

**(1993) 03 KAR CK 0021**

**In the Karnataka High Court**

**Case No :** Regular Second Appeal No. 468 of 1981

Krishnaswamy Naidu

APPELLANT

Vs

Jagannatha Naidu

RESPONDENT

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**Date of Decision :** 18-03-1993

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 4, 100

**Citation :** (1993) ILR (Kar) 1606 : (1996) 5 KarLJ 181

**Hon'ble Judges :** Mirdhe, J

**Bench :** Single Bench

**Advocate :** M. Rangarao and K.S. Ramesh, for the Appellant; K.G. Raghavan and Kaleemulla Shariff, for the Respondent

**Final Decision :** Allowed

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## **Judgement**

Mirdhe, J.—This Regular Second Appeal is filed by the appellant who was the defendant in the trial Court u/s 100 of C.P.C. against the Judgment and Decree dated 22.1.1981 passed by the Civil Judge, KGF. in R.A.No. 80 of 1979 confirming the Judgment and Decree dated 9.7,1979 passed by the Munsiff, KGF, in O.S.No. 209 of 1974.

2. I have heard the learned Counsel for the appellant and the learned Counsel for the respondent fully and perused the records of the case.

3. The respondent filed the suit for cancellation of the registered Release Deed dated 25.8.73, the certified copy of which is at Ex.D-1 and for restraining the appellant from alienating the suit schedule property and from collecting rents of the suit schedule premises and costs, on the averment that the appellant is a close relative of the respondent and he was also acting as the Power of Attorney Holder of Sri B. Bhaskara Naidu who was the original owner of the schedule property and the respondent is a permanent resident of KGF and that the appellant, i.e. the respondent in the Courts below offered his help in getting the sale deed effected and asked the respondent to execute a release deed nominally

in his favour and subsequently tried to sell the property and that the respondent here only believing the representation agreed and executed the release deed nominally for a consideration of Rs. 1,000/-. The appellant filed his written statement contending that the release deed Ex. D-1 is a genuine document and all the allegations made by the respondent against the appellant in respect of getting the deed executed are false, and on the basis of the contentions taken by him in the written statement, he prayed for the dismissal of the suit. The trial Court decreed the suit of the respondent. The appellant was aggrieved by the Judgment and Decree of the trial Court and hence he preferred R.A.No. 80/79 in the Court of the Civil Judge, Kolar and the Civil Judge, Kolar, after hearing both sides dismissed the appeal confirming the Judgment and Decree of the trial Court. The appellant being aggrieved by the Judgments and Decrees of both the Courts below, preferred this R.S.A.

4. This Court has framed the following Questions of Law for consideration in this appeal:

(1) Whether the Court below has committed an error of law in not framing appropriate issues that arise out of the pleadings?

(2) Whether the Court below has committed an error of law in examining the question of undue influence when no such case was made out by the plaintiff in his suit?

(3) Whether the Court below has committed an error of law in holding that the existence of fiduciary relationship shifts the burden on the defendant to establish that the transaction is not vitiated by fraud or misrepresentation?

(4) Whether the Court below has committed an error of law in holding on the basis of surmises and conjectures that the release deed is vitiated either by undue influence or misrepresentation or fraud?

5. RE. QUESTION NO. 1: The plaintiff filed the suit for cancellation of Ex. D-1 the Release Deed dated 25.8.73 and his case relating to the circumstances under which he executed the release deed is to be found in paras 4 and 5 of his plaint which are as follows:

"4) The defendant is a close relative of the plaintiff. He was also acting as the power of attorney of B. Bhashyakarlu Naidu who was the original owner of the schedule property. The defendant is a permanent resident of K.G.F. known to all persons. He has his own house in Pritchard Road just opposite the suit schedule property and has his house a few houses away from the house of the tenant. Very recently he shifted to Bangalore for the purpose of starting a Finance Corporation. But still he has been going to K.G.F. every week and is keeping contact with persons there.

5) That the plaintiff explained his difficulties to the defendant and his intention to sell the property. The defendant offered to help him in getting the sale effected and asked him to execute a release deed nominally in his favour so that he can

threaten the tenant with a notice and successfully self the property. The defendant further represented that he has got his Advocate at Bangarpet and that he would get the document ready and that the plaintiff can sign the same. The plaintiff honestly believed the representations and agreed."

The defendant, i.e. the appellant in his written statement has denied the allegations made in para 5 as absolutely false and so far as para 4 is concerned, he has admitted that the plaintiff is his sister's son but denied that he was the holder of power of attorney for any Bashyakarlu Naidu but he admits that M. Bashyakarlu Naidu was the original owner of the suit schedule property. The issues framed by the trial Court are as follows:

1. Whether the plaintiff is entitled to cancellation of registered release deed dated 25.8,1973 executed by him in favour of defendant?

