damages for use and occupation of the property at the rate of Rs. 5,500/- per month. While also holding that the claim for mesne profits would require a separate enquiry. And has answered Issue No. 3 in the affirmative.

The additional issue No. 1, pertaining to valuation has been negated and additional issue No. 2 has also been answered in the negative. It was the contention of the defendants that the registration of a gift deed by plaintiff No. 2 during the subsistence of the sale deed dated 25.10.2002 not being valid and tenable, has been negated by the trial court on the footing that such a contention could be accepted if the sale deed had withstood the scrutiny of the court, and since that has been found to be void, it ceases to exist and could be ignored for all purposes.

The first defendant appearing in person has canvassed arguments at length and has also submitted written arguments questioning the correctness of the judgment. It is sought to be pointed out that the second defendant was in fact the adopted daughter of the second plaintiff as evidenced by various documents, produced and marked as exhibits. It is in order to deny inheritance to her that a false and concocted case was foisted on the defendants and as a counter blast to the pending suit for declaration by the second defendant, claiming as the adopted daughter of late Rangaswamy and Lakshmiddevamma, the elder sister of the second plaintiff. The said suit is pending consideration in OS 8909/2003, which aspect of the matter has been religiously glossed over by the trial court, according to the first defendant.

It is pointed out by the first defendant that the finding of the trial court of the General Power of Attorney in favour of the second defendant, dated 27.2.1998 as having been validly terminated is not tenable. In that, the very contention of the plaintiffs was self defeating. If it was their case that the said General Power of Attorney was cancelled through the notice at Exhibit P-5, the same cannot be sustained as there is no reference to the same. If it is their case that no such Power of attorney was executed, the same cannot also be cancelled. On the contrary, it is argued that the Power of Attorney was executed for a limited purpose and that there was no power conferred to alienate the suit property. Significantly, there was no attempt to demonstrate that the same was not notarized in the presence of defendant No. 2 and that she was not identified by the Advocate, who had endorsed the same, in the presence of two witnesses.

It is also pointed out that the second defendant was not an uneducated, helpless old lady as held by the court below. The evidence on record would indicate that she has studied upto matriculation and is conversant both in Kannada and in English. She affixes her signature in English and is a litigant, who had been involved in over 40 court cases.

The candid statement of the second plaintiff before the Police at Exhibit D-6, that she had indeed executed the Power of attorney and an agreement of sale in respect of the suit property in favour of the second defendant, is unfairly negated by the trial court.

It is also contended that the finding of the court below that a gift deed could be validly executed in respect of the suit property even during the subsistence of the registered sale deed in favour of the first defendant was opposed to law and not tenable. Even if the sale deed has been subsequently held to be void by the court below, the gift deed could not have been executed at the relevant point of time.

It is to be noticed that the first defendant has gone to great lengths in dissecting the large volume of documents, produced to demonstrate several facts including the invalidity of the adoption of the first plaintiff and the invalidity of the marriage of the second plaintiff with late Rangaswamy. Apart from seeking to

demonstrate that there are admissions made by plaintiff No. 2 in many documents and circumstances as to the suit property being the subject matter of the transaction. As the trial court has not addressed the same and has chosen to proceed on the basis of certain documents that are referred to in the body of the judgment - it would be sufficient for this court to consider the correctness or otherwise of the judgment with reference to those documents and to juxtapose other documents on record, to justify any conclusions to be drawn.

5. The learned Senior Advocate Shri Vivek Reddy, appearing for the counsel for the plaintiffs seeks to justify the judgment of the court below, while seeking to highlight the following circumstances and the answers elicited in the course of the evidence of the defendants, to demonstrate the fraud committed by the defendants.

It is contended by Shri Reddy, as herein under:

Exhibit P5 is the paper publication issued by the plaintiff No. 2 revoking all the General Power of Attorneys and warning the general public not to deal with defendant Nos. 1 and 2.

Defendant No. 1 has replied as per Exhibit D-15 to the Paper and in the said reply, he has not stated about the existence of the alleged Sale Agreement dated 18.12.1996 and the alleged General Power of attorney dated 27.02.1998.

