
(2014) 06 OHC CK 0018

Orissa High Court

Case No: F.A. No. 83 of 1988

Sarada Sawalka

APPELLANT

Vs

Swatantra Kumar
Agarwal

RESPONDENT

Date of Decision: June 7, 2014

Citation: (2014) 2 ILR 625 : (2014) 2 OLR 744 Suppl. : (2014) 2 OLR 744

Hon'ble Judges: D. Dash, J

Bench: Single Bench

Final Decision: Allowed

Judgement

D. Dash, J.

The appellant (defendant in the court below) being unsuccessful in the Court of Subordinate Judge, 1st Court, Cuttack (as it was then) in T.S. No. 11 of 1986 has filed this appeal challenging the judgment and decree passed therein decreeing the suit of the respondent (plaintiff in the court below) for specific performance of contract for sale of the suit land with structures standing thereon. For the sake of convenience and to avoid confusion in order to bring clarity, the parties hereinafter have been referred to as they have been arrayed in the suit.

2. The plaintiff has filed the suit for specific performance of contract for sale of the suit land in the busy locality of Choudhury Bazar of Cuttack, the ancient and historic city of the State of Odisha as described in Schedule-"A" of the plaint together with a double stored building standing thereon comprising of shop rooms and residential houses, directing the defendant to execute and register the sale deed on receiving balance consideration of Rs. 63,000/- within the time stipulated and on failure to be done through Court with the relief of permanent injunction.

3. Plaintiff's case is the following:-

The Schedule-"A" property absolutely belonged to one Jagadei Bai Bajaj and that she had got in a partition under a registered deed of partition. Jagadei died on 10.05.1982 leaving the defendant as her daughter and sole successor-in-interest. The defendant has been given in marriage at Kolkata in West Bengal.

The plaintiff was inducted by Jagadei as a tenant in respect of a portion of the building standing over land Schedule-"A" on a monthly agreed rent of Rs. 1,000/- with effect from April, 1981.

3.1 Jagadei being old and ailing wanted to shift to Kolkata to stay there with her brother as nobody remained by her side at Cuttack to look after her. So she wanted to sell the property described in Schedule-"A" and this plaintiff agreed to purchase the same. Therefore, an agreement was entered into between them on 10.07.1981 for sale of the said property for a consideration of Rs. 1.90 lakh. A sum of Rs. 1.00 lakh was paid to Jagadei Bai Bajaj, on that day by the plaintiff in presence of witnesses and the possession of the Schedule-"A" property together with the structure standing thereon was accordingly delivered and the Jagadei also parted with the custody of all the title deeds in respect of said property in favour of plaintiff. It was agreed that after obtaining permission from Khasmahal and from Urban Land Ceiling Authorities, the sale deed would be executed and registered within a period of one and half year. It is stated that the defendant who is the daughter of Jagadei was then present.

3.2 The plaintiff then repaired the building and further constructed residential rooms on the first floor with kitchen and store rooms spending a sum of Rs. 51,000/- and carried on business. When the plaintiff stayed in the ground floor, he also inducted a tenant, namely, Gopal Padiwal on the first floor w.e.f. 01.06.1965 and one Mahavir Prasad Agrawal who was earlier a tenant continued as such accepting the plaintiff as his landlord and so also one Nandalal Harlalka.

3.3 Jagadei died on 10.05.1982. Thereafter the defendant also acknowledged the execution of earlier agreement made by her mother on 10.07.1981. In this regard she executed another agreement on 19.12.1982 and received further sum of Rs. 40,000/- in presence of local gentlemen, as further part of consideration as agreed before. It was then agreed that sale deed would be executed in January, 1986 after renewal of Khasmahal lease in her favour on receiving balance sum of Rs. 50,000/-.

3.4 That subsequently, the defendant demanded more money and then there arose dispute. So a settlement was arrived at the intervention of local gentlemen during end of month of December, 1982. It was agreed that the plaintiff would continue to pay Rs. 36,000/- towards further consideration money by way of monthly rent @ Rs. 1,000/- from 01.01.1983 to December, 1985.

3.5 In January, 1985, the defendant again demanded Rs. 20,000/- which gave rise to a dispute followed by settlement that the plaintiff would pay a further sum of Rs. 10,000/- by

way of rent per month till October, 1986. Although two agreements to the above effect were agreed to be executed, those were not done by the defendant despite of the fact that plaintiff had handed over the stamp papers etc. for the said purpose and on the contrary the defendant typed out therein as if those were just agreements in respect of tenancy and asked the plaintiff to sign. The plaintiff did not agree and thus those remained with the defendant like that.

3.6 The plaintiff went on making payment as per the decision of the gentlemen and in view of the terms of agreement for sale by way of monthly rent till June, 1985. The defendant was then staying at Kolkata. So, the monthly rent for July was sent by money order and that was returned back. Next when the rent for July and August was sent by a cheque, the defendant though received it but thereafter the rent for the month of September was not received.

3.7 The plaintiff thereafter was surprised to receive a notice from defendant's Advocate on 07.10.1985 stating therein that he was a monthly tenant at will being inducted as such w.e.f. from 1st May, 1984 with agreed monthly rent of Rs. 1,000/- and in view of that, the notice was for termination of tenancy seeking vacant possession.

