

(1927) 08 MAD CK 0021
In the Madras High Court

Narayana Doss Balakrishna Doss

APPELLANT

Vs

Buchraj Chordia Sowcar and Others

RESPONDENT

Date of Decision : 08-08-1927

Acts Referred:

Citation : (1927) 53 MLJ 842

Hon'ble Judges : Venkatasubba Rao, J

Bench : Division Bench

Judgement

Venkatasubba Rao, J.—The plaintiff in this suit impeaches a mortgage executed by him. The 2nd defendant Purushothamdas is his maternal

uncle and he became indebted to the 1st defendant, a money lender, in a large sum of money. When Purushothamdas was pressed for repayment,

the plaintiff executed a"" mortgage in favour of the 1st defendant securing his share in his family property and making himself liable for his uncle"s

debt. The transaction is challenged by the plaintiff on the ground that it is vitiated by undue influence. The short point to be decided in the case is : is

it so vitiated? I may however point out that a mass of evidence has been adduced to show, or to rebut, that other invalidating grounds existed,

namely, (1) that in the deed finally executed, the term that the amount is repayable on demand was fraudulently inserted, contrary to the original

understanding that it was repayable only after two years; (2) that the 1st defendant falsely denied the existence of certain jewels and repudiated

after the execution of the deed his promise to return them to the 2nd defendant. Not only was evidence directed to these points but much time was

taken up on that account. But when the case reached the stage of final argument, the Counsel for the plaintiff and the 1st defendant adopted the

view which I was disposed to take from the start and confined themselves to the bare question, the question decisive of the case--is the transaction

vitiated by undue influence? I may state that I did not prevent evidence being adduced on the other points as I felt that in the event of the case

going further, the parties should have no ground of complaint on the score of any evidence having been shut out.

2. The following pedigree may be found useful in understanding the facts of the case:

Damodardas d. 8-12-19

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| |

Govardhandas Balakrishnadas d. 1914

| m. Rukmanibai.

Subbaroyadas |

(minor) Plaintiff

Born 4-2-05.

3. The father of the plaintiff died in 1914 and the plaintiff thereafter lived at Madras with his maternal uncle, the 2nd defendant, whereas his mother

resided also at Madras in the family house along with Govardhandas and his son. On the 30th of September, 1917, there was a partition of the

family properties. The grandfather separated from the rest and certain properties were allotted in common to the other members of the family. At

the partition the plaintiff who was an infant was represented by his mother and his maternal uncle, the 2nd defendant, who acted as his guardian.

Immediately after the partition, a trust deed was executed constituting the plaintiff's grand-father and Purushothamdas trustees for managing the

properties belonging to the plaintiff, his uncle and his uncle's son. These properties, of course, included those that fell to their share at the partition.

Damordardas died in 1919 and on the 5th, January, 1921, a deed came into existence which appointed one Chinna Veerappa trustee in the place

of Damodardas. Shortly afterwards Chinna Veerappa died and Purushothamdas remained and continued to be the sole trustee.

4. There were dealings between the 1st defendant and Purushothamdas, and in

the course of such dealings, the latter became indebted to the 1st defendant in a large sum of money. It is unnecessary to go into the history of these dealings and it is sufficient to say that in August, 1925, it was found that Purushothamdas owed the 1st defendant a sum of Rs. 24,000 and that the position of the former was extremely precarious. I must add that Purushothamdas left Madras in 1923, and returned only about July 1925. During this period the evidence discloses that the dealings between the 1st defendant and Purushothamdas continued and it became more and more manifest that Purushothamdas was in difficulties, It is also important to note that during his absence from Madras, the plaintiff went to live in the family house with his mother and his paternal uncle Govardhandas. After Purushothamdas returned, the plaintiff seems to have continued to live at his family residence but was frequently visiting the former. This was the state of things that prevailed on the 14th of August, 1925, when the suit mortgage deed was executed. On that date the plaintiff was 20 years of age and in the eye of the law an adult. It is common ground that the plaintiff was much attached to his maternal uncle. In fact, as I have shown, the boy practically lived as his ward, preferring his protection to that of his mother and his paternal uncle. The 1st defendant finding that Purushothamdas was not in a position to pay the large amount due to him, began to feel uneasy and brought pressure to bear on him for the repayment of his debt. A lawyer's notice was sent making a demand and it was evident that the 2nd defendant was in a state of bankruptcy. It is said that he had lands in the mofussil of some small value and that he imagined he was going to get at a future date a fabulous amount from some source. These points have not been pursued and the case was argued on the footing that Purushothamdas was on the date of the mortgage practically a bankrupt. He has in fact since been adjudicated an insolvent and the Official Assignee now represents his estate in the suit. The 1st defendant's demands having become persistent, a proposal came to be made which was to the effect that the plaintiff was to execute a mortgage in his favour charging the plaintiff's share in certain two houses with the debt and making that share security for its repayment. A scribe by name Kahiman Ali, a man suggested by the 1st defendant, was employed and a mortgage deed was prepared and executed. Though the plaintiff was the

