

(1987) 05 AHC CK 0026
In the Allahabad High Court
Case No : Second Appeal No. 724 of 1981

Ram Sewak Dubey and Others

APPELLANT

Vs

Smt. Ajirana and Others

RESPONDENT

Date of Decision : 20-05-1987

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Specific Relief Act, 1963 — Section 31

Citation : AIR 1988 All 41 : (1987) 2 AWC 1249

Hon'ble Judges : A.N. Dikshita, J

Bench : Single Bench

Advocate : V.B. Khare, L.P. Tewari and P.C. Tripathi, for the Appellant; R.N. Singh, S.N. Singh and Krishnaji, for the Respondent

Final Decision : Dismissed

Judgement

A.N. Dikshita, J.—This Second Appeal has been preferred by the defendant-appellants against the judgment and decree dated 22-12-1980 passed by Sri G. S. Pandey, Additional Civil Judge, Gorakhpur, in Appeal No. 191 of 1978 by which the appeal preferred by the plaintiff-respondents was allowed and the judgment and decree dated 15-3-1978 passed by the 3rd Additional Munsif, Gorakhpur, in Original Suit No. 693 of 1968 dismissing the suit was set aside.

2. The original plaintiff Smt. Rituraji brought a suit for the cancellation of the sale deed dated 24-1-1969 alleged to have been executed by her in favour of the defendants on the allegations that after the death of her husband she was left with one daughter alone; that one of the daughters of the plaintiff was married to defendant No. 1 while defendants Nos. 2 and 3 were the collaterals of defendant No. 1; that after the death of the plaintiff's husband defendant No. 1 was looking after her and he started living with the plaintiff; that defendant No. 1 proposed to the plaintiff for a medical check up of her eyes and ears on account of the old age and brought her to Gorakhpur; that defendant No. 1 impressed upon the plaintiff that some document be executed by her so that her property

may be divided equally amongst her daughters; that on the said pretext the plaintiff's thumb impressions on several blank papers were obtained by defendant No. 1; that sometime in June, 1969 the plaintiff could over-hear about the execution of the sale deed and on inspection it was revealed that the alleged sale deed which was said to have been executed by the plaintiff was the outcome of fraud and undue influence; that the alleged sale deed was never executed by her nor it was ever read over or explained to her; that no consideration had ever passed; that the marginal witnesses of the sale deed were none else but the nephew of defendant No. 1 and the other one a resident of the village of defendant No. 1; and that the alleged sale deed covered the entire agricultural holdings of the plaintiff.

3. The defendants contested the suit alleging that the plaintiff was burdened with loans and he required money to pay them off; that she herself offered and agreed to sell her holdings in favour of defendant No. 1; that defendant No. 1 purchased it for Rs. 6000/- out of which Rs. 4500/- were paid to the plaintiff at her residence while the remaining amount of Rs. 1500/- was paid to her before the Sub-Registrar, and that the allegations of fraud and undue influence made by the plaintiff were wrong.

4. On a perusal of the pleadings of the parties the learned Munsif framed two issues which are to the following effect:

1. Whether the sale deed dated 24-1-1969 was liable to cancellation in view of the allegations as contained in para 11 of the plaint?

2. To what relief was the plaintiff entitled?

5. The learned Munsiff on the basis of the evidence on record held that the plaintiff had failed to establish the plaint allegations and had also failed to prove her contentions. The suit was accordingly dismissed as already indicated above.

6. Aggrieved by the judgment and decree dated 15-3-1978 passed by the trial Court the plaintiff preferred an appeal to the court of the District Judge, Gorakhpur, which was transferred to the court of the Additional Civil Judge for disposal.

7. The lower appellate court found that admittedly the plaintiff was an illiterate lady and as such the burden of proving due execution of the sale deed and the passing of actual consideration was on the defendants (vendees) which they failed to discharge. It has also been held by the lower appellate court that the consideration of Rs. 6000/- being the price of the agricultural holdings never passed on to the plaintiff. The evidence of D.W. 2 Gauri Shankar, who was a marginal witness to the deed, is admittedly a relation of defendant No. 1. This witness admitted in his cross-examination that on being paid Rs. 4500/- the plaintiff Smt Rituraji had issued an acknowledgment and given it D.W. 4 Ram Bilas. The lower appellate court has found that the amount of Rs. 4500/- and Rs. 1500/- were never paid as consideration to the plaintiff. The lower appellate court

has observed that the document evidencing the acknowledgment was not produced in court and the non-production of such an important document which would have been the best piece of evidence for the passing of the consideration casts a doubt about the payment as well as the genuineness of the deed in question. Further it has been found by the lower appellate court that D.W. 3 Bajrang Sahai, the scribe of the deed, had stated that at the time when the stamped papers were brought before him for scribing the matter on the document it bore the thumb impressions of Smt. Rituraji, the plaintiff, thereby indicating that some fraud had been perpetrated. This statement of D.W. 3 Bajrang Sahai has been contradicted by D.W. 4 Ram Bilas who is one of the vendees. As regards the acknowledgment D.W. 4 Ram Bilas stated that on being demanded by the plaintiff Smt. Rituraji the acknowledgment was returned to her. The statement of D.W. 5 Ram Sewak that he withdrew the money from the Bank was disbelieved by the lower appellate court as the relevant papers showing such withdrawal from the Bank had not been produced. The submission on behalf of the defendants that the endorsement of the Sub-Registrar carried higher degree of presumptive value as regards the character of a document was repelled by the lower appellate with the observation that the veracity of documents has also to be judged taking into consideration the surrounding facts and circumstances of the case. The genuineness of the deed dated 24-1-1969 was found to be doubtful and the lower appellate court came to the conclusion that it had been got executed by fraud and undue influence. Agreeing with the contention raised on behalf of the plaintiff that the judgment of the trial Court was based on surmises and conjectures and lacked proper appreciation of the evidence on record the lower appellate court allowed the appeal filed on behalf of the plaintiff as already indicated above and granted the relief of cancellation of the sale deed dated 24-1-1969. Hence this Second Appeal before this Court. The respondents in this appeal are Smt. Ajirana and Smt. Alena who were substituted before the lower appellate court as the heirs of the original plaintiff Smt. Rituraji.