Defendant No. 2 has also replied to the notice issued by the plaintiff vide Exhibit D-41 and in the said reply, she has not stated about the existence of alleged Sale Agreement dated 18.12.1996 and the alleged General Power of attorney 27.02.1998.

Exhibit P-11 is the reply notice issued by the defendant Nos. 1 and 2 and in the said notice also, they had not stated about the existence of the alleged Sale Agreement dated 18.12.1996, the alleged General Power of Attorney dated 27.02.1998 and the sale deed dated 25.10.2002.

After filing of the suit, the defendants have stated for the first time about the existence of the alleged Sale Agreement dated 18.12.1996, General Power of Attorney 27.02.1998 and the sale deed dated 25.10.2002.

In the sale agreement, it is alleged that the entire sale consideration amount of Rs. 25,000/- was paid to plaintiff No. 2 and all the original documents were handed over to defendant No. 1.

In Exhibit D-25, the General Power of Attorney, there is no reference to the alleged sale agreement executed between the plaintiff No. 2 and the defendant No. 1.

So also, in the sale deed, there is no reference about the execution of the sale agreement dated 18.12.1996.

In the sale deed again, it is alleged that, Rs. 2,00,000/- was the sale

consideration, but in the written statement, there is no reference to the payment of Rs. 2,00,000/- to the plaintiff No. 2.

Defendant No. 1 is an income tax assessee, but he has not produced any documents before the court below, to show that he has paid the sale consideration to the plaintiff and hence an adverse inference has been drawn by the court below.

The witnesses to the alleged General Power of Attorney are S. Nagaraja and Sri. Somashekar C. Sri. Somashekar is the son of defendant No. 1 and if that is so, it is not clear why the defendants No. 1 and 2 were not having knowledge about the alleged existence of the said General Power of Attorney till 23.10.2002.

It is the claim of defendant No. 2 that she came to know about the General Power of Attorney two days prior to the execution of the sale deed dated 25.10.2002. Defendant No. 1 claims that he came to know about the execution of the General Power of Attorney through his wife. It is surprising to notice that, Defendants 1 and 2 claimed that Krishnamma, the plaintiff No. 2, gave them the General Power of Attorney, when there is no such plea either in the written statement or in the affidavit evidence and hence it is an after-thought and a fraudulent claim and this itself shows that no such General Power of Attorney was executed by Plaintiff No. 2 in favour of Defendant No. 2. When Krishnamma herself had published in the news paper on 4.9.2002 (that is one month before the alleged sale deed) that the defendants were masquerading with a bogus General Power of Attorney, it is inexplicable as to how she executed the General Power of attorney in favour of defendant No. 2.

If as per the say of the defendants, they came to know about the existence of the General Power of Attorney only on 23.10.2002, it is not clear how defendant No. 2 was able to procure water and electricity connections to the suit schedule property on 30.07.2002.

As per the sale deed executed on 25.10.2002, it was shown as a vacant site, but as on the date of execution of the sale deed, there was a building in existence over the property in question, as water and electricity connections were obtained as per Exhibits P-13 to P-21.

In the cross examination of PW-2, the defendants have not cross examined about the handing over of the General Power of Attorney only two days before the execution of the sale deed.

The defendant No. 2 has filed the suit in O.S. No. 9387/2004 challenging the gift deed executed by plaintiff No. 2 in favour of the plaintiff No. 1 dated 16.02.2004 and she has withdrawn the same and hence she cannot question the same. The defendant No. 1 was also having the knowledge of the same as it is admitted by defendant No. 1 in his cross examination. If that is so, there is no reason forthcoming why he has not challenged the same till the year 2012.

Defendant No. 1, in his cross examination, has admitted about the paper

publication issued by plaintiff No. 2 and admitted that the plaintiff No. 2 requested the general public not to purchase the properties from defendants No. 1 and 2.

Defendant No. 1, in his cross-examination, has stated that, he has spent Rs. 7.00 lakh for the construction of the building, but had failed to answer when he had constructed the building in question and he had stated that as on the date of the execution of the sale deed, there was a vacant site.