only individual affected by the mortgage deed, Purushothamdas also nominally joined in its execution. Its recitals make it perfectly clear (and there is no dispute on this point) that the debt was that of the 2nd defendant and that the plaintiff derived no personal advantage. I may notice that the deed says that a trifling amount in cash was paid to the plaintiff but the evidence has shown that this is utterly false and it is not now denied that the plaintiff derived no benefit whatever from the deed. In this case there has been a lot of hard swearing on every side and I am quite prepared to endorse a remark made by one of the counsel at the bar that a single case hardly ever presents a greater collection of liars than have figured at this trial. The curious result has been that none of the counsel has chosen to rely upon the evidence even of his own witnesses and with great propriety each of the counsel has taken his stand mainly on admitted or undisputed or indisputable facts. What, then, are those facts? Besides those that I have adverted to, the evidence also shows that the plaintiff was practically not possessed of any property other than his share in these two houses. They were valued by the 1st defendant himself at Rs. 20,000 and although Purushothamdas to suit his purposes estimates them as being worth very much more, it was not seriously suggested that the mortgage really left any margin. These two houses (the subject of the mortgage) were part of the trust estate legally in charge of the 2nd defendant. The next important point to note is, that about two weeks after the date of the mortgage, Purushothamdas made an application to this Court asking that he should be discharged from the office of trustee in respect of the estate of the plaintiff and his co-parceners (Ex. IX, dated 31st August, 1925). An order was made on that application by consent and it is alleged that the properties were thereafter formally handed to Goverdhandas (Plaintiff's paternal uncle) in whose favour Purshothamdas also passed a promissory note, dated the 8th September, 1925, for Rs. 4,000 being roughly the amount for which he was then accountable in respect of his management. That the condition of Purushothamdas was perilous also appears from the fact that at the instance of one Ponnandi Chetti, a criminal warrant had been issued for his arrest, first on the 17th of July, 1925, and that warrant having been returned unexecuted, a second one was issued on the 15th of August, 1925. Ponnandi Chetti had instituted criminal proceedings in respect of an alleged breach of trust by Purushothamdas to whom certain

diamonds were said to have been entrusted in his capacity as broker. The dates of these warrants are very significant, the second of them having been issued just one day subsequent to the execution of the mortgage deed in question. It will be seen that so far I have been referring to facts which are either admitted or not denied. To the same category belong a few more facts. It is not disputed that neither the 1st defendant nor Purushothamdas directed the plaintiff to seek independent or disinterested advice. There is then the fact that the 1st defendant was aware that the plaintiff had his mother alive and that he had also a paternal uncle. Indeed the 1st defendant admits having seen the plaintiff's mother and having spoken to the plaintiff's paternal uncle before the date of the mortgage. It is not disputed that the 1st defendant was aware that the plaintiff was then only 20 years old, that Purushothamdas was his maternal uncle, that the properties mortgaged belonged to the plaintiff, that the debt was that of Purushothamdas with which the plaintiff had no concern, and that under the deed the latter obtained no benefit whatsoever.

5. Having stated facts regarding which there is practically no dispute, I shall now turn to that part of the evidence in respect of which there is some conflict.

