

(2014) 02 OHC CK 0016
In the Orissa High Court
Case No : First Appeal No. 469 of 1980

Umakanta Dutta and Others

APPELLANT

Vs

Prasanna Kumar Giri and Others

RESPONDENT

Date of Decision : 03-02-2014

Acts Referred:

Contract Act, 1872 — Section 16

Citation : (2015) 119 CLT 293 : (2014) 1 OLR 595 Suppl.

Hon'ble Judges : Raghubir Dash, J

Bench : Single Bench

Advocate : B.H. Mohanty, S.C. Misra, J.K. Bastia, S.C. Mohanty, L.K. Parida, P.P. Mohanty and R.K. Nayak, Advocates for the Appellant; P.K. Pattnaik, B.P. Pattnaik, R.L. Senapaty, P.K. Prusty, S.N. Senapati, S.K. Pattnaik and M.R. Sarangi, Advocates for the Respondent

Judgement

Raghubir Dash, J.—Plaintiffs suit for declaration of right, title & interest as well as recovery of possession in respect of the suit house & homestead having been dismissed by the Learned Trial Court, he has preferred this appeal against the Judgment & decree dated 20.09.1980 & 27.09.1980, respectively, passed in Title Suit No. 4 of 1978 by the Learned Sub-Judge, Rajrangpur. The Plaintiff-Appellant having died during pendency of the appeal, his L.Rs. have been substituted as A-1(a) to A-1(g). Defendant Nos. 1 to 4 have been arrayed as Respondent Nos. 1 to 4 in the same order. Respondent No. 1 having died during pendency of the appeal his son has been substituted as Respondent No. 1(a).

2. Undisputed facts are that one Keshab Chandra Giri & Kailash Chandra Giri were two brothers. The Defendants are four sons of Keshab. The other brother Kailash & his wife Saraswati, who happens to be the sister of the Plaintiff, had no issue. Kailash expired in the year 1975 leaving behind his widow Saraswati who had been suffering from frequent menstruation problem for a long period. She died on 12.12.1976. The said Saraswati was the recorded owner of the suit house & homestead. About one month before her death she executed one

registered sale deed dated 10.11.1976 wherein the suit house & homestead (suit property) are shown to have been alienated to the Plaintiff.

3. Plaintiffs specific case is that the suit property was acquired by Saraswati herself & she & her husband had been in exclusive possession of the suit property. Since Saraswati had been suffering for a long period & could not get cured despite of local treatment, she was advised to go to Vellore for better treatment. To meet her medical expenses, she decided to raise funds by disposing of the suit property. On 10.11.1976, she executed one registered sale deed in favour of the Plaintiff alienating the suit property for a consideration of Rs. 7,000 (Rupees seven thousand) which was paid to her by the Plaintiff at the time of registration in presence of the Sub-Registrar, Rairangpur which was followed by delivery of possession. However, since she was ill, the Plaintiff permitted her to reside in the suit house. Before being able to go to Vellore, Saraswati died of her illness on 12.12.1976. Immediately after her death, the Defendants forcibly took over possession of the suit property claiming the same to be theirs. The Plaintiff had filed one mutation case which, being objected to by the Defendants, was not allowed. Hence the suit.

4. All the Defendants have filed a joint written statement taking the defence of non-maintainability of the suit on several grounds such as limitation, estoppel, waiver, acquiescence & absence of cause of action. With regard to the execution of the sale deed, the Defendants have pleaded that after death of Kailash, his old & ailing widow could be gained over by the Plaintiff who, by exercise of fraud & undue influence, obtained the sale deed from her without payment of any consideration. It is the specific case of the Defendants that since Saraswati had been suffering from menstrual troubles, she was under treatment of Dr. Nityananda Pal, a private medical practitioner. When Saraswati became invalid & was bed ridden for about 5 to 6 months preceding her death, taking advantage of the situation the doctor & his nephew Radhashyam Pal joined hands with the Plaintiff to grab some properties of Saraswati. On the day the impugned sale deed was executed, the Plaintiff along with Dr. Nityananda Pal, Radhashyam Pal, Makhan Pal, Udit Narayan Pal & Ajit Pal brought Saraswati in the car of one Ram Sebak Sahu on the pretext of taking her to Rairangpur hospital. Since Saraswati was invalid, they brought her maid-servant with them. At Rairangpur, they took her to the Sub-Registrar's office & got three sale deeds prepared, one in the name of the doctor's wife, another in the name of the wife of the doctor's brother, Radhashyam Pal & the last one in the name of the Plaintiff & L.T.Is. of Saraswati were taken on the sale deeds without allowing her to know the contents of the deeds. Saraswati had no knowledge that she was going to dispose of her immovable property including house & homestead. There was no passing of consideration. She had never intended to alienate her immovable properties. There was no necessity on her part to transfer her properties including the suit property. It was falsely stated in all the three sale deeds that she was disposing of her property to raise funds for her expensive treatment at Vellore. She was never taken to Vellore for her treatment & about one month