The plaintiff gave a reply to the said notice but it again went unanswered. It was next sent on 26.11.1985 calling upon the defendant to execute the sale deed in favour of the plaintiff in respect of the schedule property on receiving the balance agreed consideration of Rs. 63,000/- within 15 days. However, the reply came about filing of a petition under the provision of Odisha House Rent Control Act vide HRC Case No. 67 of 1985 before the House Rent Controller, Cuttack for eviction of the plaintiff from the tenanted premises.

The plaintiff claims that there being no subsisting relationship of landlord and tenant since 10.07.1981, i.e., the date when defendant's mother executed the agreement to sell the tenanted premises along with the land and rest structures described in Schedule "A", the proceeding under the Act is not maintainable.

3.8 The plaintiff also claimed that he is always ready and willing to perform his part of the contract and to pay the balance amount of Rs. 63,000/- besides meeting the expenses for the purpose of sale, such as, for the Stamp Duty, Registration Fees etc. and in view of the failure on the part of the defendant, the suit was filed.

4. The defendant contested the suit by filing written statement.

4.1 The assertion of the defendant is that the important documents relied upon by the plaintiff are forged and fabricated. She and her mother are paradasin women coming from a conservative Marwari community without knowing, Odia writing. The documents are said to have not been read over and explained to them in other words created for the purpose.

4.2 A stand is taken that even accepting the contents of those documents for the sake of argument, in the facts and circumstances of the case and in view of the position of the law, no decree for specific performance of contract can be granted, inasmuch as, under the terms of the contract and the conduct of the parties at the time of entering into the alleged contract and the other circumstances under which the alleged contract was entered into gives the plaintiff an unfair advantage over the defendant and the purpose of the contract would involve hardship upon the defendant, which would not have been foreseen by the defendant in the facts and circumstances of the case. Enforcement of the specific performance of contract is said as inequitable. Side by side it is stated that the defendant has no house at Cuttack except the suit house and the defendant get substantial income from the rent.

4.3 The defendant and her mother were having a retained mohariar, namely, Rama Chandra Parida and they did not know any person named Duryodhan Baithalu, who is said to have scribed these two important documents which are the basis of the present case. Had the documents been scribed by Sri Parida, he would have taken due care to safeguard the interest of the defendant and her mother and that is projected as a suspicious circumstance against these documents.

4.4 The documents of agreements for sale are vitiated by fraud and undue influence. It is stated that the defendant and her mother had reposed great trust and confidence on the plaintiff and his father Biharilal Agrawalla, who were in a position to dominant over the will of the defendant and her mother. They were acting as the well wisher of these two helpless ladies. It is also stated that the said Biharilal had arbitrated the disputes over the property affair of defendant's cousin brother and the plaintiff was looking after the construction work and other matters of the defendant while submitting accounts etc. The documents, according to the case of the plaintiff, on their face suffer from inherent improbabilities.

4.5. The holding is a Khasmahal holding and at the time of alleged contract there was no subsisting lease. So, the contract even if was there can be said to be a contingent contract and the purpose of the same was wholly dependent upon the permission from the Khasmahal authorities. So, there being no permission, the contract is not specifically enforceable.

4.6. One Gangaram Chhapolia, who is a signatory to the document is a noted litigant of the State and he was a close friend of Biharilal, the father of the plaintiff so also one Dr. Gopal Chandra Sahu and they are not of that locality and they have thus been figured there. The reason given for execution of the contract by the mother of the defendant is false.

4.7 The story of the contract coming into being is not believable, inasmuch as, after the alleged contract, this defendant had undertaken substantial and major construction work over the suit property and there the plaintiff was working as her agent being the tenant

and the plaintiff and the defendant were treating each other as if brother and sister.

After the contract even Jagadei inducted other tenants in portion of the suit house and executed rent agreements where the plaintiff stood as an attesting witness. This is projected as a strong and suspicious circumstance against the genuineness of the said contract and in support of non-execution of Ext. 1, the first agreement for sale as such and also the same being the outcome of fraud and undue influence taking advantage of relationship as it was existing then, being in a position to dominate the will.

4.8 The defendant denied that Jagadei at any point of time decided to finally move to Kolkata to stay with her brother and so before leaving Kolkata, she wanted to sell the schedule property including the structure standing thereon. The plaintiff had never agreed to purchase it. No such agreement was entered into between the plaintiff and the mother of the defendant on 10.07.1981 with agreed consideration of Rs. 90,000/-. There was no such writing and execution of any document to that effect. No part of consideration amounting to Rs. 1,00,000/- was received by Jagadei and there was no delivery of possession of schedule "A" land. It is stated that taking advantage of old age, illness of Jagadei and the special relationship between the plaintiff and the father of the defendant, fraud was practiced on Jagadei and this manufactured document is the outcome of the same for grabbing the valuable property of the defendant. It is further stated that the plaintiff was then having no capacity to make payment of said sum.

4.9 The defendant denies the fact that it was agreed between the parties that after obtaining the permission from Khasmahal authority and from the Office of the Urban Land Ceiling Authorities, she would execute and register the sale deed within one and half years in favour of the plaintiff on receiving the balance amount of Rs. 90,000/-. The execution of agreement on 10.07.1981 is denied.