6. The plaintiff, who equally with Purushothamdas and Ratanchand (the son and the main witness of the 1st defendant) had shown himself a thoroughly unreliable witness, has deposed that he was asked by them, at and before the mortgage, to keep the transaction secret from everyone including Govardhandas. Purushothamdas who previous to and at the trial was consistently supporting the plaintiff, has however given a different version and said that there was no secrecy imposed and in this respect he was supported by the 1st defendant. It is difficult to say as between these three who has been guilty of the least lying, but in this instance,, I am prepared to hold that the plaintiff was not expressly asked not to mention this matter to any third party.

7. The 1st defendant admits that he had known both the plaintiff and the 2nd defendant for some years previously and that he had frequently seen the nephew in his maternal uncle's house. The 1st defendant pretends that he had however no knowledge of the fact that the plaintiff was living for several years under the same roof as Purushothamdas, I have not been asked

seriously to believe this, and I find that the 1st defendant knew of the fact that the plaintiff was living with Purushothamdas and as a member of his household. The 1st defendant also deposed that he was not aware of the existence of the criminal warrant. In this respect again I am not prepared to act on his evidence. Purushothamdas swears--and in this he is corroborated by several--that he was in hiding at Mambalam, a suburb of Madras, from the 6th August to the 18th August, 1925, and that during that time he was living with the 1st defendant at that place with a view to evade the criminal warrant which had been issued. I believe that this is substantially true and that the 1st defendant was aware at the time that a warrant was out for his debtor's arrest. There is another controversial point. Was the 1st defendant made aware of the existence of the trust deed? The plaintiff, Rahiman Ali, the scribe, and Purushothamdas give one version which is to the effect that the trust deed was shown to the creditor. Ratanchand, the son of the 1st defendant, swears he was not shown the trust, deed. I have unhesitatingly come to the conclusion that the evidence of Ratanchand must be rejected on this point. I reject his evidence mainly on the ground that it is so utterly improbable. In the first place, Ratanchand admitted in his evidence that several documents constituting the title deeds were put into his hands. He was asked in the witness box by his counsel to select the documents of which he was given inspection. The documents were either in English or Telugu, neither of which he professed to understand, but he went through the form of looking at each document and ultimately was able to say that certain documents alone were handed to him and not the others. Among those which he was not shown were found to be the deed of trust and the deed of appointment of a new trustee. By what method he was able to make this selection it is impossible to say. In passing I may note that according to him the partition deed was one of the documents handed to him which shows that Purushothamdas acted at the family division as the guardian of the plaintiff. Before Ratanchand was put into the box, I asked the 1st defendant's counsel what his case was in regard to this point and he made an express statement that the only documents, which were handed to his client before the transaction was entered into, were some papers in a suit including a decree. The evidence of Ratanchand is at direct variance with this

statement, for according to him several other important deeds were placed in his hands. I am inclined to believe that the 1st defendant in his anxiety to make out that he was not at the time aware of the trust had recourse to this falsehood. There was no motive on the part either of the plaintiff or Purushothamdas to suppress mention of the trust deed. As a matter of fact we find that soon after the transaction, disputes arose between the 1st defendant on the one hand and the plaintiff and Purushothamdas on the other. Every possible contention was put forward on the latter's behalf to show that the mortgage deed was invalid and inoperative. It did not occur to them to say that plaintiff and Purushothamdas stood in fiduciary relations and the transaction was therefore invalid. It was long after the disputes began that this aspect of the case presented itself to the legal advisors of the plaintiff and there can be, therefore, no motive on the part of the plaintiff and Purushothamdas for withdrawing the trust deed from the documents handed to the 1st defendant. I am clearly of the opinion that the latter was on the date of the transaction aware of the peculiar relations between the uncle and the nephew by reason of the existence of, and arising out of, the trust deed.

8. There has been some little controversy as regards how far the plaintiff was competent to understand the nature of the, transaction at the time he entered into it. He pretended that he did not know its nature when he executed the bond. After much fencing and prevaricating he greatly modified this answer and there is not the slightest doubt that he was aware, at any rate, generally, of the nature and the terms of the deed which he was called on to execute. The truth is, he had a bare knowledge of the facts, namely, that he was making himself liable for his uncle's debts and that he was giving his property as security. He was competent enough to understand this, but I do not think that he was in a position to resist the importunity of his uncle to whom he was attached. There is no evidence that he ever consulted Govardhandas and, although there is much doubt as to when the transaction first came to his knowledge, I cannot find on the evidence that he knew it at the time the mortgage deed was given. At any rate, on the material on record, there is nothing to show that the plaintiff sought the advice of any person, either of his paternal uncle or his mother or any stranger.