Defendant No. 1, in his cross-examination, has stated that, during the execution of the sale agreement, Exhibit D.26, the witnesses present were Sri. Nagaraj and Sri. Somashekar, but in the agreement, the names of some other persons are found and hence, the execution of Exhibit D-26 is doubtful.

In the sale deed, it is alleged that, Rs. 2,00,000/- is the sale consideration, but in the written statement, there is no reference to the payment of Rs. 2,00,000/- to the plaintiff No. 2.

Defendant No. 1 had the knowledge of the General Power of Attorney only two days before the execution of the sale deed and if that is so, it is inexplicable how he had obtained water and electricity connections to the suit schedule property in the name of R. Sudharani. Defendant No. 2 had stated that the contents of Exhibits D-26 and D-27 are correct, but failed to answer properly, as there is conflicting narration in the said documents.

Exhibit D.21, the khata of the property was obtained in the year 2005, that is after the filing of suit.

The defendant No. 1 had stated that after execution of the sale deed, he was looking after the suit schedule property since from the date of the execution of the sale deed. If he was really in the possession of the property, it is not clear as to why he was not looking after the suit schedule property since the year 1996.

Defendant No. 2, in her cross-examination, had stated that, she does not admit all the contents of Exhibit D.25, but had failed to answer the questions and the Court has noted that her answers were evasive.

Defendant No. 2 had stated that, plaintiff No. 2 had informed her about the handing over the documents to defendant No. 1 in the year 1996. It is not evident under what circumstances she had obtained water and electricity connection on 30.7.2002.

She had further stated that she had seen the General Power of Attorney only two days prior to the execution. If that is so, it is inexplicable as to how she had obtained water and electricity connections in her name on 30.07.2002.

She had further stated that she had not done any act based on Exhibit D-25, apart from execution of the sale deed. If so, how water and electricity connections were obtained in her name on 30.07.2002.. She further states that, Krishnamma was not having any difficulty to come to the Sub-Registrar's office.

If so, it is inexplicable as to why she gave the General Power of Attorney to defendant No. 2. She had denied about making an application to the Bangalore Electricity Supply Company (BESCOM) and the Bangalore Water Supply and Sewerage Board (BWSSB).

The General Power attorney was given two days before execution of the sale deed and it shows that fraud is apparent on the face of record.

The list of witness filed by the defendants does not tally with the documents.

Para 15 of the evidence of the defendant No. 2 is contrary to her contention. If defendant No. 2 had received the amount and handed over the same to plaintiff No. 2, absolutely, no documents were produced before the court. Further, she had stated that Rs. 2,00,000/- was received by plaintiff No. 2 as sale consideration and the said excess amount was to provide water and electricity connection to the suit schedule property. The said say of the defendant No. 2 is contrary to her contentions.

Defendant No. 2 had claimed that, she had sold two properties, one in favour of her son Sri. C. Somashekar and the suit schedule property in favour of her husband. The contention of defendant No. 2 is that, the property sold in favour of her son had fallen to her share as per partition deed dated 13.11.2002. If it is so, why she has obtained GPA from C. Krishnamma is inexplicable.

Defendant No. 2, has stated that, she was not ready to file an affidavit before the BESCOM authority or before the court about the obtaining of electricity connection to the suit schedule property fraudulently in her name by the plaintiff No. 2.

Defendant No. 2 had failed to answer properly before the court below and the same has been recorded by the court.

And on the above contentions, Shri. Reddy seeks dismissal of the appeal.

6. In the light of the above contentions and on a close examination of the record, the findings of the trial court when examined with reference to the relevant documents, cannot be sustained. The finding of the trial court that it was not possible for defendant No. 2 to have executed the sale deed dated 25.10.2002, for the reason that the second plaintiff had terminated the General Power of Attorney dated 27.2.1998, Exhibit 25 and the agreement of sale dated 19.12.1996, on the basis of which, the said sale was said to have been executed - is on the basis that by issuance of the notice, duly published in a newspaper, as on 4.9.2002, all documents that could be relied upon by the defendants were cancelled and terminated, can hardly be sustained.