8. Heard learned counsel for the parties. Learned counsel for the appellants has urged that the lower appellate court has wrongly misread the evidence on behalf of the parties and thus has committed an error of law warranting interference by this Court in second appeal. In support of his submission the learned counsel has placed reliance upon *Govindraja Gounder v. Narayanaswami Pillai* 1969 SCD 624, *Mehanga Singh v. Sunder Chand* 1969 SCD 781 and *Radha Nath Seal (dead) by his legal representatives Vs. Haripada Jana and Others*, where it has been held that in a case where findings of fact have been recorded by the court below by misreading the evidence the High Court would be justified in interfering with such findings of fact. I respectfully agree with the proposition of law laid down in the above decisions by the Supreme Court, but in the instant case before me the learned counsel for the appellants failed to point out as to where the lower appellate court has misread the evidence. On the other hand I find that the lower appellate court has very graphically scanned the evidence both oral and documentary and has recorded its findings strictly in accordance with the

evidence adduced on behalf of the parties. The lower appellate court has found on the basis of the evidence that the plaintiff Smt. Rituraji was an illiterate lady and fraud was perpetrated on her. The case of the plaintiff from the very beginning was that she was an illiterate lady, and that defendant Ram Sewak on a false pretext obtained her thumb impressions on some blank stamped papers. Bajrang Sahai, D.W. 3, a defendant's own witness has admitted that when the stamp paper was given to him for scribing the deed it already bore the thumb impressions of Smt. Rituraji, the plaintiff. In such circumstances the burden was on the appellants (defendants) to prove the execution of the sale deed and the passing of the actual consideration. The lower appellate court has found that the appellants failed to discharge this burden. As regards consideration, the lower appellate court found on the basis of the oral evidence that the amount of Rs. 4500/- was not paid to the plaintiff Smt. Rituraji, since deceased The acknowledgment in token of having received Rs. 4500/- was not produced in court though the appellants came forward with the case that such an acknowledgment was there as admitted by Ram Bilas, D.W. 4. His explanation that on being demanded by Smt. Rituraji the acknowledgment was returned to her was found very unconvincing and was rightly not believed by the lower appellate court. This acknowledgment was a material document to show the payment of Rs. 4500/- to Smt. Rituraji and in its absence the lower appellate court rightly came to the conclusion that the amounts of Rs. 4500/- as well as Rs. 1500/- were never paid as consideration to the plaintiff. In view of the above it cannot be said that the lower appellate court has committed misreading of evidence either oral or documentary.

9. Learned counsel for the appellants then submitted that the sale deed was duly executed and registered. Once it was found that Smt. Rituraji was an illiterate lady, as was the case of the plaintiff, the burden shifted on the defendants-appellants to prove the execution and passing of the consideration. In such a situation Courts always insist on placing the burden of proof on the person who was in such advantageous position to establish that he did not abuse his position. The principle was" originally confined to cases of Pardahnashin ladies but there is no reason why the said principle should not also embrace within its sweep the cases of persons who by reason of their apparent physical or mental incapacity or infirmity or being placed in circumstances where they are greatly amenable to the overpowering influence of another person are induced to enter into conveyances and transactions relating to their property. Appellant Ram Sewak who is the son-in-law of Smt. Rituraji was residing with her and it has come in evidence that signatures of Smt. Rituraji were obtained on plain stamped papers for other purposes as has been found by the lower appellate court. In *Daya Shankar Vs. Smt. Bachi and Others*, it has been held that in order to prove the genuineness of a document the burden is on the person enjoying the dominating position and not on the person challenging it. As shown above it is manifest that such a burden has not been discharged. On the other hand it is apparently emerging that fraud and undue influence was perpetrated on Smt. Rituraji.

Further a finding of fact has been recorded that no consideration was paid to the plaintiff. These findings of fact are not liable to interference by this Court in Second Appeal.

10. Another submission on behalf of the appellants has been made that a necessity arose for Smt. Rituraji to dispose of her agricultural holding. There is not an iota of evidence as to what compelled Smt. Rituraji to dispose of her holdings. The story of debt which Smt. Rituraji had to clear necessitating the sale of the entire holdings was rightly found wholly unconvincing. I do not find any good reason to differ from the findings recorded by the lower appellate court.

11. In *R. Ramachandran Ayyar Vs. Ramalingam Chettiar*, the Supreme Court has held that the High Court cannot interfere with the conclusions of fact recorded by the lower appellate court however erroneous the said conclusions may appear to be to the High Court. The Supreme Court further observed that however gross or inexcusable the error may seem to be there is no jurisdiction u/s 100, C.P.C. to correct that error.

s 12. In view of the above discussions this appeal has no merit and deserves to be , dismissed.

13. In the result the appeal is dismissed with costs.