9. The last point that remains to be noticed is, did the 1st defendant take any part in persuading the plaintiff in entering into the suit transaction? It is

not disputed that there was persuasion on the part of Purushothamdas. The 1st defendant suggested that he left the transaction to Purushothamdas

to be put through and that he did not take an active part. It is difficult to say precisely what part the 1st defendant took, but I entertain no doubt

that he was more than a mere silent participator it is very probable that the 1st defendant, in his anxiety to get his debts secured, joined with

Purushothamdas in inducing the plaintiff to execute the deed. I am prepared to believe that very little persuasion on his part was necessary, but I

cannot say that he kept himself scrupulously free from the taint. His evidence is demonstrably false on so many points that I am not disposed to

believe him when he says that he took no part in the transaction.

10. I have now stated my conclusions on points regarding which there has been some dispute and from the welter of false testimony, which every

one of the parties has asked me to reject, I have disentangled such facts as are reasonably free from doubt. The 1st defendant has not gone into

the witness box, his son Ratanchand has proved himself an untrustworthy witness, the plaintiff, the scribe Rahiman Ali and Purushothamdas are

unscrupulous liars and on every conceivable point as many versions have been given as there are witnesses in the case. I have therefore taken care

to separate out of this mass, only such facts as cannot admit of serious doubt. What then is the bearing of these facts on the question that I have to

decide? To answer this question, the law on the point must be reviewed.

11. I shall now refer to certain cases which have clearly laid down the principles applicable to a case of this kind. The first of them is Rhodes v.

Bate LR (1866) 1 Ch. Ap. Ca. 252. The plaintiff was a lady about 50 years old who was living with her brother-in-law Codrington. He became

indebted to Bate in a large sum of money and for this debt the plaintiff along with Codrington signed bonds in favour of Bate and further charged

almost the whole of her estate with the payment of the debt. The plaintiff complained that the documents and securities were obtained by the undue

influence exercised on her by Codrington as well as Bate, both of whom, she alleged, stood in confidential relations to her. I may note in passing

that this case differs from the present one, in so far as the creditor, the 1st

defendant, does not stand in any fiduciary relation to the plaintiff. But the case establishes certain propositions which have a close bearing on the case 1 have to decide.

12. Lord Justice Turner after examining the evidence found that at the date of some of the transactions complained against, Bate stood in confidential relations with the plaintiff and as the facts of the case brought it within the principles which the Lord Justice stated in his judgment, he set aside those transactions.

13. What then are the principles stated?

(1) Where confidential relations exist, those standing in such relations cannot entitle themselves to hold benefits unless they can show that the persons who have conferred the benefits had competent and independent advice. In this case, neither does the age nor the capacity of the person conferring the benefit affect the principle.

This is stated by the learned Lord Justice to be "'a settled general principle of the Court'".

(2) Age and capacity are considerations which may be of importance in cases where no confidential relation exists.

14. Knight Bruce, L. J., concurs in this judgment. In this case there is a distinct finding that the plaintiff was not of weak mind and was perfectly

competent to understand what she did (p. 256). There is also a finding that the plaintiff signed the deeds in question freely and voluntarily and

without pressure or soliciation on the part of the defendant, that the contents were fully explained to her and she clearly understood their nature and

effect (p. 257). It is also noticeable that the judgment makes mention of the fact that Bate told the plaintiff that Codrington would not be in a

position to repay the debt and that ultimately she would be obliged to repay it (p. 261). Bate told the plaintiff this and cautioned her but the learned

Lord Justice says that Bate did not press the subject upon her as an independent and disinterested advisor would have done, nor did he

recommend the plaintiff to employ an independent solicitor (p. 261).

15. The facts of this case serve to show with what strictness the principle of the law enunciated in the judgment is enforced.

