
(2015) 02 CAL CK 0047

In the Calcutta High Court

Case No : E.O.S. 1 of 1985 and C.S. No. 240 of 1990

Kumkum Mittal and Others

APPELLANT

Vs

Robin Paul and Others

RESPONDENT

Date of Decision : 23-02-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 4
Contract Act, 1872 — Section 16, 17
Evidence Act, 1872 — Section 32

Citation : (2015) 02 CAL CK 0047

Hon'ble Judges : Debangsu Basak, J.

Bench : Single Bench

**Advocate : Anirban Ray, S. Mukherjee and S. Kundu, for the Appellant;
Aniruddha Mitra, Advocates for the Respondent**

Judgement

Debangsu Basak, J.—The suit is for declaration and perpetual injunction.

2. The plaintiffs claim that the original plaintiff No. 1 was in absolute control and management of two companies, namely, the New Red Bank Tea Estate Company Private Limited and Surendranagar Tea Estate Private Limited. The plaintiffs claim that the first defendant took over the control and management of the two companies wrongfully and illegally from the original plaintiff No. 1. The defendant Nos. 6 and 7 had enjoyed credit facilities from the defendant No. 2. The original plaintiff No. 1 and the plaintiff No. 2 were the guarantors of such credit facilities. Title deeds of the tea estates of the defendant Nos. 6 and 7 and Dharanipur Tea Estate were kept as mortgage with the defendant No. 2. With the passage of time and the tea industry coming into an economic slump, the credit facilities enjoyed by the defendant Nos. 6 and 7 from the defendant No. 2 became bad. The original plaintiff No. 1 had explored various ways of repaying the defendant No. 2. According to the plaintiffs, the defendant No. 3 was a high official of the defendant No. 2. The defendant Nos. 1, 2 and 3 had engineered and took over of the shares held by the original plaintiff No. 1 and the other plaintiffs in the defendant Nos. 6 and 7 by the defendant No. 1. The plaintiffs complain that the

defendant Nos. 1, 2 and 3 coerced and exercised undue influence over the original plaintiff No. 1 and the plaintiff No. 2 to make them enter into two agreements on May 14, 1981 and May 31, 1981. By exercising undue influence and coercion the defendant Nos. 1, 2 and 3 had made the original plaintiff No. 1 and the plaintiff No. 2 part with the shares held by them in the defendant Nos. 6 and 7. By this mechanism the management of the defendant Nos. 6 and 7 changed from the plaintiffs to the defendant No. 1, without any correspondent benefit or the premises made being fulfilled. All these had happened through a series of transactions on and from May 14, 1981. According to the plaintiffs, these transactions were brought about by the defendant Nos. 1, 2 and 3 by exercising undue influence and coercion on the original plaintiff No. 1 and the other plaintiffs. The plaintiffs seek a declaration that all transactions made by the original plaintiff No. 1 and the other plaintiffs on and from May 14, 1981 in respect of the defendant Nos. 6 and 7 are null and void and not binding upon the plaintiffs. They seek consequential reliefs with regard thereto.

3. The defendant No. 1 and the defendant No. 2 are contesting the instant suit.

4. The defendant No. 1 has denied exercising any undue influence or coercion on the original plaintiff No. 1 or any of the plaintiffs in relation to any of the transactions. The transactions alleged by the plaintiffs in respect of the defendant Nos. 6 and 7 are admitted. The defendant No. 1 claims that no undue influence was exerted in arriving at the transactions on May 14, 1981 or subsequent thereto. It is contended that the transactions in question is not one single transaction but a series of transaction entered into between diverse persons. The defendant Nos. 6 and 7 had approved of such transactions in their Board meetings.

5. Nine issues were settled by the Order dated March 30, 2000. Such issues are as follows:--

"1. Did the defendant Nos. 6 and 7 suffer set back between 1975 to 1981 not only because of the set back in the Tea industry but also due to the mismanagement and/or insufficient management of the plaintiffs and also misappropriation of the funds of the defendant Nos. 6 and 7 by the plaintiff as alleged in paragraph 13 of the written statement?

2. Did the defendant No. 1 make any representation, promise or give any assurance to or induce or pressurize the original plaintiffs as alleged in the plaint?

3. Did the defendant No. 1 do anything to induce the original plaintiffs as alleged in paragraphs 23 and 26 of the plaint?

4. Was the defendant No. 11 introduced to the original plaintiff No. 1 by the defendant No. 1 as alleged in paragraph 45(i) of the plaint?

5. Has the defendant failed or neglected or refused to perform any part of its obligations under the agreement dated 14th May, 1981 as alleged in paragraph 47 of the plaint?

6. Were the transactions mentioned in paragraph 45 of the plaint brought about by the defendant No. 1 to 5 in collusion and conspiracy with each other and by perpetrating on the original plaintiffs with intent to deceive the plaintiffs as alleged in paragraph 54 of the plaint?

7. Are the agreements dated 14th May, 1981 and 31st May, 1981 and the transaction mentioned in paragraph 45 of the plaint vitiated by fraud or are void or voidable or not binding on the plaintiff as alleged in paragraphs 54, 55 and 60 of the plaint?

8. Is the defendant No. 1 not entitled to exercise any right title or interest in respect of the shares in the defendant Nos. 6 and 7 and in respect of the Dharanipur Tea Estate as alleged in paragraph 61 of the plaint?

9. Are the plaintiffs entitled to or can claim restoration of possession of Red Bank Tea Estate, Surendranagar Tea Estate and Dharanipur Tea Estate as alleged in paragraph 61 of the plaint?"