The notice in question said to have been issued on behalf of plaintiff No. 2 reads as follows:

"PUBLIC NOTICE

Under instructions from my client, Smt C. Krishnamma, W/o late G. Rangaswamy residing at No. 12, Goragunte Palya, Bangalore - 560 022 I notify the general public my client's tenants and other concerned, at Goragunte Palya, Malleswaram, Nandini Layout, as follows:

Smt. Sudha Rani, w/o Sri Chandrashekar and Sri Chandrashekar, S/o. Late Lakshmaiah, Nandini Layout, Bangalore, have obtained signatures/thumb impression of my client on several blank stamp papers and plain papers. My client apprehends that the above said persons have created/manufactured documents of their desire without my client's consent and knowledge to suit their illegal activities. It is learnt by my client that the above said persons have misused the said blank stamp papers and concocted the same as GPA and other documents purported to be dealing with the tenants of my client and they have further misappropriated the rents collected from my client's tenants and they have not given proper accounts. Therefore I hereby notice my client's tenants that if and when the above said persons were to approach my client's tenants for collecting rent on the aforesaid concocted documents, the tenants are hereby warned not to pay the rents to them. I further notify the general public not to deal with the above said persons in any manner like entering into sale, mortgage, lease etc., In spite of this notice, if any person or persons enter into any sort of dealing with the above said persons, they are doing at their own risks and consequences and the same are not binding on my client in any manner." It is to be noticed that a reply was issued to this notice on behalf of the defendants, through counsel, by publishing the same in a news paper, dated 15.9.2002, to the following effect.

"This Rejoinder is in response to the paper publication in the Kannada Daily Sanjevani dated 4.9.2002 with reference to Smt. C. Krishnamma w/o late G. Rangaswamy under instructions from my client Sri G.L. Chandrashekar S/o. Late Lakshmaiah, residing at No. 12, 3rd "A" Main Road, Goraguntepalya, Bangalore-560022. It is made known to the public that, my client Sri Chandrashekar denies categorically all the concocted allegations made against him contained in the said notice which are facts of malicious intentions, legally extraneous, irresponsible, frivolous, unwarranted and misconceived ground of action.

My client states that he being a Retired Warrant Officer from the Indian Air force coupled with high educational qualifications and a social worker of repute could not have stooped to the nasty level of getting involved in wrong doings with his own relatives or with any one else for that matter and wonders as to how the said Advocate in the notice could substantiate the allegations grossly ignorant of documentary evidences and having not seen the documents supposed to have been manufactured as alleged. My client having a social organization shall institute appropriate suits against all those involved in this notice in Civil/Criminal courts for damages for defaming my client with costs and other consequences."

It is clear that the plaintiff has alleged that there were certain blank papers on

which her signatures had been obtained by the defendants and that they were likely to misuse the same and the general public were warned not to deal with them on the basis of any such documents which they may have. There is no indication of termination or cancellation of any particular deed. The reply notice issued on behalf of the defendants also denies having obtained any such blank documents signed by the plaintiff and in the absence of particulars with reference to which, the mischief was being alleged, the allegations could only be termed as malicious and defamatory as rightly contended by the defendant. Hence, the reasoning of the trial court that there was a termination of the General Power of Attorney and the agreement of sale is not tenable.

The court below has viewed the defendants with grave suspicion in proceeding to accept that plaintiff No. 2 was an old and infirm woman, illiterate and helpless. If the fact that plaintiff No. 2 was holding several properties and that the second defendant was managing the affairs relating to the same and that it had been left entirely in his hands then, was it not possible for the defendant to have manipulated and concocted documents in respect other properties as well, and why did he restrict his fraudulent claim, as found by the court below, to one property, that was the subject matter of the agreement of sale and the General Power of Attorney?, is a question that could be posed. Having regard to the close relationship of the parties, the intention to provide a house of their own for the benefit of the defendants, by plaintiff No. 2 for a nominal consideration, cannot be ruled out. The presumption of the court below that plaintiff No. 2 was not worldly wise and therefore the defendant was in a position to dominate the will of plaintiff No. 2 and hence the evidence tendered by the plaintiffs was sufficient to shift the burden on the defendants to prove the transaction, is also inexplicable. The plaintiffs were seeking to urge fraud, against the defendants, the case did not pertain to allegations to make out a case of a contract induced by undue influence, which is covered under Section 16 of the Contract Act, it is under that provision that such an exception to the rule of evidence is provided; The Section is reproduced for ready reference:

"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 reasons 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).