16. *Espey v. Lake* (1852) 10 Hare 260 : 68 E R 923 is an instructive case. The plaintiff was a young lady who had just come of age and joined in

making with her step-father, Speakman, as his surety, a promissory note in favour of Lake to whom Speakman owed a sum of money. The plaintiff

was living with her mother and stepfather from infancy. She received no consideration for the note which was given for the debt of her step-father.

The transaction was challenged by the plaintiff and it was set aside by Turner, V. C. It will be seen that in this case the relationship was not in the

nature of a trust; nor was it strictly that of guardian and ward. The transaction was set aside on the ground that Speakman stood to the plaintiff in a

relation which gave rise to confidence between the parties. The step-father stood in loco parentis to the plaintiff and that was considered sufficient.

It is also to be noted that this is a case of influence arising by inference from the situation of the parties. It is not necessary to prove by direct

evidence that any deception or fraud was practised. Speakman being in confidential position, it was incumbent upon him to affirmatively prove that

he did not take advantage of the position of influence which subsisted between the parties. He failed to do it and the plaintiff was entitled to

succeed. So far as Lake was concerned, he had notice of the equities arising from the position of the parties and that was deemed sufficient as

against him. There is a close resemblance between this and the present case. If it is shown that the parties stood in such a situation as to give rise to

confidence between them and that the third party who derives the benefit was aware of the existence of this relation--if this is shown, the third

party is not entitled to retain the security, unless he shows that the party conferring the benefit was a free "agent and had independent and

disinterested advice. It is not necessary for the party impeaching the transaction to prove that he was deceived by the person who put himself in

loco parentis towards him; nor is it necessary for him to make out that the third party connived at any actual fraud. The doctrine is the result of the

jealousy and solicitude with which Courts of Equity watch the interests of the weaker party where a special confidential or fiduciary relation is

established. To sum up : (1) if there is a relation which gives rise to confidence between the parties and if the person in fiduciary position obtains an

advantage--where this alone is established and nothing further, the Court gives relief to the party conferring the benefit, unless the other party

shows that he did not avail himself of the confidence which subsisted between the parties. The burden is, therefore, upon him and, if he does not

discharge the burden, the plaintiff succeeds. (2) When there is a third party involved, the position is not dissimilar. If it is shown that he was aware of the existence of such confidential or fiduciary relation, he is under the same disability as the party who occupied the position of confidence; that is to say, the Court gives relief to the plaintiff without demanding proof of fraud, or imposition, or any specific act of undue influence. It is enough that the third party was aware of the existence of the confidential relation and the Courts do not insist on proof that he was further aware of the actual exercise of undue influence.

17. These two propositions are well settled and both these principles are applicable to the facts of the present case.

18. In *Espey v. Lake* (1852) 10 Hare 260 : 68 ER 923, the case which I have been discussing, the Vice Chancellor makes an observation which I find repeatedly occurs in the cases on the subject, viz., that the creditor, the third party, was not guilty of any moral fraud, nor had he a knowledge of the principles which guide a Court of Equity 2 (1852) 10 Hare 260 : 68 ER 923 in such cases. This does not any the less render the third party liable to surrender the benefit. This is a remark which one cannot disregard in dealing with a case of the kind before me.

19. *Archer v. Hudson* (1844) 7 Beav. 551 : 49 E R 1180 is another case referred to by Mr. S. Doraiswami Aiyar for the plaintiff which is directly in point. The parties who stood in fiduciary relations were uncle and niece. The uncle overdrew his account at his bankers and the niece entered into a voluntary security for his debt. The Court found that the person who was representing the Bank in the transaction was well acquainted with the relative situation of these two parties. Lord Langdale, M. R., held (and it was subsequently affirmed by the Lord Chancellor) that, where there is a pecuniary transaction between a child and one in loco parentis towards her just after she comes of age and prior to what " may be called a complete "emancipation"" without any benefit moving to the child, the presumption is that an undue influence has been exercised to procure that liability on the part of the child. It must be shown, if the creditor is to succeed, that the child had such protection as would secure to her a free and unfettered judgment independent of any sort of control. In this case again, it will be observed that the undue influence was that which arose by

inference from the situation of the parties. It will also be observed that the third party was merely aware of the existence of the confidential relation

and that was held sufficient to disentitle him to retain the benefit.