after the sale deeds were obtained from her she died. Further case of the Defendants is that the said property was acquired by Kailash in the name of his wife Saraswati. After death of Kailash, Saraswati succeeded to the property. Since Saraswati had no issue the Defendants being the next reversioners, remained in possession of the suit property after the death of Saraswati. The impugned sale deed being tainted with undue influence, fraud & misrepresentation is void & not binding on the Defendants.

5. Learned Trial Court has framed the following issues:

"1. Has the Plaintiff any cause of action to bring the suit?

2. Is the suit maintainable in its present form?

3. Is the suit barred by law of estoppel?

4. Is the sale deed in favour of Plaintiff fraudulent?

5. Is the suit sale deed obtained by undue influence?

6. What relief, if any, is the Plaintiff entitled?"

6. In support of their respective stand, both sides have adduced evidence before the Trial Court. The Plaintiff has examined seven witnesses including himself as P.W.2. P.W.1 is the scribe of the sale deed which is marked as Ext. 1. P.Ws.4 & 5 are witnesses to the execution of the sale deed. P.W.3 has been examined to prove an application scribed by him in Mutation Case No. 2638 of 1976 which is marked as Ext. 2. P.W.6 is Ram Sebak Sahu, who is owner of the car which was allegedly hired by the Plaintiff for transportation of deceased Saraswati & others on the day the impugned sale deed was executed. P.W.7 is Baidyanath Pal who, along with his wife was, admittedly, staying in the house of late Saraswati to take her care. Before the Trial Court, Plaintiff has exhibited documents marked as Ext. 1 to 8. At the time of argument before this Court a certified copy of Judgment dated 21.08.1990 passed by this Court in F.A. Nos. 292 & 293 of 1978 has been marked as Ext. 9.

7. Defendants have examined five witnesses. Defendant No. 2 is examined as D.W.1. D.W.2 is a lady who, according to the Defendants was attending to Saraswati & was nursing her during her ailment. D.Ws. 3, 4 & 5 claim that they had seen the Plaintiff & others taking Saraswati in a car on the day the impugned deed was executed. Defendants have not exhibited any document

8. Learned Trial Court took up issue Nos. 4 & 5 together & after a threadbare discussion of the evidence on record concluded that there existed legal necessity for the vendor's medical treatment; that Saraswati had in fact executed the sale deed; that the execution & registration of the deed & acceptance of the consideration amount stood proved by the Plaintiff, & that the plea of fraud could not be proved beyond reasonable doubt. All these findings recorded by the, Learned lower Court are not challenged by the Respondents. However, the Learned Trial Court held the said transaction to be an outcome of undue influence

mostly on the ground that the valuation given in the sale deed is not the actual valuation of the suit property & the valuation shown was inordinately very low.

9. While dealing with the other issues, Learned Trial Court has stated in the impugned Judgment that issue No. 3 was not pressed with further observation that ill; view of the findings on issue Nos. 4 & 5, issue Nos. 1, 2 & 6 are answered against the Plaintiff. Thus, the suit has been dismissed.

10. The sole point for determination is as to whether the sale transaction is the outcome of undue influence & for that it is void & cannot confer title on the Plaintiff. Before going to deal with the factual aspects of the case in hand, it is necessary at the outset to take note of the settled position of law as to the different stages to be traversed through/while dealing with the plea of undue influence & the evidence thereon.

