
(1969) 10 MAD CK 0016

In the Madras High Court

Case No : Second App. No. 1562 of 1965

S. Rathnam Naidu and Another

APPELLANT

Vs

Kanni Ammal and Others

RESPONDENT

Date of Decision : 03-10-1969

Acts Referred:

Evidence Act, 1872 — Section 68

Citation : AIR 1972 Mad 413 : (1972) 85 LW 372

Hon'ble Judges : Gokulakrishnan, J

Bench : Single Bench

Judgement

1. Defendants 1 and 2 are the appellants in this court. Plaintiffs 1, 2, 3, 5, 6, 7, 8 and defendants 3, 4, 5, 6 and 7 are the respondents herein. The plaintiffs and defendants 3 to 6 are the children of the sisters of Kishtappa Naidu. The said Kishtappa is the husband of Ammayee Ammal. After the death of Kishtappa. Ammayee Ammal has executed a settlement deed in favour of the first defendant in the suit. Ammayee Ammal died on 12-1-1959. The second defendant in the suit is the transferee for valuable consideration of the properties settled upon the first defendant by late Ammayee Ammal.

2. The plaintiffs filed the suit for cancellation of the settlement deed dated 12-11-1958 executed by Ammayee Ammal in favour of the first defendant and for possession of the suit properties on the ground of fraud and undue influence by the first defendant.

3. The case of the plaintiffs is that the plaintiff schedule properties consisting of nine items of nanja and punja lands and item 10. house and sits, in Arunparuthy village are originally said to belong to one Kishtappa Naidu. After his death, his only son, Perumal Naidu, also passed away, leaving one Ammayee Ammal his widowed mother, who was absolutely entitled to the properties. Plaintiffs 1 to 8 and defendants 3 to 6 are Ammayee Ammal's husband's sister's children. The seventh defendant is the cousin brother of Ammayee Ammal's husband, with whom and with whose help Ammayee Ammal was living. The first defendant from

the village, managed to take away Ammayee Ammal to Madras, where he immediately took a settlement deed, Ex b-1, fraudulently using his undue influence, and taking advantage of her illness and old age. There was no delivery of possession in accordance with the settlement deed.

4. The first defendant resisted the suit on the ground that Ammayee Ammal and the seventh defendant were not on talking terms, that he was assisting her in the management of the properties that he was looking after her, that at her instance he came to the village and took her to Madras, where she executed the settlement deed Ex. B-1 in his favour, out of free will and volition, that he has sold the properties to the second defendant for good and valuable consideration under Ex. B-8, that he is an unnecessary party to this suit, that he had performed the funeral of Ammayee Ammal, and that there was no fraud or undue influence in the execution of the settlement deed. The second defendant pleads that he is a bona fide purchaser for value from the first defendant and adopted the allegation of the first defendant in other particulars.

5. The defendants 3 to 6 in their separate written statements contended that they came too know of the averments later and that they are not liable for costs. They prayed that a decree should be passed in their favour also.

6. The seventh defendant though appeared in person, did not file any written statement and allowed the suit to be proceeded ex parte against him.

7. The learned District munsif upholding the contentions of the defendants, dismissed the plaintiff's suit with costs. On appeal, the learned Subordinate judge, Vellore, took up for consideration as to (1) whether the settlement deed was brought about by fraud and undue influence as such whether the settlement deed is liable to be set aside; (2) whether the second defendant is a bona fide purchaser for Value and (3) as to whether the plaintiffs and defendants 3 to 6 are the reversioners to the estate of Ammayee Ammal and as such, whether they are entitled to possession.

8. After elaborately discussing both documentary and oral evidence on record, the learned Subordinate Judge came to the conclusion that the first defendant has not discharged his burden in proving that the settlement deed executed by Ammayee Ammal was out of her free will and volition and as such the settlement deed Ex. B-1 dated 12-11-1958 is void in as much as it has to be construed that the same has been executed owing to the undue influence exercised by the first defendant. The learned Subordinate Judge has also held that the second defendant is not be bona fide purchaser for value and that the plaintiffs and defendants 3 to 6 are the reversioners and they are entitled to possession of the suit properties.

9. Against the judgment and decree of the learned Subordinate Judge, defendants 1 and 2 have preferred the present second appeal.

10. The learned Counsel for the appellants submitted that the lower appellate

court has proceeded as to whether there was undue influence in executing the settlement deed Ex. B-1 and as a matter of fact there was no such specific plea or issue with reference to undue influence. Secondly, he stated that the lower appellate court has wrongly placed the burden of proof upon the defendants in respect of proving the settlement deed. He stated that the lower appellate court has misunderstood the scope of Section 68 of the Evidence Act with reference to proof of a document required by law to be attested when it is not specifically denied. Fourthly, he stated that several vital aspects adverted to by the trial court in coming to the finding have not been considered by the lower appellate court in coming to the contrary finding.