20. *Maitland v. Irving* (1846) 15 Sim. 437 : 60 E R 688 is another case which applies these well-settled principles and I do not propose to state

the facts of that case in great detail. That was also the case of a niece who had just come of age and the other party was her uncle who had

previously been her guardian. There too the third party was a creditor to whom the uncle owed a debt for which the plaintiff, the niece, made

herself liable. In that case also the creditor was aware of the peculiar confidential relations between the two parties and took the security without

making any enquiry or taking any pains to ascertain whether the niece was a free agent who acted with the full knowledge of the consequences of

Her act. From these facts the Court firstly inferred undue influence and secondly held that the knowledge of the creditor was sufficient to bring the

case within the principles I have stated.

21. *Berdoe v. Dawson* (1865) 34 Beav. 603 : 55 ER 768, *Turnbull & Co. v. Duval* LR (1902) AC 429 and *Chaplin and Co., Ltd. v. Brammall*

LR (1908) 1 KB 233 are cases of the same kind and do not call for any special remarks.

22. I may here pause to re-state, at the risk of repetition the principle established by these cases. With the exception of *Rhodes v. Bate* LR (1866)

1 Ch. Ap. Ca. 252 and *Turnbull & Co. v. Duval* LR (1902) AC 429 which are of a peculiar kind being open to the double objection of there

being two persons in a position of special influence, one of whom was the creditor himself, these various cases illustrate and enforce the same

point. In each of them, there was a third party, present besides the individuals standing to each other in fiduciary relations and the third party was

held affected not by reason of any active participation in, but by bare knowledge of, undue influence exercised in fact, or as is more frequently the

case, and this is important, by the mere knowledge of the situation of the parties which in law gave rise to a presumption of undue influence.

23. Having regard to the facts of the present case I may with advantage refer to another aspect emphasised in some of the authorities to which I

have referred. In *Espy v. Lake* (1852) 10 Hare. 260 : 68 ER 923, *Turnbull & Co.*

v. Duval LR (1902) AC 429 and Chaplin and Co., Ltd. v.

Brammall LR (1908) 1 KB 233 the stranger creditor claimed immunity on the ground that he took no part in the transaction but left it entirely to the

person in fiduciary position. This argument was in each of these cases expressly negatived. The 1st defendant in the present case has taken up a

somewhat similar position, but that cannot avail him.

24. Mr. Grant for the 1st defendant has cited two cases. The first of them, Bainbrigge v. Browne LR (1881) 18 Ch. D 188, does not support him

as it states (and very clearly) the law in just the same terms as the other cases which have been already referred to. On the evidence it was found in

that case that the defendants had no notice of the circumstances giving rise to the equity. Fry, J., in his judgment says:

I think that the defendants were entitled to come to the conclusion that the children were resident away from their father, not under his control, fully

emanccipated from him, assisted by the advice of their friends, and by the advice of a solicitor who was bound to do his duty to them.

25. This passage shows that the case, far from supporting Mr. Grant, is really against his contention.

26. The second case relied on by Mr. Grant is Thornber v. Sheard (1850) 12 Beav. 589 : 50 ER 1186 which is said to decide the other way (of

which I am doubtful), but if it does, it is against the clear weight of authority and I cannot follow it. There is an Indian case Raj Coomar Roy v.

Alfuzuddin Ahmed (1881) 8 CLR 419, a decision of a single Judge, which purporting to follow Thornber v. Sheard (1850) 12 Beav. 589 : 50 ER

1186 states the law thus:

But I do not find any authority for holding that a third party, who stands in no confidential relation to the grantor, is bound in the first instance to

show that no undue influence was used.

27. I must with the greatest respect dissent from this observation and hold that it does not correctly represent the law on . the point.