ILLUSTRATIONS

(a) A having advanced money to his son, B, during his minority, upon B's coming of age obtains, by misuse of parental influence, a bond from B for a greater amount than the sum due in respect of the advance. A employs undue influence.

(b) A, a man enfeebled by disease or age, is induced, by B's influence over him as his medical attendant, to agree to pay B an unreasonable sum for his professional services, B employs undue influence.

(c) A, being in debt to B, the money-lender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on B to prove that the contract was not induced by undue influence.

(d) A applies to a banker for a loan at a time when there is stringency in the money market. The banker declines to make the loan except at an unusually high rate of interest. A accepts the loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence.]"

On the other hand, in so far as the allegation of fraud in so far as the manner in which the Agreement of sale dated 18.12.1996, the General Power of Attorney dated 27.2.1998 and the Sale deed dated 25.10.2002 are said to have come into existence, was clearly on the plaintiffs. Except the allegation that defendant No. 2 had managed to obtain the signatures of plaintiff No. 2 surreptitiously on blank stamp papers, there is no attempt to dislodge the genuineness of those documents by tendering evidence, to establish that the same are bogus documents. The General Power of Attorney was a notarized document, with several independent signatories and there is no attempt to summon any of those witnesses. The concerned Notary would have maintained records, which would have also indicated the presence or the absence of Plaintiff No. 2 when the document was notarized, there is no endeavour to produce any such evidence.

The law is well settled in so far as the nature of evidence to be tendered and the manner in which the burden of proof would have to be discharged in civil cases, where allegations of fraud are made. A Note on The "Evidence and Burden of Proof in the Indian Contract Act, 1872, 14th edition, by Pollock and Mulla, reads thus:--

"Evidence and Burden of Proof

In a great majority of cases, fraud is not capable of being established by positive

and tangible proof it is by its very nature secret in its movements. It is, therefore, sufficient if the evidence given is such as may lead to an inference that fraud must have been committed. In most cases circumstantial evidence is the only resource in dealing with questions of fraud *Rakhal Chandra Bardhan Vs. Prosad Chandra Chatterjee and Others*, ; *Mt. Umrao Begum and Others vs. Sheikh Rahmat Ilahi* AIR 1939 439 (Lahore) ; *Bhabhutmal Nathmal v. Khan Mohammad*, AIR 1946 Nag 419 at 423; *Passarilal Mannoolal Vs. Mst. Chhuttanbai and Others*, . If this were not allowed, the ends of justice would be constantly, if not invariably, defeated (*Pandit Parkash Narain vs. Raja Birendra Bikram Singh* AIR 1931 333 (Oudh) ; *Thangachi Nachial and Another Vs. Ahmed Hussain Malumiar and Others*, ; *Thangachi Nachial and Another Vs. Ahmed Hussain Malumiar and Others*, . At the same time the inference of fraud is to be drawn only from positive materials on record and cannot be based on speculation and surmises; *Arabinda Barma and Others Vs. Chandra Kanta-->* ; *Passarilal Mannoolal Vs. Mst. Chhuttanbai and Others*, ; however suspicious the circumstances, however strange the coincidences and however grave the doubts, they alone cannot take place of proof of fraud. The evidence of fraud must be sufficient to overcome the natural presumption of honesty and fair dealing; it is not to be presumed or inferred lightly. *Rakhal Chandra Bardhan Vs. Prosad Chandra Chatterjee and Others*, ; *Govinda Naik Gurunath Naik Vs. Gururao Puttanbhat Kadekar since deceased by Lrs. Mrs. Padmavathi Gururao Kadekar and Others*, . Evidence of unfairness in the transaction may be considered, but not when direct evidence on the question of fraud is unreliable. *Harihar Prasad Singh and Others Vs. Narsingh Prasad Singh and Others*, . The solitary testimony of the plaintiff would not suffice. *Hajra Bai and Others Vs. Jadavbai*, . Pleas of fraud must be examined by the Court with utmost rigour. (*Firm of Sodawaterwala v. Volkart Brothers*, AIR 1923 Sind 25 at 28). The burden of proving, fraud lies on the person alleging it.