11. The facts as stated above by the appellants herein are that Ammayee Ammal was residing in her husband's village and wrote a letter to the first defendant to go over to her village and take her to Madras. Accordingly the first defendant went to the village and wanted to take her from the village. When he was prevented from doing so by the children of Ammayee Ammal's husband's sisters, he was able to take of the police in or about November 1958. It is in evidence that soon after she had been to Madras i.e.. on 12-11-1958. Ammayee Ammal has executed the present disputed document. On 12-1-1959, Ammayee Ammal died. Subsequent to her death, the first defendant has sold away the suit properties has arisen as to whether Ammayee Ammal's husband's sisters children are entitled to the suit properties and as to whether the settlement deed is void. It is not in dispute that in the absence of settlement deed. Ammayee Ammal's husband's sisters children are entitled to get the suit properties.

12. With the above facts, I have considered the submission made by the learned counsel for the appellants. The plaint proceeds on the basis that the settlement deed is void on one or the other ground of undue influence, coercion or fraud, The trial court has also taken up the issue as to whether the settlement deed by Ammayee Ammal to the first defendant is true or is void and liable to be set aside for all or any of the reasons mentioned in the plaint, in paragraph 16 of the trial court's judgment, the trial court has stated that it has to find out as to whether the settlement deed is not a voluntary act of Ammayee Ammal. The trial court, after discussing the evidence on record and reading the decision in *Inche Noria v. Sk. Allie Bin Omer*, 56 MLJ 349 : AIR 1924 PC 3 has stated that is not impressed with this argument because the first defendant can never be said to have had control over the actions of Ammayee Ammal and that Ammayee Ammal has executed the settlement deed out to her free will and volition. Hence the argument of the learned counsel for the appellant that the plea of undue influence was not the issue before the trial court cannot hold good.

13. The learned counsel for the appellants stated that the lower appellate court was wrong in placing the burden of proving the settlement deed upon the first defendant. The learned advocate for the respondents, Mr. Parthasarathi Iyengar, took me through the evidence and also various case laws on this aspect. Before discussing the case laws, it is better to understand as to how the settlement

deed came to be executed. The first defendant has got the settlement deed executed within a few days after Ammayee Ammal was taken to Madras. There were two attestors to the settlement deed and they have not been examined on the ground that one is dead and the other attestor's whereabouts are not known. Hence, practically, the scribe is the only witness who can speak about the execution of the settlement deed. He states that the first defendant gave him the description of the property with reference to the prior documents and that Ammayee Ammal was an old woman aged about 60 years. The lower appellate court disbelieved P. W. 3 as a got up witness. It is clear from the evidence on record that except the first defendant, Ammayee Ammal never had any independent advice executing the settlement deed. The Registrar who registered the settlement deed Ex, B-1 has not been examined in this case. The first defendant has mentioned in his evidence that Ammayee Ammal wrote a letter to him requesting him to go over to the village and take her. But that letter has not been produced by the first defendant. The first defendant stated that since the plaintiffs gave trouble he had to take Ammayee Ammal from the village with the help of police. But the first defendant has not examined any police official to substantiate that Ammayee Ammal was willing to go over with him but for the obstruction given by the plaintiffs in the suit. It is also significant to note that the settlement deed mentions properties which have been already sold by Ammayee Ammal as properties given by way of settlement to the first defendant. More than this, we have the evidence of the first defendant, who sold all the properties mentioned in the settlement deed to the second defendant. With this background, the learned advocate for the respondents, Mr. Parthasarathi Aiyangar, cited the decision in 56 MLJ 349 : AIR 1929 PC 3. In that case it has been held that-

"Where the relation between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor, the court sets aside the voluntary gift, unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justifies the court in holding that the gift was the result of a free exercise of the donor's will".

13-A. It has been further mentioned in the above-said decision that-

"I take it to be a well-established principle of this court that persons standing in a confidential relation towards others cannot entitle themselves to bold benefits which those others may have conferred upon them, unless they can, show to the satisfaction of the court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them". It has been further held in the above decision that-

"The burden lies on the recipient to show that the donor has independent advice, or adopted the transaction after the influence was removed, or some equivalent circumstances".