28. This being the legal position, I shall now examine whether the facts I have stated bring the present case within the principles laid down in these

various decisions. In discussing the facts I have carefully separated those that are admitted or not denied from those that are disputed. It seems to

me that I cannot support this transaction even if I confine myself only to

indisputable and undisputed facts. Supposing this was a transaction between the plaintiff and the 2nd defendant and there was no third party in the case, could this be supported? That they stood in confidential or fiduciary relations is well established by authority. It is not special relations arising from certain situations only, such as parent and child, or, guardian and ward, that are jealously watched by the Court; on the other hand, the principle on which equity gives relief is extended and applied to all the variety of relations in which dominion may be exercised by one person over another. (White and Tudor's Leading Cases, 8th Edition, Vol. I, p. 282) Similarly, the Court does not fetter its discretion by a fictitious regard to the age of the person aggrieved; for the fact that the child has attained the bare age of majority signifies little and complete emancipation is insisted on. The law looks at the substance of the thing and it is essential that the relationship should have ceased not merely in name but in fact. The plaintiff lived for several years with, and under the protection of, the 2nd defendant who besides was his maternal uncle and acted as his guardian at the , family partition. The plaintiff again was not fully removed from the influence of the 2nd defendant, and it cannot be said that there was complete emancipation. These facts alone would give rise to a position of great confidence between the parties. If the case had been merely one between the plaintiff and the 2nd defendant, it would have been the latter's clear duty to see that the relations were completely dissolved and that the donor had independent and disinterested advice.

29. Lindley, L. J., in *Allcard v. Skinner* LR (1887) 36 Ch. D 145 classifies cases in which equity invalidates gifts into two groups. The second group, with which we are concerned, consists of cases where the Courts infer undue influence from the mere position of the parties and throws upon the donee the burden of proving that he has not abused his position and that the donor had independent advice and was removed from the donee's influence. In such cases, the transaction is disallowed not on account of any positive fraud but because it is contrary to the general policy of the law. (White and Tudor's Leading Cases, 8th Edition, Vol. I, pages 278 and 279).

30. To this group belongs the present case. No evidence has been given of the kind required and it therefore follows that if the transaction was

between the plaintiff and the 2nd defendant, a Court of Equity would not uphold it.

31. How does the presence of the third party then affect this case? I have already said that when a stranger takes the gift tainted with the undue influence of the person in fiduciary position, with notice of the circumstances giving rise to the equity, the Court will compel him to give up the benefit. Now applying this rule and again confining myself to admitted facts, I am of the opinion that the 1st defendant is bound to surrender the benefit. He was aware of the antecedent confidential relations, he was also aware that they were not completely dissolved and that the parties are not met on equal terms; he was further aware that the plaintiff was not in a position to exercise free, unfettered and deliberate judgment and that he was not directed to seek disinterested or independent advice. On these facts alone, the plaintiff can in my opinion, succeed.

32. But whatever my own view may be, it is unnecessary to rest my judgment on admitted facts alone. On the date of the transaction the plaintiff and the 2nd defendant occupied the position of trustee and cestui que trust and I have found that the 1st defendant was aware of the existence of this special relationship. I have further found that the plaintiff who was not a free agent equal to protecting himself was persuaded by Purushothamdas to enter into this transaction and that he was so drawn into this inequitable and unconscientious bargain also in some measure under the influence of the 1st defendant himself. In any case, being aware that there was importunity by Purushothamdas which the plaintiff was unable to resist, he took full advantage of it. I have therefore come to the conclusion that the transaction cannot be upheld and I set it aside.

33. There remains only one small matter which I must notice. The mortgage deed was attacked by the plaintiff inter alia upon the ground that when he executed it none of the attesting witnesses was present. This case partially broke down when his chief witness Rahiman Ali was obliged to modify his previous answer and say that the plaintiff had admitted execution before the attesting witnesses signed their names. This ground was not seriously relied on and I do not think I need pursue the point.

34. As regards costs, I have an observation to make. The conduct of the 1st defendant in entering into the transaction was not dishonest or morally

wrong, and it is on account of the equitable principles which the Court applies that the plaintiff succeeds. If, therefore, the 1st defendant had been

content to state the truth and leave the law to take its course, I should have been inclined to deprive the plaintiff of his costs in view of the fact that

he has given false evidence. But as the 1st defendant himself has adduced much untrue evidence I do not think there is any reason for departing

from the ordinary rule and I direct that he shall pay the plaintiff his costs of the suit.

35. I fix the remuneration of the short-hand clerks at Rs. 300. I direct that the plaintiff and the 1st defendant shall each pay for the transcript of the

evidence and copies supplied Rs. 150. If either of them pays more than his share in the first instance, he will be entitled to recover the excess from

the other.