6. The first issue is taken up for consideration. The plaintiffs contend that, between 1975 and 1981 the tea industry as a whole had suffered financial setbacks. The defendant Nos. 6 and 7 were in the tea industry. By reason of the industry wise financial setback, the defendant Nos. 6 and 7 also suffered financial setback. The defendant Nos. 6 and 7 were, therefore, not in a position to repay the defendant No. 2. The original plaintiffs had approached the defendant No. 2 for further financial assistance and reduction in the rate of interest to tide over the financial crisis. The plaintiffs contend that, the defendant No. 2 was the sole banker of the original plaintiffs and of the defendant Nos. 6 and 7. The original plaintiffs were then in the management and control of the defendant Nos. 6 and 7. They had reposed trust and faith in the defendant No. 2.

7. Neither of the contesting defendants have established in evidence that the financial setback suffered by the defendant Nos. 6 and 7 during the period 1975 and 1981 was due to the mismanagement and/or insufficient management of the original plaintiffs and misappropriation of the funds of the defendant Nos. 6 and 7 by the original plaintiffs. Paragraph 13 of the written statement of the defendant No. 1 has not been established in evidence. Both the contesting defendants, however, admit that the defendant Nos. 6 and 7 had suffered financial setback during this period.

8. Indisputably the defendant Nos. 6 and 7 suffered financial setback between the period 1975 and 1981. That the tea industry as a whole had suffered financial setback during this period of time is not disputed. The contesting defendants however have failed to establish that, the setback suffered by the defendant Nos. 6 and 7 was also due to the mismanagement and/or the inefficient management of the original plaintiffs and/or misappropriation of the funds of the defendant Nos. 6 and 7 by the original plaintiffs.

9. In such circumstances the first issue is answered by holding that the

defendant Nos. 6 and 7 suffered setback between 1975 and 1981 due to the setback in the tea industry. The parties particularly the contesting defendants have failed to establish the balance portion of the first issue and therefore the balance portion of the first issue is answered in the negative and against the defendants.

10. The second issue is taken up for consideration. On this issue, the plaintiffs contend that, the defendant No. 2 was the sole banker of the defendant Nos. 6 and 7. The original plaintiff No. 1 had reposed faith and trust in the defendant No. 2 and its officials. The defendant No. 3 was one of the high officials of the defendant No. 2. The plaintiffs claim that the defendant Nos. 2 and 3 advised the original plaintiff No. 1 and the plaintiff No. 2 to dispose of their controlling shares in the defendant Nos. 6 and 7 on consideration of Rs. 20 Lakhs so that the financial difficulties and the labour unrest faced by the original plaintiff No. 1 and the plaintiff No. 2 in the affairs of the defendant Nos. 6 and 7 would be taken care of by the new promoter. The plaintiffs contend that, original title deeds with the regard to the defendant Nos. 6 and 7 as also Dharanipur Tea Estate were kept in deposit with the defendant No. 2 as security for loans and credit card facilities enjoyed by the defendant Nos. 6 and 7 from the defendant No. 2. According to the plaintiffs, the original plaintiff No. 1 was eager to have the title deeds of Dharanipur tea estate released as security from the defendant No. 2 so that the original plaintiff No. 1 could carry on with tea business from Dharanipur tea estate. According to the plaintiff, the defendant No. 2 acting through the defendant No. 3 made a representation to the original plaintiff No. 1 and the plaintiff No. 2 that, on the sale of the shares held by the original plaintiff No. 1 and the plaintiff No. 2 in the defendant Nos. 6 and 7 to the person identified by them for the consideration negotiated by them, the defendant No. 2 would release the title deed of Dharanipur tea estate to the original plaintiff No. 1 and the plaintiff No. 2.

11. The plaintiffs claim that, in the informal meetings between the original plaintiff No. 1 and the defendant No. 3 acting on behalf of the defendant No. 2, the defendant No. 1 was introduced to the original plaintiff No. 1 and the plaintiff as the person capable of bringing about the desired result for the original plaintiff No. 1 and the plaintiff No. 2. The defendant No. 1 claimed himself to have a consultancy firm. The original plaintiff No. 1 and the plaintiff No. 2 believed that the defendant No. 1 was a person acting on behalf of the defendant No. 2 and, therefore, acted on the basis of the instructions given by the defendant No. 1 with the regard to the dealings and transactions between the defendant Nos. 6 and 7 and the defendant No. 2.

12. The plaintiffs contend that, the defendant No. 2 sanctioned a fresh loan of Rs. 52.20 lakhs in favour of the defendant No. 6 on December 22, 1980 and a sum of Rs. 13.50 lakhs in favour of the defendant No. 7. The defendant No. 2 however did not disburse such sanctioned amount to the defendant Nos. 6 and 7.

13. The non-receipt of the sanctioned amount aggravated the financial situation

of the defendant Nos. 6 and 7. Labour unrest broke out due to the non-payment and/or irregular payment of wages and irregular supply of ration. This made the original plaintiff No. 1 and the plaintiff No. 2 to look forward to the defendant Nos. 2 and 3 for immediate release of finance. Instead of releasing the sanctioned amount, the defendant No. 2 called upon the defendant Nos. 6 and 7 to bring down the outstanding dues to the defendant 2. This letter, according to the plaintiff, was issued to coerce the plaintiffs to act at the dictates of the defendant Nos. 1, 2 and 3. The original plaintiff No. 1 and the plaintiff No. 2 approached the defendant No. 3 for assistance. The defendant No. 3 advised the original plaintiff No. 1 that they get in touch with the defendant No. 1 before giving any reply to the letter of the bank. The defendant No. 1 was, therefore, introduced by the defendant Nos. 2 and 3 to the original plaintiff Nos. 1 and 2. The defendant No. 1 on one hand promised to work on the financial situation of the defendant Nos. 6 and 7 by offering to buy out the shares held by the original plaintiff No. 1 and the plaintiff No. 2 in the defendant Nos. 6 and 7 with a promise to have the title deeds in respect of Dharanipur Tea Estate released from the defendant No. 2 and to cause the defendant No. 2 to release the personal guarantee of the original plaintiff No. 1 and the plaintiff No. 2 in favour of the defendant No. 2. The plaintiffs had no option than to accept the offer of Rs. 2,50,000/- and had agreed to the transfer of shares in the defendant Nos. 6 and 7. By a letter dated March 7, 1981 the original plaintiff No. 1 placed on record the substantial compliance of the advice of the defendant No. 1. According to the plaintiff, the letter dated March 7, 1981 being Exhibit "A" was made over by the original plaintiff No. 1 to the defendant No. 3 personally.