4.10 The plaintiff never repaired the old structure at his cost nor had he constructed the residential rooms including the store and kitchen in the first floor spending a sum of Rs. 51,000/-. The defendant claims to have made all constructions. The plaintiff had taken the portion of the building and was carrying on business as well as was using a portion as residence on payment of monthly rent as a tenant and continued as such. After the death of Jagadei on 10.05.1982, this defendant had never acknowledged the execution of the agreement dated 10.07.1981 by her mother. There was never any agreement due to the intervention of the local gentlemen to the effect that the plaintiff would continue to pay monthly rent from 01.01.1983 till December, 1985 amounting to Rs. 36,000/- i.e. @ Rs. 1,000/- per month. It stands to no reason as to why after a contract for sale, such an agreement would stand and become the requirement and necessary for being entered into. The defendant denied to have entered into an agreement and executed the same on 19.12.1982 acknowledging the execution of agreement dated 10.07.1981 by her mother having received a sum of Rs. 40,000/-. There was no agreement that the defendant would execute the sale deed in January, 1986 after renewing the Khasmahal lease in her favour and on receiving the balance, sum of Rs. 50,000/-. That is the reason for the

purported agreement but there is omission as regards such arrangement which makes the document further suspicious and exposes that its on account of fraud.

4.11 The defendant never demanded a sum of Rs. 20,000/- in January, 1995 giving rise to the dispute and ending with the settlement at the intervention of the local gentlemen followed by the decision that the plaintiff would pay Rs. 10,000/- as monthly rent amounting to Rs. 1,000/- per month till October, 1986. When such was the decision and the parties had agreed with the same, no document in writing to the said effect being there, itself is a highly suspicious feature. The allegation of the plaintiff that afterwards the defendant as per the agreement instead of getting two agreements as per the said decision had produced just two agreements in respect of tenancy is denied. Payment of monthly rent till June, 1985 as per the terms and agreement for sale and decision of the gentlemen and sending of the amount by money order etc. are all denied. The defendant admits that the plaintiff had sent the monthly rent of July and August by cheque, which she had received. Sending of monthly rent by the defendant in shape of cheque through registered post and its non-acceptance by the defendant is denied.

4.12 The averments of the Advocate's notice served upon the defendant are asserted to be true and correct. It is stated that the plaintiff had not sent any Advocate's notice calling upon the defendant to execute the sale deed in favour of the plaintiff being ready and willing to pay the balance amount of Rs. 63,000/- within 15 days in respect of the schedule property with structure standing thereon. The proceeding under the Odisha House Rent Control Act was rightly instituted and the Controller has rightly passed the order.

4.13 The plaintiff's readiness and willingness to perform his part of the contract is also seriously challenged. The plaintiff has not given any notice calling upon the defendants specifying time and place to execute the registered documents nor has he tendered any copy of the sale deed to the defendant as required under law.

4.14 The suit properties are all tenanted in occupation of different persons including the plaintiff except one room on the ground floor in possession of the defendant. The occupation of the plaintiff as a tenant is in respect of one shop room and three back rooms including the kitchen after eviction of the erstwhile tenant Rahim Bux. The plaintiff's father, who was having old acquaintance with the mother of the defendant and was almost remaining as their guardian, had given necessary advice to the defendant's mother when there was a fall out with other co-sharers. The father of the plaintiff approached the defendant's mother and it was in March, 1981 with a request to allow the plaintiff to occupy that room. Ultimately in April, 1981 the plaintiff occupied the room. The plaintiff then suggested to the defendant's mother that a power of attorney be given to him so that he would look after the outside affair in relation to the properties and for that purpose papers were produced and the defendant's mother believing the plaintiff signed on blank papers. The plaintiff all along continued as a tenant under the mother of the defendant and side by side used to look after the affairs of the defendant, who at times

was remaining outside Cuttack leaving the property and related financial interest to be looked after. Allegation has also been made that the defendant's money was misappropriated by the plaintiff. The reconstruction and addition of room to the structure already in existence is said to have been made by the defendant at her own cost when the plaintiff was looking after the said work and upon the plaintiff, the defendant had reposed full faith and confidence. When such was the state of affairs, in December, 1982 the plaintiff gave another suggestion for execution of power of attorney as had earlier been given by her mother. In good faith and believing the words of the plaintiff, the defendant avers to have signed again on some blank paper. The plaintiff occupied the back rooms after construction and the rent was enhanced to Rs. 700/- per month in place of initial rent of Rs. 300/- per month. With all these pleadings the defendant has prayed to non-suit the plaintiff.

5. On such rival pleadings of the parties, the trial court framed seven issues as indicated in paragraph-4 of the impugned judgment. Besides the issues of maintainability, limitation, existence of cause of action, the issues have also been framed with respect to the genuineness of the agreement dated 10.07.1981 purported to have been executed by Jagadei and so also the later agreement dated 19.02.1982 said to have been executed by this defendant. The next important issue is with regard to the plaintiff's legal entitlement to get the decree for specific performance of contract.

5.1 During trial, the plaintiff examined eight witnesses when the defendant also examined equal number of witnesses. Good number of documents have been admitted in evidence from both the sides and those will be specifically referred to hereinafter as and when the necessity would arise.

