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(1970) 08 KAR CK 0003

In the Karnataka High Court

Case No : First Appeal No. 22 of 1964

Govinda Naik Gurunath Naik	APPELLANT
Vs	
Gururao Puttanbhat Kadekar since deceased by Lrs. Mrs. Padmavathi Gururao Kadekar and Others	RESPONDENT

Date of Decision : 06-08-1970

Acts Referred:
Contract Act, 1872 — Section 23

Citation : AIR 1971 Kar 330 : (1971) 1 MysLJ 43

Hon'ble Judges : E.S. Venkataramiah, J;C. Honniah, J

Bench : Division Bench

Advocate : B.K. Ramachandra Rao and A.G. Holla, for the Appellant; K.R. Karanth and Padubidri Raghavendra Rao, for the Respondent

Final Decision : Dismissed

Judgement

Honniah, J.—This is a Defendant''s appeal. The defendant became the owner of the suit schedule properties by virtue of his adoption to his adoptive father Gurunath Naik in 1933. Even prior to the adoption, the plaintiff was a tenant of a portion of the left wing of the property situated in Durgada Bail in Hubli Town belonging to Defendant''s adoptive father. When the defendant was about 18 years of age he began to manage the properties and thereafter also the plaintiff continued to be a tenant of a portion in the left wing of the plaint schedule properties. In about the year 1945-46 the Defendant thought of demolishing both the left and right wings of the building as it had developed serious cracks in the walls and putting up a new construction. As the defendant was in need of money he borrowed from the plaintiff on Promissory Notes Exts. 94 to 97 a sum of Rupees 35,000/- in all at six per cent, interest per annum.

Then on. 17-6-1949 the Defendant executed a deed of simple mortgage, Ext. 82. in favour of the plaintiff with a period of three years for repayment with interest at six per cent, per annum, the consideration amount being the Promissory Notes amounts mentioned above. The properties mortgaged were C. T. S. 289 to 284,

fully described in paragraph 2 of the plaint. As mentioned in paragraph 2 of the plaint the Defendant made some payments towards the principal and interest to the plaintiff and after taking into account such payments the Defendant became due in a sum of Rupees 26,000/- towards principal and Rupees 7583/45 towards interest, as on the date of suit, 18-6-1959. As the Defendant had agreed to pay the amount in three years'' time as stipulated in the mortgage deed, but did not pay the same the plaintiff issued several notices to him calling upon him to discharge the mortgage debt. As the Defendant failed to pay the amount, the plaintiff ultimately filed the suit out of which this appeal arises for recovery of Rupees 33,583/45 towards principal and interest.

2. The defendant has admitted the execution of the mortgage deed and also the consideration. He has also admitted that the rate of interest as mentioned in the deed is six per cent per annum. While admitting these facts, he has stated that the plaintiff was his advisor from 1934 and he was young, the plaintiff took advantage of his inexperience and dominated on him; that he persuaded him to demolish the old building and erect a new building thereon and promised him to pay a lakh of rupees for the construction of the new structure by way of loan.

Taking advantage of his dominating position he got into an agreement as per Ext. 104 dated 20th day of May 1948, under which the plaintiff had to shift to the newly constructed right wing on the same rent of Rupees 64/- per month that he was paying for the portion that he was occupying in the left wing till then, and that after the Defendant constructed the new building on the left wing the defendant had to let out that portion to the plaintiff on an annual rent of Rupees 6800/- for a period of 25 years. Accordingly, the plaintiff shifted to the portion of the right wing, but went on paying rent at the rate of Rupees 64/-per month, even though, according to the defendant, the portion so occupied by the plaintiff would have fetched Rupees 600/- per month.

3. As could be seen from the material available in the case, the Defendant did not put up any building on the loft wing. On the other hand he sold that portion to his partner in the Jewellery business, Chipade, as per Ext. 86 dated 21-5-51 with a condition to repurchase the same. As the Defendant did not put up any new building on the left wing as agreed to between him and the plaintiff, the Defendant agreed to the plaintiff remaining as tenant in the portion of the right wing that was occupied by him in addition to two more rooms in the first floor under Ext. 113 dated 13-8-1953. paying a rent of Rupees 250/- per month, for a period of 20 years.