14. By two letters dated March 9, 1981 being Exhibit "B" collectively the original plaintiff No. 1 recorded physical inability to continue in the management of the defendant Nos. 6 and 7. The original plaintiff No. 1 requested the defendant Nos. 2 and 3 to release finance in favour of the defendant Nos. 6 and 7. According to the plaintiffs, on receipt of Exhibit "B", the defendant Nos. 2 and 3 promised disbursement of sanction as well as compliance of the agreement.

15. The original plaintiff No. 1 and the plaintiff No. 2 sought to identify other purchasers. However, the defendant 1, 2 and 3 ensured that the defendant Nos. 2 and 3 did not accept any offer made by any other purchaser other than the person identified by the defendant Nos. 1, 2 and 3. According to the plaintiffs, in the first week of April, 1981 a meeting was held at the office of the defendant No. 3 wherein the original plaintiff No. and the defendant No. 1 were present. In such meeting the defendant No. 1 made various representations to the plaintiffs. The defendant No. 1 claimed that there was no buyer on whom the defendant No. 2 can rely upon to accept the liabilities of the defendant Nos. 6 and 7. In such circumstances the defendant No. 1 himself had agreed to take over the liabilities of the defendant Nos. 6 and 7 to the original plaintiff No. 1 and the plaintiff No. 2. The plaintiffs would be released of their liabilities as guarantors in respect of the accounts of the defendant Nos. 6 and 7 and that the title deeds in respect of Dharanipur Tea Estate would be released by the defendant No. 2 in

favour of the original plaintiff No. 1. As the original plaintiff No. 1 was made to accept such proposal by the defendant No. 1 and the defendant No. 3 acting on behalf of the defendant No. 2. The defendant No. 3 acting on behalf of the defendant No. 1 accorded approval to such proposal of the defendant No. 1.

16. According to the plaintiffs, by a letter dated April 6, 1981 the original plaintiff No. 1 informed the defendant Nos. 2 and 3 that they would comply with the arrangements arrived at in April 1981. Since the consideration was not fixed, in another meeting at the end of April 1981 the defendant No. 1 offered a sum of Rs. 1 Lakh to the plaintiffs as consideration price. The original plaintiff No. 1 and the plaintiff No. 2 had declined to accept the same.

17. According to the plaintiffs, the refusal to accept the sum of Rs. 1 Lakh as consideration for the transfer of the shares in the defendant Nos. 6 and 7 to the defendant No. 1, led the defendant No. 2 to issue a demand notice recalling the entire credit facilities of the defendant Nos. 6 and 7. On receipt of such demand notices, the original plaintiff No. 1 met the defendant No. 3 acting on behalf of the defendant No. 2. In such meeting the defendant No. 3 acting on behalf of the defendant No. 2 prevailed upon the original plaintiff No. 1 and plaintiff No. 2 to accept the offer of the defendant No. 1 for transfer of shares in the defendant Nos. 6 and 7. In such circumstances on May 14, 1981 an agreement was entered into between the original plaintiff No. 1 and the defendant Nos. 1 to 4 being Exhibit "K".

18. The plaintiffs claim that the agreement dated May 14, 1981 was cancelled on May 28, 1981 being Exhibit "LL". The plaintiffs claim that on May 31, 1981 the original plaintiff No. 1 was made to sign various documents without giving the originals thereof to the original plaintiff No. 1. The original plaintiff No. 1 was not given any time to go through the same or to be apprised of the contents thereof. The plaintiffs claim that the defendants did not perform their obligations under Exhibit "K" assuming the same to be alive.

19. The plaintiffs contend that in September 1981 they received a draft deed of lease from the Advocates of the defendant No. 1 in relation to Dharanipur Tea Estate. The plaintiffs point out that although the defendant No. 1 had recalled the credit facilities in the month of April 1981 they did not pursue such notices of demand. On the contrary the defendant No. 2 accommodated the defendant Nos. 6 and 7 by releasing a sum of Rs. 22.50 Lakhs and reworking the credit facilities including lowering the rate of interest charged in the account.

20. The plaintiffs claim that the defendant No. 11 was introduced to the original plaintiff No. 1 by the defendant No. 1. The original plaintiff No. 1 and the plaintiff No. 2 did not have any Advocate at their own. The agreement dated May 14, 1981 as well as May 31, 1981 was executed in presence of the defendant No. 11. According to the plaintiffs, the defendant Nos. 1, 2 and 3 and in collusion and in conspiracy with each other had caused the original plaintiff No. 1 to execute documents with regard to Dharanipur Tea Estate. The original plaintiff No. 1 did

not give any letter in favour of the defendant No. 3 in respect of Dharanipur Tea Estate. Consequently, it is claimed by the plaintiffs that the cancellation of the agreement dated May 14, 1981 being Exhibit "K", the original plaintiff No. 1 continues to remain as the proprietor of the Dharanipur Tea Estate. The plaintiffs rely upon Sections 16 and 17 of the Contract Act, 1872 and submit that, every transaction entered into between the original plaintiff No. 1 and the plaintiff No. 2 on and from May 14, 1981 being Exhibit "K" is vitiated due to undue influence, misrepresentation and fraud. The plaintiffs rely upon All India Reporter Mst. Sethani Vs. Bhana, in this regard. The plaintiffs rely upon Section 32 of the Indian Evidence Act, 1872 and All India Reporter Sitaji and Others Vs. Bijendra Narain Choudhary and Others, in support of the proposition that the evidence of the plaintiff No. 2 is admissible in evidence with regard to the statements made by the original plaintiff No. 1 prior to his death.