5.2 The trial court has first of all taken up issue No. 4 for decision on analysis of evidence. At paragraph-6 of the judgment, he has found that the plaintiff was in occupation of the shop and residential premises of the suit building in 1981 and was paying rent to Jagadei under Exts. 2 and 2/a, which are rent receipts dated 05.05.1981 and 07.07.1981 respectively. Next in paragraph-7 he has found that the plaintiff occupied the shop room as well as the residential room in the suit premises in the year 1981 being given by Jagadei and paid Rs. 1,000/- to her per month as rent and it is only after that Jagadei executed a power of attorney on 07.01.1981 authorizing the plaintiff to look after all her affairs, such as, litigations, finance etc. Next in paragraph-8 of the judgment on going through the evidence piloted by the parties in respect of their respective cases, the trial court has found that Jagadei had proposed to sell the suit house to the plaintiff and at the end, the finding is to the effect that Ext. 1 the agreement dated 10.07.1981 in favour of the plaintiff is a valid document in all respect.

5.3 Next issue No. 5 with regard to the agreement executed by the defendant on 19.02.1982 upon analysis of the evidence the finding has been rendered that the said agreement Ext.-4 is also a valid one. Lastly on Issue No. 6 the trial court has accepted the evidence of the plaintiff and taking some other circumstances as those emanate from

evidence into consideration has arrived at a conclusion that the plaintiff was/is all along ready and willing to perform his part of the contract. Decisions as aforesaid have led to the final result when the suit has been decreed followed by grant of reliefs to the plaintiff as prayed for.

6. Learned counsel for the appellant attacks each of the findings rendered by the trial court on issue Nos. 4, 5 and 6 and calls in question their legal acceptability and propriety. To buttress his submission first with regard to issue Nos. 4 and 5 being not answered correctly, he has with great pain drawn the attention of this Court to the depositions of the almost each of the witnesses examined from both the sides with reference to the documents admitted in evidence and marked exhibits as and when necessary, which will be pointed out at appropriate place in course of discussion. His submission is that both these agreements Exts. 1 and 4 ought not to have been held to be valid in the eye of law. It is his submission that in both the cases the so called executants are paradasin women or at least of that category hailing from a conservative community having no such worldly experience when the plaintiff was enjoying that position to dominate their will being reposed with full trust and confidence because of his prior acquaintance and relationship. So, in such a case, according to him, the burden heavily lies upon the plaintiff to establish due execution with all required proof of the facts that the executants had the knowledge of the nature of the document and were also aware of the contents of the same and then had consciously executed the document fully knowing its implication etc. All these, according to him, have not been duly established by the plaintiff in the instant case and evidence on those score is far from satisfaction and wholly deficient. So, it is submitted that the trial court ought to have held that due execution of those documents have not been established by the beneficiaries, i.e., plaintiff under the document. In this connection, he has pointed out certain circumstances, which are all suspicious in nature in support of his case. It is his submission that the beneficiaries under the documents having failed to establish the due execution of Exts. 1 and 4, the court below ought to have refused to act upon those documents and take those as the basis for grant of the relief to the plaintiff. According to him, on this ground alone, the appeal is to succeed and the suit is to be dismissed. In this light he has placed several decisions for deriving support.

6.1 Learned counsel for the respondent, on the other hand, submits all in support of findings referred by the trial court on Issue No. 5. He contends that the evidence on record is overwhelming to prove the due execution of Exts. 1 and 4 and there has been the evidence on record providing the explanation as regards the requirement of Ext. 4 even after the execution of Ext. 1 and the necessity for the same. In course of his submission he has gone to project the improbabilities of the case of defence.

7. In the backdrop of above rival submissions as aforesaid, this Court is now called upon to examine the correctness and consequently the sustainability of the finding of the trial court on issue Nos. 4 and 5.

It may be stated here that in case the findings on these issues are rendered against the plaintiff, the fate of the suit gets sealed and in the event the findings are rendered affirming the findings of the trial court, the next issue with regard to the readiness and willingness on the part of the plaintiff to perform his part of the contract would stare for a decision and then the finding on that issue would decide the ultimate result and independently also it can have the impact over the result of the suit according to its answer if given in negative.

8. The issue No. 4 concerns with the so called agreement for sale Ext. 1 purported to have been executed by Jagadei in favour of the plaintiff, the proposed vendee. The trial court on examination of the evidence has arrived at a conclusion that the said document is a valid one and not fraudulent as alleged by the defendant.

Now, therefore, in view of the submission advanced in course of hearing of the appeal the said answer rendered by the trial court needs to be put to required test as per law and settled position to arrive at a conclusion and with regard to the correctness of the same.

From the very beginning one thing surfaces so far as in this case that the court below has lost sight of the important aspect concerning the burden of proof of the execution of documents Exts. 1 to 4 in the peculiarity of facts and circumstances of the case. It is seen that the said aspect has been given go bye by the trial court and that requires consideration keeping in mind the submission of the learned counsel for the parties.