11. In the case of Raghunath Prasad vs. Sarju Prasad and Others, AIR 1924 60 (Privy Council) , while dealing with Sub-section (3) of Section 16 of Indian Contract Act, 1872, it has been held that in the first place it is to be substantiated that the relations between the parties to the contract must be such that one is in a position to dominate the will of the other. Then the issue whether the contract has been induced by undue influence is to be determined. Thereafter, the third point, which is on the onus probandi, is to be determined. If the transaction appears to be unconscionable, then the burden of proving that the contract is not induced by undue influence shall be placed on the person who is in a position to dominate the will of, the other. It is further observed that the consideration of the factum of undue influence has to be in the aforesaid order, otherwise mistakes are bound to occur.

12. Now, it is to be first decided as to whether the relation between the Plaintiff & late Saraswati was such that the former was in a position to dominate the will of the latter. Admittedly, Plaintiff is the brother of late Saraswati. The relationship between brother & sister itself is not sufficient to arrive at a conclusion that one is in a position to dominate the will of the other. Therefore, other facts & circumstances are to be taken into consideration. There is no evidence showing that Saraswati was very much attached to the Plaintiff. In order to show that Saraswati was completely under the dominance of the Plaintiff, Defendants have pleaded that after the death of Saraswati's husband, the Plaintiff picked up quarrel with the Defendants & poisoned their cordial relationship with Saraswati & could completely gain over her. But, this plea is not substantiated by reliable evidence. Defendant No. 2 being examined as D.W.1 has stated in his evidence that after the death of Saraswati's husband, he along with his wife started residing in Saraswati's house & was helping her in cultivation of her agricultural land. According to him, this continued for about 2-3 months. In the meanwhile the Plaintiff could gain over her. As a result, Saraswati fell out with D.W.1 & ultimately D.W.1 left Saraswati's house. D.W.2 tries to corroborate D.W.1 but both of their evidence on this point is highly inconsistent. D.W.1 does not claim that during life time of Kailash (Saraswati's husband), he was staying with

Kailash & Saraswati. From his evidence in para -3 of his deposition it can be construed that after the death of Kailash, he came to reside in Saraswati's house. But D.W.2 says that when Kailash was alive, D.W.1-Pratap, along with his family members, was residing with Kailash & Saraswati. Besides this contradiction, it is also quite important to note that in the written statement there is no indication that Defendant No. 2 (D.W.1) was staying with Kailash & Saraswati during their life time or for a period of 2-3 months since the death of Kailash. That apart, D.Ws. 3 & 4, who are close neighbours of Saraswati & D.Ws.5, who is a co-villager, have not stated in their deposition that Defendant No. 2 was residing in Saraswati's house during her life time. Therefore, the plea that the Plaintiff marred the cordiality between Saraswati & Defendant No. 2 is not believable. Consequently, it is not believable that the cordial relationship between Saraswati & Defendant No. 2, if any, got spoiled at the insinuation of the Plaintiff. Now, let it be examined as to whether the Plaintiff had any influence over Saraswati.

13. There is no evidence showing Plaintiff taking any extra interest in the affairs of Saraswati either before or after the death of her husband. P.W.7 & her wife used to look after the ailing old lady. It is admitted by D.Ws. 1 & 2 that Makhan & his wife were taking care of the old lady. This Makhan is none other than P.W.7. (In the written statement, it is clearly stated that Baidyanath Pal (P.W.7) @ Makhan is a son of Saraswati's cousin sister). P.W.7 says that since 5-6 years before the death of Kailash, he & his wife had been living in Kailash's house & managing his affairs. D.W.2 also admits in her cross-examination that since the life time of Kailash, Makhan & his wife had been staying with Kailash. P.W.7 is a relative of Saraswati. It is there in his evidence that when a doctor advised that Saraswati should be taken to Vellore for treatment, they decided to raise funds by selling lands. At the instance of Saraswati he approached one Ram Sebak Sahu (P.W.6), who did not come forward to purchase the land as he was to purchase one truck. The witness further states that on being asked by Saraswati, he contacted one Dr. Pal & settled the deal. As more money was required & no customer was found for Saraswati's agricultural land, they contacted the Plaintiff, who agreed to purchase the house & homestead for a consideration of Rs. 7,000 (Rupees seven thousand). All these statements of P.W.7 go unchallenged. During his cross-examination, this witness has stated that he used to work under the instructions of Saraswati. He has also stated that the Plaintiff had never lent money to Saraswati. He has denied that he was managing the affairs of Saraswati only under instructions of the Plaintiff. D.W.1 has stated that after the death of Kailash, Plaintiff brought P.W.7 & his wife to the suit house to look after Saraswati. This is not corroborated by any other witness. Rather it is admitted by D.W.2 that since the life time of Kailash, P. W. 7 & his wife had been staying in the suit house to look after Kailash & Saraswati. Thus, it is found that even though the Plaintiff, the Defendants Saraswati all were having their respective dwelling houses in the same village Bahalda, Defendants were not taking any interest in the affairs of Saraswati even though they are agnates of