4. The Defendant has contended that the plaintiff took the mortgage deed referred to above exercising undue influence. According to him, the plaintiff got the lease deed of 1953 for a low rent of Rupees 250/- per month when in fact it would have fetched Rupees 600/- per month. His case was that the plaintiff in order to secure interest at the rate of 18 per cent, on the mortgage took the lease deed of 1953 stipulating a rent of Rupees 250/- only per month. Therefore, according to him the mortgage deed is vitiated by fraud and undue influence and

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is unenforceable and that in any event, account should be taken on the footing that the plaintiff had to pay Rupees 350/- more per month towards rent and that amount should be adjusted towards the principal and interest under the mortgage and that if so done nothing was due to the plaintiff.

5. On these contentions the following issues were raised by the trial Court:--

(1) Does the defendant prove that the suit mortgage and the lands covered by the mortgage are vitiated by fraud, undue influence and misrepresentation and therefore void and unenforceable as pleaded?

(2) Does defendant prove that the lease transactions of 20-5-1948 and 13-3-53 and the transactions covered under the suit mortgage are all one and the same transaction?

(3) Is defendant entitled to accounts of transactions of rent other than the suit mortgage?

(4) Whether the defendant proves that the suit mortgage debt stands fully satisfied?

(5) Whether the suit mortgage transaction is opposed to Section 18 of the B. R. H. and L. H. Rates Control Act?

(6) Whether the suit mortgage transaction is opposed to Section 23 of. the Indian Contract Act and Section 25 of the Bombay Money Lenders'' Act and hence not enforceable?

(7) What is due under the mortgage?

(8) Whether the defendant is entitled to instalments? And if so, at what rate?

6. The plaintiff examined himself, The defendant besides himself examined two others on his behalf. The trial Court after considering the oral and documentary evidence in para 12 of its Judgment held: On issue No. 1

"I am therefore of the opinion that there is no taint of fraud, undue influence or misrepresentation in respect of the mortgage bond and issue No. 1. will be answered against the defendant."

7. On issue No. 2, the trial Court held that Ext. 104. Ext. 82 and the lease of 1953 are not one and the same transaction.

8. On issue No. 3. the trial Court held that the defendant was not entitled to accounts.

9. On issue No. 4, the trial Court held that the discharge pleaded was untenable.

10. The trial Court found the other issues against the defendant and decreed the suit with costs and future interest at the rate of five per cent, per annum, and directed that the amount be paid within six months. As against that judgment and decree the Defendant has filed this appeal.

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11. The real question for consideration in this appeal is whether the finding of the learned Civil Judge could be justified or not. The party alleging the fraud is bound to establish it by cogent evidence and even if he creates some suspicion that cannot be accepted as proof. Unless the proved circumstances are incompatible with the hypothesis of the person charged with fraud having acted in good faith they cannot be accepted as sufficient proof of fraud. Therefore, we have to examine this case with this point of view and ascertain whether the Defendant has placed material on record to show that due to the fraud committed on him the mortgage deed is vitiated.

12. The case of the defendant is that the plaintiff had agreed to finance him to the extent of one lakh of rupees and he never had the intention of fulfilling that promise at any time; that the plaintiff had insisted on payment of interest at 18 per cent, per annum on the moneys that he had advanced. According to the Defendant he came to Hubli, as he was adopted by the widow of Gurunath Naik, to her husband in the year 1933 and started managing the properties of his adoptive father including the suit schedule properties from 1934. It is contended by the Defendant that as the plaintiff was a tenant in the portion of the left wing even prior to his adoption the plaintiff, taking advantage of his young age and inexperience became his advisor in all his affairs and had dominating influence on him. Except making an averment to that effect, he has not placed any evidence to indicate or to create at least suspicion that at any point of time the plaintiff had a dominating influence over the defendant and used that influence to make unconscionable gain.

The evidence in this case shows that the defendant started Shroff business in partnership with one Alur in 1941 or so, about 8 years after his adoption. His partner Alur was a pleader and the evidence shows that he was also the legal advisor of the defendant. Alur died in the year 1942 and after his death, the evidence discloses that one B.A. Desai and another L.A. Desai became the legal advisors of the Defendant. B.A. Desai died in the year 1956 and the other legal advisor also died in the year 1962. It is therefore, clear from these facts that at all material points of time, from the very beginning, the Defendant had expert legal advice and as a matter of fact he started Shroff business in partnership with one of the pleaders, as stated above. From these circumstances it is abundantly clear that the plaintiff could not have been Defendant''s advisor; nor could he have exercised any dominating influence on him in his affairs. From the mere fact that the plaintiff was the tenant in a portion of the suit schedule properties and advised him at one stage or the other to demolish the old building as the same was old and cracks had developed in the walls, it cannot be said that he had dominated over the Defendant, and had exercised undue influence over him.