The admitted facts uncertain that when Ext. 1 is said to have been executed on 10.07.1981, Jagadei being a widow was aged about 65 years. At the relevant time she was staying alone at Cuttack. Her daughter (the defendant) being given in marriage was staying at Kolkata and so also other relations. Admittedly by that time this plaintiff was in occupation of the part of the building standing over the land as a tenant. The subject matter of this Ext. 1 is the entire land and building standing thereon. Except this property in the heart of the city at Cuttack, it is stated by the parties that Jagadei had no other property. So by parting with this property she decided of being rendered not only landless but also homeless with risk of seeking shelter under the roof of someone else at their mercy. The father of the plaintiff admittedly was in good terms with Jagadei and even after the so called Ext. 1, the agreement for sale, the plaintiff was given the power of attorney authorizing him to sell for proper and adequate consideration any property and goods and to execute and sign and register the sale deeds to complete the sale, which itself is a significant feature in the sense that when already the plaintiff had the agreement for sale in his favour and when it is said that he was delivered with the possession of the property in part performance of the said agreement, that was no occasion or reason for being appointed as such by execution of one deed of the power of attorney for sale of very same property, which plaintiff admits to have accepted. Interestingly, in Ext. 1, there is absolutely no indication with regard to the prior possession of the plaintiff and his tenancy, which was admittedly continuing at least till then as per plaintiff's case and version in court. The executant being an old widow is said to have executed this Ext. 1 as

per the case of the plaintiff for sale of the entire land and building that she was having at Cuttack in favour of the plaintiff. She belonged to Marawari community, which is generally taken to be conservative with orthodox approach. So, here in view of the aforesaid, the matter has to be approached by putting burden of proof upon the plaintiff as regards due execution by applying the principles of execution of document by paradanashin ladies. This aspect appears to have not at been taken due care of and so also the impact of those on the decision on issues as above. Therefore, this Court is inclined to consider this aspect in deciding issue No. 4 and 5 while judging the sustainability of the said finding of the trial court.

9. At this juncture, before proceeding for further examination the settled position of law are required to be discussed and stated for reference and proper appreciation in arriving at a correct decision.

The law as to the burden of proof has been summarized in a decision of Privy Council in case of AIR 1925 204 (Privy Council)

"The law throws around her a special cloak of protection. It demands that the burden of proof shall in such a case rest, not with those who attack, but with those who found upon the deed, and the proof must go so far as to show affirmatively and conclusively that the deed was not only executed by, but was explained to, and was really understood by the granter. In such cases, it must also, of course, be established, that the deed was not signed under duress, but arose from the free and independent will of the granter. The law as just stated too well settled to be doubted or upset."

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"The law of India contains well known principles for own disadvantage when they have not the usual means of fully understanding the nature and effect of what they are doing. In this it has only been given the special development, which Indian social usages make necessary, to the general rules of English Law, which protect persons, whose disabilities make them dependent upon or subject them to the influence of others, even though nothing in the nature of deception or coercion may have occurred. This is part of law relating to personal capacity to make binding transfers or settlements of property of any kind."

The position thus emerges that executant being a pradahnashin woman, the deed was read out to her; it must further be shown that it was explained to her, or that she understood its conditions and effect; and that the explanation included all material points as well as the general nature of transaction. The principle upon which the law accords protection as above is founded on equity and good conscience.

"In the instant case the learned Munsif, and on appeal, the learned Subordinate Judge found concurrently that the two widows put their thumb marks without understanding the true import of the document. Imam, J., in second appeal reversed the said finding on the

ground that they were vitiated by an erroneous view of the law in the matter of burden of proof. The judgment, if we may say so with respect, consists of propositions which appear to be contradictory. The learned Judge after reviewing the case law on the subject, concludes his discussion by holding that it was the duty of the plaintiff to prove that there was fraud committed and that, as that had not been established, the question whether the document was read over and explained to the plaintiff in his opinion, in the circumstances, did not arise. This proposition, in our view is clearly wrong and is contrary to the principles laid down by the Privy Council in a series of decisions. In India, pradahnashin ladies have been given a special protection in view of the social conditions of the time: they are presumed to have an imperfect knowledge of the world, as by the paradah system they are practically excluded from social intercourse and communion with the outside world...

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"... The legal position has been very well-settled. Shortly it may be stated thus: The burden of proof shall always rest upon the person who seeks to sustain a transaction entered into with a pradahnashin lady to establish that the said document was executed by her after clearly understanding the nature of the transaction. It should be established that it was not only her physical act but also her mental act. The burden can be discharged not only by proving that the document was explained to her and that she understood it, but also by other evidence, direct and circumstantial."

As held by this Court in Chandal Bewa v. Madhav Panda and others XXVI (1960) CLT, 304, that when a question arises as to whether the document has duly been executed by an old and illiterate lady belonging to a village, in order that the documents may be enforced against her, or, as a matter of that, in order that it may be found by the Court that the documents were properly executed, the vendee must prove that the documents were read over and explained to the illiterate executant, who is a lady, and she knew the nature and character of the transactions while she became a willing party to the documents and particularly that she was aware of the acreage involved in the transactions.

On the aforesaid, this Court then has taken a view that there is no justification as to why rule applicable to paradahnashin ladies on the ground of their ignorance and illiteracy should be restricted to that class only and should not also apply to the case of a poor lady who is equally ignorant and illiterate, but is not paradahnashin, simply because she does not belong to that class, the object of the rule of law being to protect the weak and the helpless, the distressed and the down-trodden and it should not be restricted to a particular class or community. Even in the case of a lady who is outside the paradahnashin class, it is for those who deal with her to establish that she had the capacity of understanding that she has been entering into the transaction voluntarily and with full knowledge and import of what the transactions actually meant. In case of [Prasanna Kumar Giri and Others Vs. Radhashyam Paul and Others and Sandhya Rani](#)

[Paul](#), it has also been so held. Same is the view taken in case of [Kuma Dei Vs. Md. Abdul Latif](#), Reliance has been placed upon the decision in [Mst. Kharbuja Kuer Vs. Jangbahadur Rai](#), that as regards documents taken from a paradhanashin women, the Court has to ascertain that the party executing them has a free agent and has been duly informed of what she was about that reason for the rule is; that ordinary presumption that a person understands the document to which he has affair his name does not apply in case of a paradhanashin women: that burden shall always rests upon the person who seeks to sustain a transaction entered into with a paradhanashin lady to establish that the said document was entered into by her after clearly understanding the nature of the transaction: that it should be established that it was not only her physical act but also her mental act and that the burden can be discharged not only by proving that the document was explained to her and that she understood it but also by other evidence direct and circumstantial.