The charge of fraud, though in a civil proceeding, must be established beyond reasonable doubt. *A.L.N. Narayanan Chettyar and Another vs. Official Assignee*, AIR 1941 93 (Privy Council) ; followed in *Union of India (UOI) Vs. Chaturbhai M. Patel and Co.*, . In any case, the level of proof required is extremely high and is rated on par with a criminal trial. *Savithramma Vs. H. Gurappa Reddy adn others*, ; *Ranganayakamma and Another Vs. K.S. Prakash (D) by L.Rs. and Others*, ; *Alva Aluminium Ltd., Bangkok Vs. Gabriel India Limited*, , (heavy burden to show fraud). The burden of proof is not a light one. On another view, although the burden of proof is the same as in other civil proceedings, (*Hornal v. Neuberger Products Ltd.*, [1957] 1 QB 247, [1956] 3 All ER 970), namely, proof on the balance of probabilities, it is not easily discharged in practice. (*Chitty on Contracts*, 28th edn, p. 361, para 6-045.)

To prove fraud, it must be proved that representations made were false to the knowledge of the party making them, or were such, that the party could have no reasonable belief that they were true; that they were made for the purpose of being acted upon and that they were believed and acted upon and caused the

actual damage alleged. Gauri Shankar and others Vs. Manki Kunwar--> ; People's Insurance Co. Ltd. Vs. Sardar Sardul Singh Caveeshar, . He can succeed only upon proof of fraud as alleged by him."

(emphasis supplied)

There was no such acceptable evidence to presume that there was fraud apparent, merely on the basis of allegations made by the plaintiffs. The absence of proof of the source of the consideration of Rs. 2 lakh paid under the sale deed or the fact that there is no mention of the agreement of sale or the General Power of Attorney or the non mentioning of the said documents in the reply notice by the defendants to the public notice issued by the plaintiffs, does not vitiate the transaction. The plaintiffs have not also established that it was they would had constructed the suit property and not the defendants. The allegation that the defendants had stolen the original documents from the custody of the plaintiff No. 2 is also merely alleged and there is no proof of the same. The statement made by plaintiff No. 2 before the police that she had indeed executed the agreement of sale and the General Power of Attorney being tested on the touchstone of Section 27 of the Evidence Act, 1872, was unnecessary, for the court to negate the same as not being evidence. It was an admission made by the plaintiff No. 2, which is not denied or explained away.

The further circumstance that plaintiff No. 2 had executed a gift deed in favour of plaintiff No. 1 in respect of seven items of property, including the suit property under a registered gift deed dated 16.2.2004, in the face of the subsisting sale deed in favour of defendant No. 2 and which was in fact under challenge in a suit that was instituted on 21.6.2004, is rather casually held by the trial court as being a valid document, which could have been legally executed as on the relevant date. The title conferred under the sale deed in favour of the second defendant is at best set at naught only by virtue of the judgment and decree under challenge. It is therefore perplexing that the court could hold that plaintiff had a subsisting right to convey under the gift deed, in so far as it pertained to the suit property. Section 48 of the Transfer of Property Act, 1882, would apply and there was no right or title conveyed under the Gift deed so executed.

In the light of the above findings of this court, it is not necessary to address certain other incidental points canvassed by the parties. The primary reasoning of the trial court is therefore found to be incorrect and untenable.

Consequently the appeal is allowed and the judgment and decree of the court below is set aside and the suit is dismissed. No order as to costs.