2. Whether the plaintiff is entitled to permanent injunction against the defendant restraining him from alienating suit schedule property and from collecting rents on schedule property?

3. Whether the suit is not properly valued and whether C.F. paid is insufficient?

4. To what relief?

6. The respondent sought for cancellation of the release deed on the ground that the appellant made certain representations as averred by him in para 5 of his plaint and he believed those representations and executed the Release Deed, but the issue No. 1 framed by the trial Court is very vague. It does not specify on what ground the plaintiff sought for the cancellation of the release deed. Therefore, it will have to be held that the trial Court committed an error in not framing appropriate issues that arises out of the pleadings in this case. Question No. 1 is answered accordingly.

7. RE. QUESTION NO. 2: The trial Court has held that the Ex. D-1 was obtained by practising undue influence by the appellant. The lower appellate Court has confirmed this finding. There is no issue framed regarding undue influence in this case, and if we read the plaint, there is no such averment so as to make the Court think that the case of the respondent is that Ex. D-1 is vitiated by practising undue influence alleged to have been exercised by the appellant on the respondent. I have also gone through the evidence of the respondent P.W.1. Even in his evidence also he has not stated that Ex. D-1 came to be executed by him on account of the undue influence exercised by the appellant on him. The learned Counsel for the respondent submitted that the plaint and the evidence on record disclose that there is close relationship between the appellant and the respondent and the respondent is in fact the appellant's sister's son and that the respondent was brought up by the appellant and in fact he has acted as a defacto guardian. From the pleadings and the evidence on record, it may be possible to infer that there is close relationship between the appellant and the respondent and the respondent was also at one point of time in his life was

helped by the appellant. But these facts by themselves are not sufficient to make out a case that Ex. D-1 was brought about by practice of undue influence by the appellant on the respondent. Therefore, it will have to be held that there is neither proper pleading nor evidence to lead to the inference that Ex. D-1 is vitiated by undue influence alleged to have been exercised by the appellant on the respondent.

8. The learned Counsel for the respondent further submitted that the parties understood as to what was the controversy between them and therefore, they have led proper evidence also and the Judgment of the trial Court cannot be set aside merely because no proper issues have been framed in this case. He relied on Bhagwati Prasad Vs. Shri Chandramaul, . The Supreme Court in that case has held as follows:

"If a plea is not specifically made and yet it is covered by an issue by implication and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely, in the issues, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case."

But the Supreme Court has also further observed in that case as follows:

"Undoubtedly if a party asks for a relief on a clear and specific ground, and in the issues or at the trial, no other ground is covered either directly or by necessary implication, it would not be open to the said party to attempt to sustain the same claim on a ground which is entirely new. But in considering the application of this doctrine to the fact of a particular case Court must bear in mind the other principle that considerations of form cannot over-ride the legitimate considerations of substance."

And the Supreme Court has given a guideline as to how the Court should act in a case where the relief sought is not based on pleadings made by the parties, as follows:

"What the Court has to consider in dealing with such an objection is did the parties know that the matter in question was involved in the trial, and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to one party, the Court cannot do injustice to another."

9. If both the sides knew as to to the controversy between them and proceeded with the evidence knowing fully well as to what is the controversy between them and no new case is made out by either of them during the course of the evidence, the Court cannot set aside a Judgment merely on the ground that no proper issues were framed. It is enough if there is an issue which covers the contentions. But, in this case it is difficult to hold that the issues framed by the trial Court cover the contention that Ex. D-1 is vitiated by undue influence. In *Afsar Sheikh and Another Vs. Soleman Bibi and Others*, the Supreme Court has held that:

"Although "undue influence", "fraud", "misrepresentation" are cognate vices and may, in part, overlap in some cases, they are in law distinct categories, and are in view of Order 6, Rule 4, read with Order 6, Rule 2, of the Code of Civil Procedure, required to be separately pleaded, with specificity, particularity and precision. A general allegation in the plaint, that the plaintiff was a simple old man of ninety who had reposed great confidence in the defendant is much too insufficient to amount to an averment of undue influence."