9.1 In case of "Krushna Chandra Patra and another Vrs. Kami Bewa and another" 1988 (2) O.L.R.-582, it has been enunciated that the situation relating to the document executed by paradhanashin women and illiterate person, the onus lies on the person who derives the benefit under the document to prove and establish that the executant had executed the document after having full knowledge of the contents as well as its effect and consequences. Further in case of [Rankanidhi Sahu Vs. Nandakishore Sahu](#), this court while holding the principles governing proof of execution of document taken from paradhanashin woman to be actually applicable to the document taken from an illiterate woman, reiterated further that the burden is heavy on the person getting advantage under the document to establish that the contents of the document were read over and explained to her, she understood the same, she had independent advise at the relevant time, and that the execution of the document was not only a physical act, but also a mental act. In the said case, while alternatively holding that the document under challenge therein was not merely executed, it was held to be void and inoperative document conferring no title in respect of immovable property covered under the said transaction.

9.2 This court in case of [Narayan Mishra and Others Vs. Champa Dibya \(dead\) and Others](#), have held that the disposition of such nature made must be found to have been substantially understood and must really be the mental act, as its execution is the physical execution of the person who makes it. The words of caution for the court are that the court must be satisfied that the deed has been explained to and understood by the party under disability either before execution or after it, under situations showing that the deed has been executed with the full knowledge and comprehension. Mere execution by such a person although not accompanied by duress, protest or obvious signs of understanding or one of comprehension itself not the real proof of true understanding mind of the executant. It must be proved affirmatively and concluded that the deed was not only executed by but also explained to and really understood by the grantor. The courts have been asked to insist the proof that the lady had independent legal advise

although in variable terms depending upon the facts and circumstances of each case to case. Generally, the Courts have to demand affirmative to prove on the subject of the lady's intelligent understanding and execution of deed and the court would not repeatedly hold that this onus to have been discharged where it has not been shown that the lady had any independent advise. The true nature of transaction must be proved to have been understood by the executant.

The protection applicable to a pradahnashin woman can be extended to illiterate and rustic village woman or to documents made by old, invalid inform and illiterate persons [Krishna Mohan Kul @ Nani Charan Kul and Another Vs. Pratima Maity and Others,](#)

9.3 In case of [Karunamoyee Debi Vs. Sm. Maya Moyi Debi and Others,](#) it has been emphatically held that those who seek to affect paradanashin woman with liability under the instrument are bound to prove that they had knowledge of the nature and character of the transaction, that they had some independent and disinterested adviser in the matter; and that they executed the instrument fully understanding what they were about in doing so. In several other cases, it has also been held that when a Court in dealing with disposition of property by pradahnashin woman ought to be satisfied that the transaction was explained to her specially in a case where, without legal assistance, she executed document written in a language she did not understand, which deprived of all her property {Ashgar v. Delroos I.L.R.-3 Cal. 324 (P.C.) and Amarnath Vr. Achan ILR 14 All.-420 (P.C.)} Where an instrument has not been properly explained so that she did not understand its contents and effect or did not know what liabilities she was incurring, the transaction cannot stand".

In case of Satish v. Kali Dasi 34 C.L.J.-529:-

"The position settled is that when the court is called upon to deal with a deed executed by a pardanashin lady, it must satisfy itself on evidence, first fact that the deed was actually executed by her with full understanding of what she was about to do; secondly, that she had full knowledge of the nature and effect of the transaction in which she is said to have entered; and thirdly, that she had independent and disinterested advice in the matter. The cases fall broadly into two groups, namely, first - the cases where the person who seeks to hold the lady to the terms of her deed is one who stood towards her in a fiduciary character; and secondly, the cases where the persons who seek to enforce the deed was an absolute stranger. The court in former class of cases will act with great caution and will presume confidence put and influence exerted, in the later class of cases the court will require the confidence and influence to be proved intrinsically. If the confidence is reposed and it is abused, the court will grant relief."

In Shree Thakurjee Vrs. Ramdei, 59 M.L.J. 14 (P.C.) it has been held that where the facts disclose a confidential relation between the parties and also establish that the deed was harsh and unconscionable, the burden of proving absence of undue influence rests on the party seeking to support the deed.

Its also the position settled in a plethora of decisions standing in a confidential relation towards others cannot entitle themselves to hold the benefits which those others have conferred upon them unless they can show to the satisfaction of the court, the person by whom the benefits have been conferred had competent and independent advice in conferring them.