13. In the year 1947, the Defendant borrowed a sum of Rupees 5,000/- on 26-5-1947 under the Pronote Ext. 94 and again on 5-10-47 he borrowed another sum of Rupees 5,000/- under Ext. P. 95, on 20-5-1948 he borrowed a sum of

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Rupees 10,000/- under Ext. 96. It is on that date Ex. 104, came into existence between the parties. That was an agreement to lease the left wing of the building for 25 years. Again on 29-5-1948 he borrowed Rupees 15,000/- under Ext. 97. In all a sum of Rupees 35,000/- was borrowed by the Defendant. The interest stipulated in all these documents is six per cent, per annum.

14. Sri B.K. Ramachandra Rao, the learned counsel for the Defendant, relying upon the terms of Ext. 104, contended that the plaintiff had practised fraud on the Defendant. His argument was that the rent was shown as Rupees 64/- only per month, which represented the rent that the plaintiff was paying for only a portion of the left wing. According to him Rupees 6800/- per annum was the just rent for the right wing portion that was occupied by the plaintiff; that the plaintiff in order to get over the law applicable to money lending business, mentioned interest at six per cent only in the mortgage deed and resorted to this contrivance to practise fraud on the Defendant. The agreement Ext. 104 is dated 20-5-1948, a year prior to the date of the mortgage. The arrangement under Ext. 104, as could be made out, was temporary and the Defendant had to construct a new building on the left wing and let out the same to the plaintiff on a rent of Rupees 6800/- per annum. Sri Ramachandra Rao further contended that from the terms of Ext. 104, it could be spelled out that this was an unconscionable bargain that the plaintiff struck and according to him this circumstance is to be considered as fraud committed on the Defendant so as to vitiate the mortgage deed. We are unable to accept this contention.

15. Having regard to the ability of the defendant to manage his properties and the fact that from the year 1941 he had legal advisors in all matters and that himself started jewellery business, as early as in 1941 it is impossible to hold that the plaintiff could have or did practice fraud on the Defendant in obtaining Ext. 104 from him. It was always open to the Defendant to complete the left wing of the building and to ask the plaintiff to move into it and pay at the rate of Rupees 6800/- per year.

16. The defendant has also set up oral agreement to the effect that the plaintiff had promised to pay a lakh of rupees towards the expenses of constructing a new building and after paying Rupees 35,000/- he did not fulfil his promise and when the Defendant was in strained circumstances, the plaintiff took advantage of the situation and got up the mortgage deed. There is evidence in this case to show that the defendant had borrowed Rupees 15000/- from one Washikar, besides borrowing Rs. 45,000 from the Punjab National Bank in 1948 itself. At about the time of the mortgage the Defendant had borrowed more than Rupees l,00,000/-. It is significant that in his letter dated 27-11-1950 (Ex. 100) the defendant does not refer to the promise of plaintiff to lend him one lakh. It is for the first time in Ext. 106 dated 20-9-1951 there is a reference to a promise to lend Rupees 50,000/-. This apparently is an afterthought. It is therefore, difficult to believe the story of the Defendant that he was in strained circumstances or that the plaintiff had promised to pay a lakh of rupees.

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17. The learned Civil Judge in the course of his judgment has stated thus:--

"The fact, however, appears to be that the plaintiff has not promised any definite financial assistance to the defendant. It is certainly probable that when the plaintiff advanced a loan of Rupees 10,000/- to the defendant on 20-5-1948, he made it clear to the defendant as to what his objects were, namely, that he should get a long term lease of the right wing premises and it is only after the Defendant agreed to the plaintiff''s terms that the loan under the promissory note was advanced to him. It is significant that Ext. 96 and the agreement to lease the left wing premises, Ext. 104 have been executed on 20-5-1948. It is further to be noted that one of the terms of Ext. 104 Is that the plaintiff should be allowed to occupy the right wing premises on a rent of Rupees 64 per month until the left wing premises were ready. This in my opinion is an unconscionable term and seems to have been agreed to by the defendant by sheer stress of circumstances namely that his financial condition was critical, that the building undertaken was in a half finished stage, that he was already indebted to the plaintiff on the earlier pronotes and that he had a faint assurance from the plaintiff of further financial assistance."