21. The defendant No. 1 contends that the alleged cause of action of the original plaintiff No. 1 is personal and that the same does not survive the death of the original plaintiff No. 1. According to the defendant No. 1 the suit has abated and is therefore liable to be dismissed. It is further contended on behalf of the defendant No. 1 that although the suit was filed in 1984, the plaintiffs took no steps for early disposal of the same. The plaintiffs did not file any interlocutory application in the suit. The evidence of the witness of the plaintiffs had commenced only in October 1993. The cross-examination of the witness of the plaintiffs was closed in March 1999. The plaintiffs took no steps to have the suit heard thereafter.

22. In the written notes of argument it is claimed on behalf of the defendant No. 1 that the Court called upon the defendant No. 1 to address only on the issue of undue influence. Such contention of the defendant No. 1 is without any basis. At no point of time did I call upon the defendant No. 1 to limit its submissions on the issue of undue influence only. All that I did, was to call upon the defendant No. 1 to address me on the issue of undue influence first and, thereafter, address me on the other relevant issues.

23. On the issue of undue influence, fraud and coercion it is contended on behalf of the defendant No. 1 that the transactions took place after various meetings and discussions. It is also pointed out that the transactions in question are a series and not a single one. According to the defendant No. 1, the ingredients of undue influence under Section 16 of the Contract Act, 1872 have not been established. The plaintiffs have relied upon hearsay evidence. There is no evidence to establish that the defendant No. 1 was in a position to dominate the will of the defendant No. 2 or was in a position to obtain undue advantage. It is contended that the mere statement of the original plaintiff No. 1 does not establish the case of undue influence. The original plaintiff No. 1 had appointed an independent consultant to search for new buyers and give proposals for revival of the estates. In support of such proposition reliance is placed on All India Reporter Ladli Prasad Jaiswal Vs. Karnal Distillery Co. Ltd. and Others, , All

India Reporter Afsar Sheikh and Another Vs. Soleman Bibi and Others, and All India Reporter Shrimati and Others Vs. Sudhakar R. Bhatkar and Others, .

24. It is contended on behalf of the defendant No. 1 that the financial condition of the defendant Nos. 6 and 7 and Dharanipur Tea Estate was bad. They had huge financial liabilities. Such liabilities were in excess of Rs. 3 crores. The new management of the defendant Nos. 6 and 7 and Dharanipur Tea Estate took over the entire liabilities of Rs. 12 Lakhs payable by the original plaintiffs to the defendant No. 2. The transaction therefore cannot be said to be unconscionable.

25. It is contended on behalf of the Defendant No. 1 that the suit had been filed three years from the date of the agreement and, therefore, the suit is barred by limitation under Articles 56 and 59 of the Limitation Act, 1963.

26. On behalf of the defendant No. 1 it is contended that the plaintiffs have sought relief with regard to two agreements dated May 14, 1981 and May 31, 1981. It is pointed out that the agreement dated May 31, 1981 has not been marked as an exhibit. It is submitted that, the defendant No. 2 is not a party to the agreement. It is contended on behalf of the defendant No. 2 that the defendant Nos. 6 and 7 had enjoyed various credit facilities. The original plaintiffs did not deny the liability of the defendant Nos. 6 and 7. Two tea estates of New Red Bank Tea Estate Company Private Limited and Surendranagar Tea Estate Private Limited and the Dharanipur Tea Estate were marked in favour of the defendant No. 2 as collateral securities in respect of the credit facilities. Prior to May 14, 1981, the original plaintiffs had executed guarantee documents in favour of the defendant No. 2. The mortgage of the three estates continued in favour of the defendant No. 2 even after May 14, 1981. It is, therefore, claimed that the defendant No. 2 did not obtain any unfair advantage over any of the plaintiffs. With regard to the contention of the undue influence it is contended on behalf of the defendant No. 2, since it is not a party to the agreement dated May 14, 1981 being Exhibit "K" it cannot be contended that the defendant No. 2 caused the original plaintiffs to enter into such agreements under undue influence. Similar is the contention with regard to the allegation of fraud as the defendant No. 2 is not a party to Exhibit "K".

27. On the quality of the evidence on behalf of the plaintiffs, it is submitted by the defendant No. 2 that the witness of the plaintiffs being the plaintiff No. 2 did not have any personal knowledge of the transaction.

28. The defendant No. 2 contends that, it had initiated recovery proceedings before the Debts Recovery Tribunal and that no relief should be granted to the plaintiffs that would prejudice the rights of the defendant No. 2 in the Debts Recovery Tribunal Proceedings.

29. The decision on the second to the eighth issues would turn on the conduct of the defendant Nos. 1, 2 and 3 with the original plaintiff No. 1 and the plaintiff No. 2 at the material point of time. The defendant No. 1 had lent and advanced diverse monies through various credit facilities to the defendant Nos. 6 and 7.

This fact is well-established. That the tea industries had suffered a setback during the period of time alleged in the plaint is not denied by the parties. Indisputably the defendant Nos. 6 and 7 faced financial difficulties in its functioning. Such difficulties resulted in labour unrest, irregular disbursement of ration to the labourers and generally failure of the defendant Nos. 6 and 7 to service the credit facilities of the defendant No. 2. The defendant No. 3 was a high official of the defendant No. 2. The defendant No. 3 had dealt with the original plaintiff No. 1 and the plaintiff No. 2 on behalf of the defendant No. 2. This fact also appears from the evidence on record.