her deceased husband. So far Plaintiff is concerned, he was also not taking much interest in the affairs of Saraswati. P.W.7 says that whenever needed, Saraswati used to send him to call the Plaintiff. The Plaintiff has stated that he used to impart advise to Saraswati but only in respect of her treatment. He is none other than Saraswati's own brother. Therefore, such occasional advice or assistance extended by the Plaintiff to Saraswati is not unnatural. But this kind of relationship between the two siblings is not sufficient to create fiduciary relationship. By no stretch of imagination can it be said that the relationship between Saraswati & the Plaintiff to each other was such that one was in a position to dominate the will of the other. Thus, the first condition is found to be not satisfied. Therefore, it may not be necessary to proceed to determine as to whether the second condition is satisfied or not. However, since Learned Trial Court has held that the said transaction is tainted with undue influence its correctness should be thrashed out. There is no direct evidence as to any inducement administered by the Plaintiff to get the sale deed executed. The only fact that heavily weighed with the Learned Trial Court in arriving at the afore stated conclusion is inadequacy of consideration. But solely on the ground of inadequacy of consideration, a contract cannot be presumed to be induced by fraud or undue influence.

14. There are multiple reasons for inadequacy of consideration. In the case at hand, Saraswati was in need of money for her expensive treatment at Vellore. As stated by P.W.7, others did not come forward to purchase the house & homestead of Saraswati. Saraswati was issueless. Defendants were her next reversioners with whom she had no love lost. Saraswati had become quite old & sick. She was diagnosed to be suffering from cancer. So, she was counting her days. Under such circumstances, villagers would not Have come forward to buy costly property like house & homestead even at a low price as it was likely to invite litigations after the death of Saraswati. So, it is quite natural that none but Saraswati's own brother came forward to purchase the suit property. Therefore, in the facts & circumstances, it cannot be concluded that on the ground of inadequacy of consideration, the sale transaction is tainted with undue influence.

15. Here it is worth mentioning that in the written statement there is no mention about the inadequacy of consideration. The specific plea in the written statement in challenging the said transaction is that on the day the deed was executed, the Plaintiff arranged his own men & took them along with Saraswati & her maid-servant in the car of one Ram Sebak Sahu (P.W.6) on the pretext of Saraswati's treatment at Rairangpur hospital but as a matter of fact they took her to the Sub-Registrar's office & got as many as three sale deeds prepared on the same day & L.T.Is. of Saraswati taken on those sale deeds & got the deeds registered without there being passing of any consideration in respect of all the three sale deeds. But that plea has been negated by the Trial Court. This defence plea depends entirely on the evidence of D.W.2. Because, it is the clear admission of D.W.1 that from D.W.2 the Defendants could come to know about the circumstances under which the sale deeds Were obtained from Saraswati. She is not found to be

trustworthy. She was not corroborated by anyone on her assertion that for, 12 years she had worked under Saraswati. It is admitted even by D.W.1 & D.W.2 that P.W.7 & his wife were staying in Saraswati's house & P.W.7's wife was to look after the old lady. So, there was no necessity of keeping another lady to look after Saraswati. She claims that she was staying with Saraswati to nurse her. But she had admitted that in the night Saraswati died, she was not present in Saraswati's house. She has tried to suppress her closeness with D.2. She was a witness in another suit where she had deposed to the effect that she had given up her service under D.2 which means she was a servant under D.1. She denied that she had made such statement in the other suit. But the contradiction is proved by marking her previous statement as Ext. 3. Thus, this witness cannot be relied on. Consequently, the afore stated plea taken in the written statement is not acceptable. Learned Trial Court rightly rejected the same.