18. This inference of the learned Civil Judge, in our opinion, is a surmise. Neither there is any direct evidence nor circumstantial evidence from which it could be deduced that such an inference is possible. The evidence on the other hand shows circumstances contrary to the reasoning of the learned Judge. However, the learned Judge ultimately holds that the plaintiff had not committed any fraud on the Defendant. Although he holds that there are some suspicious circumstances in that behalf, in our opinion, there are no such suspicious circumstances as to support the reasoning of the learned Judge.

19. For the reasons stated above, we are unable to accept, the contention of Sri B.K. Ramachandra Rao, the learned counsel for the Defendant, that the plaintiff had committed any fraud on the defendant or had used his position in any manner to get the mortgage deed executed in his favour.

20. Sri B.K. Ramachandra Rao further contended that all the transactions, viz., under Exts, 104. 82 and 113 should be read as one transaction and if so done, the only inference that could be drawn is that the plaintiff had derived undue advantage by exercising undue influence on the defendant. It is difficult to agree with this contention of Sri B.K. Ramachandra Rao. It is not clear how a transaction of 1948 and another of 1953 should be read as part of the mortgage deed of 1949. In 1948 as stated earlier, the circumstances under which Ext. 104 came into existence were different. As indicated by us no unconscionable transaction was entered into by the Plaintiff between the mortgage deed and the document of 1953.

The correspondence between the parties, as evidenced by Exts. 100. 105, 86. 87, 108, 109 and others would show that the Defendant was a free agent and tried to defeat the claims of the plaintiff under Ext. 104. In fact the Defendant

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sold the left wing of the building to his partner in 1951 with a condition to re-purchase it and in fact took reconveyance In the year 1954. In the sale deed that he executed in favour of Chipade in 1951 he has clearly stated that he had to pay Rupees 35,000/- to the plaintiff towards principal and Rupees 3,000/- towards interest, which works out approximately to six per cent per annum till that date and in the reconveyance deed also reference is made to the terms of the mortgage deed.

21. These subsequent events belie the statement of the defendant that the plaintiff exercised undue influence in getting the mortgage deed. The Court that is called upon to examine the plea of undue influence has to consider whether the person was in a position to dominate the will of the other person, whether in fact dominated the mind of the other person, whether the person was of such a weak mind as would make him helpless against the dominating person, whether he could have had no Independent advice to enable him to arrive at an independent judgment and whether the transaction was so unconscionable, as it would have revolted against the conscience of the Court. The fact that the defendant has been indebted to the plaintiff or the plaintiff advised him at some stage in the best Interest of the defendant or helped him are not in themselves circumstances to prove that the plaintiff has exercised undue influence.

At the time the parties entered into the agreement of lease in 1948. the plaintiff had no dominating influence on the Defendant at all. The Defendant, on the other hand, entered into that agreement in his own interest. Whatever that be, that transaction cannot be read to determine whether the mortgage in question was obtained by the plaintiff by exercising undue influence; similarly the transaction of 1953. The mortgage transaction itself cannot be assailed on the ground of undue influence at all. The Defendant has admitted having received the consideration of Rupees 35,000/-and the rate of interest stipulated therein is only six per cent per annum. Could this be said as unconscionable bargain? If that is not so, it is not at all possible to hold that the mortgage transaction in question is vitiated on any ground, much less on the ground alleged by the defendant.

22. The learned Civil Judge in Para 11 of his judgment has observed:--

"I have already indicated that the plaintiff has fully exploited the difficulties of the defendant and has secured a very advantageous bargain for himself in the matter of the lease of the right wing premises."

Again in Para 13 of the Judgment the learned Judge, while referring to the transaction under Ext. 113. has stated:

"All that can be said, therefore. Is that the lease of 1953 is a very hard and unfair bargain which has been obtained by the plaintiff who was not slow to take the utmost advantage of the difficult situation in which the defendant was placed in 1953."

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These observations are not justified on the facts of this case and we may add that they are irrelevant to decide the questions at issues. The essence of the matter is whether it is shown that the plaintiff was in a position to dominate the mind of the Defendant and in fact dominated over the mind of the Defendant and got benefit of the transaction in question. There being no evidence that the plaintiff dominated and got benefit out of the transactions, we are unable to accept the contention of Sri B.K. Ramachandra Rao that the mortgage deed is vitiated either due to fraud committed by the plaintiff or exercise of undue Influence on the Defendant.

23. In the result, we agree, though not with the reasonings of the learned Judge, with his finding that there is no substance in the defence.

24. For the reasons stated above this appeal fails and is accordingly dismissed with costs.

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