30. It is claimed by the plaintiff No. 2 in its evidence that the defendant No. 1 was introduced by the defendant No. 3 acting on behalf of the defendant No. 2 to the original plaintiff No. 1 and the plaintiff No. 2. The defendant No. 1 admits in its evidence to be a consultant. Exhibit "K" being the agreement dated May 14, 1981 signed by the defendant No. 1 describes the defendant No. 1 in different places to be a businessman and to be in the management and consultancy business. Exhibit "K" recites that the defendant No. 1 was known to the original plaintiff No. 1 personally. In evidence however it has been established that the original plaintiff No. 1 came into contact with the defendant No. 1 in relation to the efforts made by the original plaintiff No. 1 to restructure the debts of the defendant Nos. 6 and 7 to the defendant No. 2. There is no evidence on the part of the defendant No. 1 to suggest that the defendant No. 1 was introduced to the original plaintiff No. 1 and the plaintiff No. 2 by any other manner than claimed by the plaintiffs.

31. Be that as it may, the evidence on record establishes that the defendant No. 1 was extending his expertise as a consultant to the original plaintiff No. 1 and the plaintiff No. 2 and the defendant Nos. 6 and 7 to tide over the financial difficulties of the defendant Nos. 6 and 7 and in particular the difficulty faced by the defendant Nos. 6 and 7 in repaying the credit facilities of the defendant No. 2. The original plaintiff No. 1 and the plaintiff No. 2 were guarantors of the loans taken by the defendant Nos. 6 and 7 from the defendant No. 2. The title deeds in respect of the tea estates of the defendant Nos. 6 and 7 were kept in mortgage to the defendant No. 1 as collateral security for the credit facilities enjoyed by the defendant Nos. 6 and 7 from the defendant No. 2. The title deed in relation to the Dharanipur Tea Estate was also kept as collateral security by the original plaintiff No. 1 with the defendant No. 2 as security for repayment of credit facilities enjoyed by the defendant Nos. 6 and 7 from the defendant No. 2.

32. Due to the financial difficulties faced by the original plaintiff No. 1 and the plaintiff No. 2 in dealing with the affairs of the defendant Nos. 6 and 7, the original plaintiff No. 1, plaintiff No. 2 and the defendant Nos. 6 and 7 were trying to find a solution to such financial impasse. At this juncture the defendant No. 2 acting through the defendant No. 3 made few suggestions to the original plaintiff No. 1 and the plaintiff No. 2. There is no evidence to the contrary. The defendant No. 2 acting through the defendant No. 3 suggested a change in management of

the defendant Nos. 6 and 7 so that the liabilities of the defendant Nos. 6 and 7 could be taken care of by the new management and the personal guarantees of the original plaintiff No. 1 and the plaintiff No. 2 could be released along with title deeds in respect of Dharanipur Tea Estate.

33. In furtherance of such solution, the defendant Nos. 2 and 3 introduced the defendant No. 1 to the original plaintiff No. 1 and the plaintiff No. 2. The defendant No. 1 made few representations, promises and assurances to the original plaintiff No. 1 and the plaintiff No. 2. The representations, promises and assurances of the defendant No. 1 to the original plaintiff No. 1 and the plaintiff No. 2 were in relation to the defendant Nos. 6 and 7, its liabilities in the market as well as change of management of the defendant Nos. 6 and 7 and the release of the personal guarantees of the original plaintiff No. 1 and the plaintiff No. 2 and release of title deeds of Dharanipur Tea Estate. To bring about a change of management of the defendant Nos. 6 and 7 the controlling shares held by the original plaintiff No. 1 and the plaintiff No. 2 in the defendant Nos. 6 and 7 were required to be sold. The original plaintiff No. 1 and the plaintiff No. 2 were also trying to find a suitable purchaser for the shares held by them in the defendant Nos. 6 and 7 and to allow a change of management in the defendant Nos. 6 and 7. They were also trying to ensure that their personal guarantees in respect of the defendant Nos. 6 and 7 stood substituted by other securities or the personal guarantee of the new management of the defendant Nos. 6 and 7. They wanted the title deed in respect of Dharanipur Tea Estate to be released by the defendant No. 2. It appears from the evidence on record that, the defendant No. 1 assured the original plaintiff No. 1 and the plaintiff No. 2 that such a solution in respect of the affairs of the defendant Nos. 6 and 7 could be worked out. The original plaintiff No. 1 and the plaintiff No. 2 carried the impression that the defendant No. 1 was capable of discharging these representations made to them.

34. By a letter dated May 7, 1981 being Exhibit "A" the original plaintiff No. 1 requested financial accommodation from the defendant Nos. 2 and 3. This request was reiterated in the letter dated March 9, 1981 being Exhibit "B". Exhibit "B" was written by the original plaintiff No. 1 as the Managing Director of the defendant No. 6 to the defendant No. 2. Exhibit "C" demonstrates that persons other than the defendant No. 1 had expressed intentions in dealing with the defendant Nos. 6 and 7 and their liabilities with the defendant No. 2. Exhibit "D" is a letter dated April 6, 1981 written by the original plaintiff No. 1 to the defendant No. 3 with copy to the defendant No. 1. This letter refers to a discussion that the original plaintiff No. 1 had with the defendant No. 1, 2 and 3 in respect of the shares in the defendant Nos. 6 and 7. The original plaintiff No. 1 records that such sale would be subject to the release of the personal guarantees of the original plaintiff No. 1 and the plaintiff No. 2 and the release of Dharanipur Tea Estate free from all encumbrances. The sale of the shares would take place on a mutually agreed consideration.

35. These correspondences demonstrate that the original plaintiff No. 1 was

dealing with the defendant Nos. 1, 2 and 3. The defendant Nos. 2 and 3 were well aware of the efforts by the original plaintiff No. 1 to sale shares held by the plaintiffs in the defendant Nos. 6 and 7 for a consideration. The defendant Nos. 1, 2 and 3 were aware of the requirement of the original plaintiff No. 1 and the plaintiffs of a consideration for the sale of shares, the release of the personal guarantees of the original plaintiff No. 1 and the plaintiff No. 2 as also release of title deeds of Dharanipur Tea Estate free from all encumbrances.