The grounds - fraud, undue influence and misrepresentation are different and distinct from each other though they may overlap over each other in a particular set of facts and circumstances. When the case made by the plaintiff was of misrepresentation, the Court was not justified in decreeing the suit of the plaintiff on the ground that Ex. D-1 is vitiated by undue influence, which was neither the case of the plaintiff nor was there any issue to that effect. In fact, it amounts to making of a new case by the Courts below, which was never pleaded by the plaintiff. Therefore, the Rulings cited by the learned Counsel for the respondent will not come to the rescue of the respondent. The Courts below committed an error of law in examining the question of undue influence when the plaintiff has not made out such a case and when there was no issue to that effect, Question No. 2 is answered accordingly.

10. Before answering Questions 3 and 4, I will have to consider as to what is the effect of the mistakes committed by the Court and giving a finding in favour of the plaintiff holding that Ex. D-1 is vitiated by undue influence when the plaintiff had not pleaded to that effect and when there was no evidence also to that effect. It is a mistake committed by both the Courts below and for the mistakes committed by the Courts, a party cannot be penalised. Both the Courts below have not at all examined the case set up by the respondent regarding the misrepresentation alleged by him which led to the execution of Ex. D-1. Even if the Court were to be under the impression that the plaintiff's case was a case of Ex. D-1 being vitiated on the ground of undue influence, still there were lack of requisite particulars in the case of the plaintiff. Under Order 6 Rule 4 C.P.C. the Court should have called for better particulars from the parties. In *Ladli Prasad Jaiswal Vs. Karnal Distillery Co. Ltd. and Others*, the Supreme Court has observed as follows:

"Order 6 Rule 4, Civil P.C., provides, inter alia, that in all cases in which the party

pleading relies on undue influence, particulars shall be stated in the pleading. The reason of the rule is : A plea that a transaction is vitiated because of undue influence of the other party there to, gives notice merely that one or more of a variety of insidious forms of influence were brought to bear upon the party pleading undue influence, and by exercising such influence, an unfair advantage was obtained over him by the other. But the object of a pleading is to bring the parties to a trial by concentrating their attention on the matter in dispute, so as to narrow the controversy to precise issues, and to give notice to parties of the nature of testimony required on either side in support of their respective cases. A vague or general plea can never serve this purpose; the party pleading must therefore be required to plead the precise nature of the influence exercised, the manner of use of the influence, and the unfair advantage obtained by the other. This rule has been evolved with a view to narrow the issue and protect the party charged with improper conduct from being taken by surprise. A plea of undue influence must, to serve that dual purpose, be precise and all necessary particulars in support of the plea must be embodied in the pleading; if the particulars stated in the pleading are not sufficient and specific the Court should, before proceeding with the trial of the suit, insist upon the particulars, which give adequate notice to the other side of the case intended to be set up."

Under those circumstances, the Court should have called for better particulars from the parties and further in *Ballo Vs. Paras Ram*, His Lordship has observed as follows;

"As I am satisfied that both the Courts below have not really determined the question of undue influence from the correct angle and have not appreciated the true tests for determining such an issue, and, as they also seem to have misplaced the burden of proof after the admissions made by the defendant, the judgments and decrees of the Courts below must be and are hereby set aside. The trial Court ought to have framed a separate issue on undue influence, after calling upon the plaintiff to supply necessary particulars so as to afford the defendant an opportunity to meet them. Accordingly, I direct that a separate issue shall be framed on the question of undue influence by the trial Court, after calling upon the plaintiff to supply the particulars of undue influence. Both the parties should be given an opportunity to amend their pleadings and to lead evidence on the real questions in issue which, unfortunately, were not tried."

11. Non-framing of proper issues by the Court below and making out a new case which was not pleaded by the plaintiff and not considering the case pleaded by the plaintiff, are the grounds which are sufficient for the matter to be remanded to the trial Court for fresh disposal in accordance with law, after giving opportunity to both sides to amend the pleadings in the case. Since the matter is to be remanded to the trial Court for fresh disposal in accordance with law, it is not necessary to answer Questions 3 and 4 raised in this Appeal.

12. For the reasons discussed above, I proceed to pass the following:

## ORDER

The appeal is allowed. The Judgments and Decrees of both the Courts below are set aside. The case is remanded to the trial Court with a direction that the trial Court shall give an opportunity to both sides to amend their pleadings and thereafter frame proper issues and dispose of the case in accordance with law. The appellant is at liberty to file an application for the deposit of the rent by the respondent in the trial Court and if such an application is filed, the respondent is at liberty to file his objections and the Court shall decide such application on its merits. The appellant and respondent are directed to appear before the Principal Munsiff Court, K.G.F. on 3.6.93 at 11.00 A.M. The trial Court is not required to issue any notice to the parties. The trial Court is directed to dispose of the case within six months from the date of appearance of both sides.