Thus, the second condition is also not satisfied. Under such circumstances, the burden of proof that the said transaction was not induced by undue influence cannot be placed on the Plaintiff.

16. Learned Counsel for the Respondents put emphasis on the fact that Saraswati being an old ailing illiterate rustic lady, burden is heavy on the Plaintiff to establish due execution of the sale deed showing that the document was not only a physical act but also a mental act of the old lady.

17. In support of this contention, reliance has been placed on several Judgments of this Court as well as the Apex Court. Since there is no dispute over the afore stated settled position of law, it is not necessary to refer to all these Judgments cited by the Respondents. To prove due execution, the Plaintiff-Appellant has examined the deed writer so also both the attesting witnesses. All of them have stated that the sale deed was scribed under the instructions of Saraswati & that its contents were read over to her & after admitting the same to be correct she put her L.T.Is. The deed writer says that Saraswati told him that since she was to go to Vellore for her treatment for cancer, she needed money. One of the attesting witnesses, P.W.4, who is a co-villager of Saraswati has stated that on the day before the execution of the sale deed Saraswati had called him to her house & told that she wanted to sell her land & homestead for which she would execute sale deeds on the next day. The witness has further stated that Saraswati had further told him that she wanted money to go to Vellore for her treatment. In his deposition, he has further stated that Saraswati herself consulted the deed writer & purchased stamp papers.

18. P.W.6 is another co-villager of Saraswati. He has come forward to say that in October, 1976 Saraswati had offered him to purchase land from her. She also took him to the spot to show her land. P.W.7, who used to take care of Saraswati, so also her landed properties, has deposed to the effect that as instructed by Saraswati, she had contacted P.W.6 who did not agree to purchase her land as he was going to purchase one truck. He further stated that Saraswati then asked him to contact Dr. Pal to purchase her land. All these evidences go

almost unchallenged. Save & except putting some suggestions to these witnesses the Defendants could not demolish their testimony. So far the sale of the house & homestead is concerned, P.W.7 has stated that Saraswati sold it to the Plaintiff as none others came forward to accept her proposal. Though she was illiterate, she was able to manage 25 Manas of landed property with the assistance of P.W.7. D.W.1 admits that Saraswati was freely spending money. All these show that though illiterate, she was never ignorant. No evidence either direct or substantial, is there on record suggesting that Saraswati, an old & ailing illiterate lady, was dependant on anyone else in the matter of management of her property affairs. Under such circumstances, there cannot be any apprehension that taking advantage of her illiteracy, the Plaintiff - Appellant could obtain the impugned sale deed from her & the execution of the deed was not her mental act. Here, it is worth mentioning that on the same day she executed three sale deeds including the one impugned in this case. Each of the three sale deeds executed by Saraswati on the same day was under challenge in separate suit & against the Judgment of the Trial Court in each of the three suits, appeal was preferred before this Court & in the meanwhile other two First Appeals bearing Nos. 292 & 293 of 1978 have been disposed of by a common Judgment dated 21.08.1990. Ext. 9 is a certified copy of the said common Judgment wherein this Court has observed that there was no question of any fraud, undue influence or misrepresentation. In view of the discussion made above, the impugned sale deed cannot be said to be tainted with undue influence. As a result, the conclusion of the Learned lower Court that it being tainted with undue influence is invalid & not binding on the Defendants is liable to be set aside. Accordingly, the appeal is allowed on contest but without cost. The impugned Judgment & decree are set aside. The suit is decreed on contest with cost. The Appellants' right, title & interest over the suit property is declared & Respondents are directed to vacate the suit premises & deliver the suit property to the Appellants within three months hence failing which they shall be liable to be evicted from the suit property through Court process.