10. Testing the facts of the present case as revealed in the evidence on record in the light of the principles enunciated in the aforementioned decided cases, it is seen that the plaintiff himself has pleaded in para. 4 of the plaint that Jagadei was old, suffering and staying alone at Cuttack. So this Jagadei's living condition, living alone with ailment then and also the mental condition as it would have been in view of those if further seen with the admitted fact that she hails from a community popularly known as Marwari community with conservative and orthodox approach which also continues at this point of time, the protection as discussed has to be made available. The plaintiff has not shown any such important activity of Jagadei so as to infer in the negative in not providing the protection concerning execution of document. Moreover, admittedly, the confidential relationship stood. It has also been pleaded that the plaintiff was a tenant with respect to a portion of the building since April 1981. The plaintiff himself deposed with regard to Ext. 1. It is his evidence that he was inducted as a tenant on a portion of the suit house for the first time in the month of April 1981 with the agreed monthly rent of Rs. 1,000/-. It is further stated that the suit house was the only property of Jagadei and she was staying alone. When the defendant being married was staying at Kolkata. He has further stated that at the time of his initial induction as a tenant, Jagadei had disclosed that the suit house was to be sold and had taken a promise from the plaintiff that he was to vacate when it would be sold. Next, he states about his offer to purchase the suit house wherein Jagadei accorded her agreement to sell for a consideration of Rs. 1.9 Lakhs and it was agreed for execution of an agreement. Interestingly, the stamp papers had been purchased on 14.5.1981 and the agreement was executed on 10.7.87 It is further stated by the plaintiff that the stamp papers were purchased by Jagadei and the scribe (P.W. 8) was called by Jagadei which P.W. 8 does not at all support and instead states to the contrary. The agreement was written in the house when one Abdul Satan and Nari Prasad Bhagat were present. This P.W. 1 the plaintiff was unable to say as to why they had gone there and at whose call. It is stated that as per the instructions of Jagadei, the deed was scribed, read over and explained to her and after payment of Rs. 1 Lakh, Jagadei signed. It is not stated as to in which language it was explained and as to whether she understood being just given a simple reading in Odiya when her signature is not in Odiya. From the very beginning, the plaintiff was aware about the proposal for sale of the property but still when he gave offer and till execution of the document he was not ready with the consideration which itself is a ground to raise doubt as regards plaintiffs entering into transaction. The reason for this part payment is not assigned. The circumstance also appears to be contradictory that when Jagadei was in a mood to sell and leave the state, she would be agreeing for arrangement like this by remaining at the mercy of plaintiff to get the balance consideration; when other vendees were readily available as stated by the witnesses.

Although the possession is said to have been delivered, the mother of defendant and the defendant continued to stay in that portion of building as before whereas said arrangement does not find indicated in Ext. 1. So also about the occupation of tenants.

10.1 It is admitted that in some portion of the house, one Mahabir Agarwalla and Nandalal Harlalka were staying as tenants. P.W. 1 (plaintiff) states that since the date of agreement for sale i.e. Ext. 1, the suit house was possessed by him on the strength of the said document and no more as a tenant. If we have a look at Ext. 1, the recital runs to the effect that the property described thereunder which was in possession of Jagadei has been delivered to the plaintiff. So here is a case where the plaintiff averred that with the execution of agreement for sale i.e. Ext. 1 and payment of part consideration, possession of the property was delivered to him, whereas the situations in the field are completely different. Even the possession with respect to the portion which was admittedly with Jagadei was not given. The other tenants were physically in occupation by then. Not a scrap of paper is shown that those tenants thereafter established the relationship with the plaintiff as that of landlord and tenant either directly or indirectly or through any conduct even. Oral evidence on that score is not believable under the circumstances. The facts and circumstances show that Jagadei was actually not in a position to deliver the possession of the suit house in its entirety as major portion was in possession of tenants and a portion was in her possession also. The recitals on Ext. 1 thus appear to be incorrect and wholly contrary to the then state of affairs.

10.2 At this stage, it comes to mind that in case of an agreement for sale and where delivery of possession is pleaded like this that plaintiff from that day ceases to be a tenant and his possession did no more remain as a tenant but as the proposed vendee under an agreement for sale in writing, it may be permissible to say that the parties meant it to be symbolic delivery of possession. But then it's incumbent upon the plaintiff to prove that he disowned the possession as tenant and began to possess under the agreement for sale in part performance of the same. Also as regards the portion in occupation of others, it must be shown that the since then they attorned the plaintiff as landlord, the basis being the agreement for sale. Although in para-72 of deposition, P.W. 1 states that he issued notice to tenants, but that is not proved. In the present case, nothing is stated about all these in the plaint and in a simple manner it is written in Ext. 1 that possession was delivered which conveys no such meaning in the peculiar facts and circumstances of the case. Thus, there was absolutely no necessity in that event to write such falsehood instead of the true state prevailing then. This Jagadei has also not communicated with those tenants in any manner as regards her executing Ext. 1, the agreement for sale asking them to have further dealing with plaintiff and that is not indicated in Ext. 1.

11. Now coming to the independent advise, P.W. 1 in para. 52 of his deposition states that at the time of talk with Jagadei, no outsider was there. Though it is stated in para. 6 of the plaint that the present defendant being the daughter of Jagadei was present there at the time of execution of Ext. 1., the same has been flatly denied which finds place in para. 56 of the deposition of P.W. 1. More interestingly, the defendant's signature is also

not there on Ext. 1 which in the facts and circumstances certainly gives rise to a doubt as regards Ext. 1.