36. In evidence it is stated on behalf of the plaintiffs that, the defendant Nos. 1, 2 and 3 thereafter caused the defendant No. 2 to issue demand notices recalling the credit facilities. These demand notices were issued to put undue pressure on the original plaintiff No. 1 and the plaintiff No. 2 to succumb to the wrongful demands of the defendant Nos. 2 and 3.

37. By two several letters dated April 13, 1981 the defendant No. 2 through its Advocate's letter called up the credit facilities and demanded payment. The defendant No. 2 also called upon the original plaintiff No. 1 and the plaintiff No. 2 to repay the credit facilities as personal guarantors. Exhibit "E" is in relation to the defendant No. 7. Similar letter was caused to be issued by the defendant No. 2 in respect of the defendant No. 6 through their Advocate's letter dated May 2, 1981 being Exhibits "G" and "H".

38. It is the evidence of the plaintiffs that, the demand notices pushed the original plaintiff No. 1 and the plaintiff No. 2 to enter into the agreement dated May 14, 1981 being Exhibit "K". Exhibit "K" is an agreement dated May 14, 1981 entered into by the original plaintiff No. 1 and the plaintiff No. 2 on one part and Radhesham Singhanian and the defendant No. 1 on the second part. The agreement deals with the transfer of shares held by the original plaintiff No. 1 and the plaintiff No. 2 in the defendant Nos. 6 and 7 as also the manner and method by which the liabilities of the defendant Nos. 6 and 7 to the defendant No. 2 would be taken care of by the incoming management for the defendant Nos. 6 and 7.

39. Significantly clause 4 of Exhibit "K" refers to Dharanipur Tea Estate. This clause recognizes the original plaintiff No. 1 to be the sole proprietor of Dharanipur Tea Estate and contemplates that the original plaintiff No. 1 would execute a lease deed in respect of the Dharanipur Tea Estate in favour of the defendant No. 6. Clause 11 of Exhibit "K" requires the defendant No. 1 and Radhesham Singhanian to have Dharanipur Tea Estate released by the defendant No. 2 within December 31, 1985.

40. Exhibit "K" requires the original plaintiff No. 1 and the plaintiff No. 2 to transfer all their shares holding to the defendant No. 1 and Radhesham Singhanian and/or nominee or nominees at a consideration of Rs. 1 Lakh. It appears from the evidence that the original plaintiff No. 1 and the plaintiff No. 2 had agreed to transfer their shares holding in the defendant No. 6 and 7 to the defendant No. 1 and/or nominated by him. The original plaintiff No. 1 and the

plaintiff No. 2 facilitated a change in the management of the defendant Nos. 6 and 7 consequent to Exhibit "K". The new management was put in possession of the Tea Estate of defendant Nos. 6 and 7. Share transfer was made consequent to Exhibit "K". On consideration of the evidence on record, I find that the defendant No. 1 did make the representations, promises and/or assurances to the original plaintiff No. 1 and the plaintiff No. 2. Such representations, promises and/or assurances included that the Dharanipur Tea Estate would be release as a collateral security from the defendant No. 2 and substitution of the personal guarantees of the original plaintiff No. 1 and the plaintiff No. 2 in respect of the defendant Nos. 6 and 7 given to the defendant No. 2. I also find that the defendant Nos. 1, 2 and 3 were acting in concert with each other. Letters written by the original plaintiff No. 1 to the defendant Nos. 2 and 3 were marked to the defendant No. 6 also. There is no evidence on record to show that the defendant No. 2 protested such course of action of the original plaintiff No. 1 and the plaintiff No. 2. The defendant No. 1 also did not protest even such a course of conduct by the original plaintiff No. 1.

41. Exhibits "F", "G" and "H" are the recall notices of the credit facilities issued by the defendant No. 2. However, it is established in evidence that the defendant No. 2 did not proceed to initiate any recovery proceedings pursuant to Exhibits "F", "G" and "H". On the contrary, the defendant No. 2 restructured the credit facilities of the defendant Nos. 6 and 7 and reduced the rate of interest payable by the defendant Nos. 6 and 7 subsequent to the change of management in the defendant Nos. 6 and 7. Between the time of change of management being May 14, 1981 brought about by Exhibit "K" and the lowering of the interest rate by the defendant No. 2 and restructuring the credit facilities by the defendant No. 2 in respect of the defendant Nos. 6 and 7, no new incident had happened excepting the change of management prompting the defendant No. 2 to rework the credit facilities in the manner done by them. This course of conduct of the defendant Nos. 1, 2 and 3 leads to the irresistible conclusion that the defendant Nos. 1, 2 and 3 were acting in concert with each other.

42. On the quality of the evidence given by the plaintiff No. 2, it is contended on behalf of the defendant No. 1 that her evidence is based on hearsay. She was not present in the meetings between the original plaintiff No. 1 and the defendant No. 1.

43. In *Sitaji and Ors.* (supra) it has been held as follows:--

"A member of the family can speak in the witness box of what he has been told and what he has learned about his own ancestors, provided what he says is an expression of his own independent opinion (even though it is based on hearsay derived from deceased, not living, persons) and is not merely repetition of the hearsay opinion of others, and provided the opinion is expressed by conduct. His sources of information and the time at which he acquired the knowledge (for example, whether before the dispute or not) would affect its weight but not its admissibility." 44. In the instant case, the plaintiff No. 2 is the widow of the

original plaintiff No. 1. She was also a member of the Board of Directors of the defendant Nos. 6 and 7 at the material point of time. Her evidence is that, the original plaintiff No. 1 used to discuss the financial difficulties faced by the defendant Nos. 6 and 7 and the manner in which the original plaintiff No. 1 was trying to ensure that they could tide over such financial difficulties. The plaintiff No. 2 is shown to be present at the Board meetings of the defendant Nos. 6 and 7. The defendant No. 1 uses these very board meetings to contend that the transactions in question were not brought about by undue influence and coercion. The entirety of the evidence of the plaintiff No. 2 cannot be wished away as hearsay evidence. She did play a role in the transactions between the original plaintiff No. 1, plaintiff No. 2 and the defendant Nos. 6 and 7 on one part and defendant Nos. 1, 2 and 3 on the other part. In her evidence she has expressed her views with regard to the transactions amongst the parties. I am of the view that, the evidence of the plaintiff No. 2 could be relied upon to arrive at finding on the issues framed in the instant suit.