Finally, the learned Judges of the Privy Council observed-

"It is necessary for the donee to prove that the gift was the result of the free exercise of independent will. The most obvious way to prove this is by establishing that the gift was made after the nature and effect of the transaction had been fully explained to the donor by some independent and qualified person so completely as to satisfy the court that the donor was acting independently of any influence from the donee and with the full appreciation of what he was doing and in cases where there are no other circumstances this may be the only means by which the donee can rebut the presumption."

The next case cited by Mr. Parthasarathi Aiyangar is *Mannankatti Ammal v. Vaiyapuri Udayar* 1961 2 MLJ 367. In this case our High Court has held that-

"Normally it would be for the person who pleads undue influence to establish that fact. But where confidential relations exist between the parties, those standing in such relations are not entitled to hold benefit unless they can show that the party who has conferred the benefit competent and independent advice. Where the relations between a donor and donee or settlor and settlee have at or shortly before the execution of the gift or settlement been such as to raise a presumption that the donee or settlee had influence over the donor or settlor, the court would set aside the voluntary gift or settlement unless it is proved to its satisfaction that in fact the gift or settlement was the spontaneous act of the donor or settlor acting under circumstances which enable him to freely exercise his independent will and mind".

14. *Veeraswami, J.* (as he then was) took into consideration the fact that the settlement deed reserved nothing for the first defendant who had completely denuded himself of all his properties by executing the settlement deed. After elaborately discussing all these aspects, *Veeraswami, J.* (as he then was) held in that case that the donee has not probed the settlement deed and as such the settlement deed is void. The next case cited by Mr. (Parthasarathi Iyengar is *Wajid Khan v. Ewas Ali Akhan*, (1886) ILR Cal 545. In that case it has been held that-

"This transaction was within the well-recognised principle that every onus is thrown upon a person filling a fiduciary character towards another of showing conclusively that he has acted honestly, and bona fide without influencing the donor, who has acted independently of him".

The next case cited by Mr. Parthasarathi Iyengar is 44 MLW 255 and the decision is also to the same effect. Then another case cited by the learned counsel is *Powell v. Powell*, 1900 1 Ch 243. In the above decision it has been observed that (pages 245 and 246):-

"It has been for many years well settled that no one standing in a fiduciary relation to another can retain a gift made to him by that other, if the latter impeached the gift within a reasonable time, unless the donee can prove that the

donor had independent advice, or that the fiduciary relation had ceased for so long that the donor was under no must show (and the onus is on him) that the donor either was emancipated, or was placed, by the possession if the independent advice, in a position equivalent to emancipation".

"In *Rash Behari Naskar and Others Vs. Haripada Naskar and Others*, , it has been laid down that

"where the executant of a document had no opportunity to have it cancelled on the ground of undue influence, it is open to his representatives to raise the defence of undue influence".

"The learned counsel Mr. Parthasarathi Iyengar also cited the decision *Mt. Sewti Vs. Rattan*, wherein it has been observed that-

"Now there is no doubt that the appellant is an old illiterate woman and that the respondent, her only, living relation, has been living with her since the lifetime of her husband. It has clear therefore that the appellant was completely in the hands of the respondent. The relationship existing between the parties was therefore sufficient to raise the presumption that the deed in question had been obtained through undue influence which rendered the fraud possible. This presumption is strengthened all the more by the fact that the gift covers the entire property belonging to the appellant that being so, it was incumbent upon the respondent to prove, in the words of the aforesaid ruling contained in *Inche Noriah v. Shaik Allie AIR 1929 PC 3*, that the gift was spontaneous act of the donor acting under circumstances which enabled her to exercise an independent will. This onus the respondent has failed to discharge".

15. After noting the conclusions arrived at in the decisions cited above and taking into consideration the facts of the present case. I have absolutely no hesitation in coming to the conclusion that the settlement deed Ex. B-1 has been taken from Ammayee Ammal owing to the undue influence exercised by the first defendant. The learned counsel for the appellants Mr. Raghavachari cited the decision in *Someshwar Datt v. Tribhuban Datt* but this decision has absolutely nothing to do with the facts of the present case and I do not think that the same supports the view taken by Mr. Raghavachari.

16. In the light of the conclusion I have arrived at and as stated I do not think that the points raised by Mr. Raghavachari as to the scope and effect of Section 68 of the Evidence Act with reference to the proof of document required by law to be attested when it is not specifically denied, require any consideration. Further I do not find that the lower appellate court has missed several vital aspects adverted to by the trial court in coming to a finding contrary to that of the trial court. The lower appellate court has considered all the relevant issues and has come to the conclusion that the settlement deed is vitiated by undue influence, In these circumstances, I do not find any ground made out by the appellants herein to reverse the well-considered judgment and decree of the lower appellate court. Hence the present second appeal is dismissed with costs.

No leave.

17. Appeal dismissed.