45. In *Mst. Sethani* (supra) the Supreme Court found that in the facts of that case the onus of the plaintiff in establishing undue influence stood discharged. Once such onus was discharged by the plaintiff it was for the defendants to prove that the transaction in question was not executed under undue influence.

46. The three demand notices issued by the defendant No. 2 precedes Exhibit "K". These demand notices were issued in a scenario where negotiation for change of management of the defendant Nos. 6 and 7 was going on. These demand notices are crucial and have the effect of exerting undue influence on the original plaintiff No. 1 and the plaintiff No. 2 to decide on the change of management in a particular way. In fact, I find that, the defendant No. 2 caused issuance of the demand notices to prevail upon the original plaintiff No. 1 and the plaintiff No. 2 to agree to the change of management of the defendant Nos. 6 and 7 in favour of the defendant No. 1 through Exhibit "K".

47. In *Ladli Parshad Jaiswal* (supra) the Supreme Court is of the view that under Order 6 Rule 4 of the Code of Civil Procedure, the party pleading undue influence must give particulars of the same in the pleadings. In the instant case, particulars of undue influence have been pleaded by the plaintiffs in the plaint. It goes on to hold that:--

"A transaction may be vitiated on account of undue influence where the relations between the parties are such that one of them is in a position to dominate the will of the other and he uses his position to obtain an unfair advantage over the other. It is manifest that both the conditions have ordinarily to be established by the person seeking to avoid the transaction; he has to prove (a) that the other party to a transaction was in a position to dominate his will and (b) that the other party had obtained an unfair advantage by using that position.

There may arise cases in which even though the burden lies on such a person to prove his case of undue influence he may establish it from admissions made by

the other party or his witnesses or from other evidence, and without giving his own testimony.

Clause (2) lays down a special presumption that a person is deemed to be in a position to dominate the will of another (i) where he holds a real or apparent authority over the other, or (ii) where he stands in a fiduciary relation to the other or (iii) where he enters into a transaction with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress. Where it is proved that a person is in a position to dominate the will of another (such proof being furnished either by evidence or by the presumption arising under sub-sec. (2)) and he enters into a transaction with that other person which on the face of it or on the evidence adduced, appears to be unconscionable the burden of proving that the transaction was not induced by undue influence lies upon the person in a position to dominate the will of the other. But sub-sec. (3) has manifestly a limited application; the presumption will only arise if it is established by evidence that the party who had obtained the benefit of a transaction was in a position to dominate the will of the other and that the transaction is shown to be unconscionable. If either of these two conditions is not fulfilled the presumption of undue influence will not arise and burden will not shift."

48. The controlling interests of two tea estates were made over by Exhibit "K" to the defendant No. 1. The defendant No. 1 was acting as the consultant of the plaintiff. From a consultant of the defendant Nos. 6 and 7, the defendant No. 1 gets to become their owner. As a consultant he was entrusted to find a solution to the financial problem faced by the defendant Nos. 6 and 7. In the process of finding such solution he becomes the owner thereof. This transformation from a consultant to the owner of the companies to such effect requires the defendant Nos. 1, 2 and 3 to establish that Exhibit "K" was brought about at arm's length. I am afraid, I am not in a position to persuade myself to hold that Exhibit "K" was brought about at arm's length by the defendant Nos. 6 and 7 while dealing with the defendant Nos. 1, 2 and 3.

49. In *Afsar Shaikh and Anr.* (supra) the Supreme Court has held that,

"It is not sufficient for a person seeking the relief to show that the relations of the parties have been such that the one naturally relied upon the other for advice, and the other was in a position to dominate the will of the first in giving it. "More than mere influence must be proved so as to render influence in the language of the law, "undue" ". Upon a determination of the issue at the second stage, a third point emerges, which is of the "onus probandi". If the transaction appears to be unconscionable, then the burden of proving that it was not induced by undue influence is to lie upon the person who was in a position to dominate the will of the other." 50. In the instant case, the defendant No. 1 acting in concert with the defendant Nos. 2 and 3 were in a position to dominate the will of the original plaintiff No. 1 and the plaintiff No. 2. They were in a position to exert undue influence. Exhibit "A" is unconscionable by reason of the

consideration for the share transfer and the fact that a consultant engaged for the purpose of taking out the defendant Nos. 6 and 7 from its financial difficulties gets to become over of the defendant Nos. 6 and 7 for a sum of Rs. 1 Lakh.

51. In *Sudhakar R. Bhatkar and Ors. (supra)* it has been held that the Court cannot go into the question of proof of onus probandi as the first issue leaving the other two issues namely, the relations between the parties to the effect that one was in a position to dominate the other and whether the contract was induced by undue influence to be left for decision later on.

52. Consequently the second and the third issues are answered in the affirmative and in favour of the plaintiffs.

53. So far as the fourth issue is concerned, the defendant No. 11 had addressed a letter dated August 11, 1981 to the original plaintiff No. 1. By Exhibit "M" the defendant No. 11 claims that pursuant to the instruction of the original plaintiff No. 1 the firm of solicitors in which the defendant No. 11 was a partner had drafted a deed in respect of the Dharanipur Tea garden for the transfer of the original plaintiff No. 1. It also notes that such draft lease would be given to the defendant No. 1. The plaintiffs claim that the defendant No. 11 was introduced to the original plaintiff No. 1 by the defendant No. 1. This appears from the evidence given by the plaintiffs. There is nothing on this aspect contrary in evidence on the part of the defendant No. 1. The conduct of the defendant Nos. 1, 2 and 3 prior to August 11, 1981 as noted above allows a finding to be arrived at that the defendant No. 11 was introduced to the original plaintiff No. 1 by the defendant No. 1. The fourth issue is, therefore, answered in the affirmative and in favour of the plaintiff.

54. Exhibit "K" is the agreement dated May 14, 1981. Apart from everything else Exhibit "K" requires the defendant No. 1 to have Dharanipur Tea Estate released from the defendant No. 2. This did not happen. Consequently, the fifth issue is answered in the affirmative and in favour of the plaintiffs.

55. The sixth issue has to be considered in light of the discussions with regard to the second and the third issues. In view of the discussions in respect of such issues, the sixth issue is answered in the affirmative and in favour of the plaintiffs.

56. The seventh issue relates to Exhibit "K" being the agreement dated May 14, 1981 and an agreement dated May 31, 1981. The agreement dated May 31, 1981 has not been marked as an exhibit. The question of declaring such agreement dated May 31, 1981 which has not been brought in evidence to be vitiated by fraud or otherwise does not arise.

57. So far as the agreement dated May 14, 1981, which is Exhibit "K" in concerned, in view of the findings arrived at in respect of the second and third issues it has to be held that Exhibit "K" is vitiated by fraud and is voidable at the instance of the plaintiffs. Since the defendant No. 1 had come in possession of

the shares of the defendant Nos. 6 and 7 from the original plaintiff No. 1 and the plaintiff No. 2, all shares held by the defendant No. 1 in the defendant Nos. 6 and 7 must be returned to the plaintiffs. The defendant No. 9 is one of the heirs of the original plaintiff No. 1. Such defendant has not prayed for any relief in the instant suit. Therefore, the shares held by the defendant No. 1 in the defendant Nos. 6 and 7 are required to be transferred to the plaintiffs.

58. The defendant Nos. 6 and 7 may have issued and allotted capital in it to the defendant No. 1 or to his family members or persons under his control. On May 14, 1981 being Exhibit "K" the original plaintiff No. 1 and the plaintiff No. 2 held 78 per cent of the shares of the defendant No. 6 and 90 per cent shares of the defendant No. 7. In such circumstances, 78 per cent shares of the present paid up, issued and subscribed share capital of the defendant No. 6 is required to be transferred to the plaintiffs and 90 per cent shares of the defendant No. 7 to the plaintiffs. The defendant No. 1 ought not to be in management and control of the defendant Nos. 6 and 7 since May 14, 1981. All issue and allotment of shares in the defendant Nos. 6 and 7 subsequent to May 14, 1981 in favour of the defendant No. 1 or his family members or persons under his control are therefore bad. The defendant Nos. 6 and 7 will therefore register the names of the plaintiffs as shareholders of 78 per cent of the issued, paid up, subscribed share capital of the defendant No. 6 and the 90 per cent of such shares in defendant No. 7 within two weeks from date. The plaintiffs will refund to the defendant No. 1 the sums received pursuant to the agreement dated May 14, 1981 within two weeks of registrations of the plaintiffs as shareholders of the defendant Nos. 6 and 7 to the extent directed.

59. In view of the discussions above therefore the seventh issue is answered by holding that Exhibit "K" being the agreement dated May 14, 1981 and the transactions mentioned in paragraph 45 of the plaint are vitiated by fraud and are therefore void and not binding upon the plaintiffs. With regard to the agreement dated May 31, 1981 which is a part of the seventh issue, since such agreement has not been marked as an exhibit, no decision can be arrived at with regard thereto.

60. The eighth issue is answered by holding that the defendant No. 1 is not entitled to exercise any right, title and interest in respect of the shares of the defendant Nos. 6 and 7. So far as Dharanipur Tea Estate is concerned, it has been submitted that, the State Government has issued a new lease in favour of a person other than the original plaintiff not. 1. The plaintiffs herein will be entitled to initiate appropriate proceedings as they may be advised for the purpose of cancellation of any lease deed in favour of any person granted by the State Government in respect of Dharanipur Tea Estate if the plaintiffs so entitled to in law.

61. The ninth issue may be answered by holding that the plaintiffs are entitled to possession of all tea estates of the defendant Nos. 6 and 7. On the question of limitation I find that, the suit was initially filed in the Court of the Assistant

District Judge, Jalpaiguri on May 11, 1984. The suit had since been transferred to this Hon"ble Court for trial. One of the subject matter of challenge in the instant suit is the agreement dated May 11, 1981. The parties had interaction even after May 11, 1981. The suit therefore cannot be said to be barred by limitation.

62. C.S. No. 240 of 1990 was directed to be heard along with E.O.S. No. 1 of 1985. None appeared for the plaintiffs in C.S. No. 240 of 1990. In such circumstances C.S. No. 240 of 1990 is dismissed. All interim orders passed therein are vacated. So far as E.O.S. No. 1 of 1985 is concerned, there will be a decree in terms of prayers (a), (b) and (d). The plaintiffs will also be entitled to decree for delivery upon cancellation of Exhibit "K". Documents described in paragraph 60(c), (d) and any other documents in relation to or in connection with or in consequences of Exhibit "K". The plaintiffs will also be entitled to decree in terms of prayer (f) of the plaint with regard to Red Bank Tea Estate and Surendranagar Tea Estate. The plaintiffs will also be entitled to decree in terms of prayers (h) and (i).

63. The department is directed to draw up and complete the decree expeditiously.

Later:-

Stay prayed for is considered and refused.