11.1. Another important fact and circumstance here is that Jagadei had executed a power of attorney i.e. Ext. 3 in favour of the plaintiff and that too it was in August 1981. Although it was stated by P.W. 1 that it was only to collect house rent from the ex-tenant Karim Box, but actually it is not so, as per the recitals of Ext. 3. First of all, where there was an agreement for sale and delivery of possession, there was no necessity for such a document at all. So the story appears to have been created that it was for realisation of rent from an ex-tenant. It appears to be an invention to pale the existence of Ext. 3 into insignificance and as an attempt to tide over the same knowing fully well that the same stands as a strong piece of evidence against the factum of execution of Ext. 1. P.W. 1 in para. 43 of deposition in clear terms admit to have read Ext. 3. Though he states to have not been authorized to sell the suit property, he cunningly avoids by feigning ignorance as to which property he was authorized to sell by that Ext. 3. Be that as it may the fact remains that in one OJC before this court, plaintiff has pressed Ext. 3 into service (Para. 52 of P.W. 1's deposition). Let us now again have a glance at Ext. 3. This is a general power of attorney. Admittedly, Jagadei had only the suit property. The power of attorney appears to have been given to file cases etc. by doing all such acts and then most interestingly under clause-8 thereof power is given for sale of the property or any part thereof for proper and adequate consideration and to execute, sign and register deeds etc. It is not understood as to what was the necessity for this and particularly for the plaintiff to accept it. When the plaintiff had already with him the agreement for sale and as per his claim, was in possession of the property, where arose the question of further giving power to the plaintiff to sell same property and the plaintiff to accept it which runs against his interest. This stands as a strong and doubtful feature concerning execution of Ext. 1. This rather shows that the lady had reposed confidence and was holding the plaintiff in trust and thus, the fiduciary relationship then stood and Ext. 1 is a created one by abusing such confidence. The plaintiff as it appears has not been able to show by such evidence that he has not abused such faith and confidence. The possession of documents of the property gets rather explained away by this that those were with him being the agent. The story now projected that those were handed over after execution of Ext. 1 is not believable.

Prior to receipt of Advocate's notice, plaintiff appears to have not reminded defendant to act in furtherance of Ext. 1 and 4. All these obviously lead to an inference that for quite sometime these Ext. 1 and Ext. 4 were not ready to be projected for the purpose and these ideas struck later. Furthermore, fatal stroke falls when the plaintiff again in January 1985 stood as a witness to an agreement between the defendant and one tenant named Mahabir Prasad and that is a house rent agreement. How the plaintiff could go for that which appears to be against his interest on the basis of Ext. 1 as claimed. If Ext. 15 is again read and so also para. 41 of the deposition of P.W. 1, it is definitely a suspicious feature. None of the tenants in occupation have been examined and it is also said by the

plaintiff that there was no issuance of receipts to them in respect of payment and receipt of house rent.

11.2. P.W. 2 has been examined as a witness to Ext. 1. He says about the presence of the present defendant by further going to say that she counted the money and received it which is not at all a fact as per the evidence of the plaintiff himself. Except stating that the contents of the documents were read over and explained to her, nothing more is stated by this witness atleast in which language that was done. Further more, when this witness says to have seen Jagadei about 100 to 200 times stretching from the year 1965 to 1981 still he expresses his inability in remembering her appearance in any manner and this witness next of course candidly admits Jagadei to be a paradanashin lady in emphatically stating that he had talked with her when she was inside the house. He has further stated to have not read the agreement personally, while also stating to have not heard the contents when those were being read over and explained to Jagadei. P.W. 2 when states regarding the status of the executant Jagadei, P.W. 3 tells in a different manner and so also P.W. 4. Moreover, P.W. 2 states to have not read the agreement. The scribe of the document Ext. 1 is P.W. 8. He has clearly stated that the witnesses and the executant did not sign in his presence and that he had not read over and explained the contents of Ext. 1 and Ext. 4. This witness has been cross examined by the plaintiff. He has again in categorical terms stated that Ext. 1 was not written under the instructions of Jagadei and so also Ext. 4 to have not been written under the instructions of the defendant. The witness has further stated that the draft of Ext. 1 and 4 were given to him by the plaintiff and he simply copied and then returned. It is his further evidence that when he objected to give his certificate and to sign on Exts. 1 & 4, the plaintiff said that parties to Exts. 1 & 4 are paradanashin ladies and therefore, would not appear before him and so he had to do like that believing him. This witness states to have accordingly at the dictate given certificate on Exts. 1 & 4 with regard to reading over and explaining the contents of the document.

11.3. For the aforesaid discussion of evidence, thus, I find that so far as the execution of Ext. 1 by Jagadei is concerned, the plaintiff has failed to prove those required facts such as the independent advise that it was both her mental and physical act when Jagadei by such document is not only rendered landless but also homeless coming down to the street remaining completely at the mercy of other even for her shelter. Moreso, when there is no provision to that effect being made and there is no evidence to show that she had the capacity or other source to have alternative arrangement with the help of that sum of Rs. 1 Lakh. Another aspect cannot also be lost sight of in this case, i.e., with regard to adequacy of consideration. As already stated, Jagadei had every reason to repose confidence and hold the plaintiff in trust. So under the circumstances, it was further incumbent upon the plaintiff to prove that this consideration of Rs. 1.9 Lakh as fixed for the land as well as building with so many tenants in the heart of the city of Cuttack was then the prevailing or fair market price or adequate. Proof on this score would have certainly gone to attach quite a good amount of fairness to the transaction,

especially when it is not the case of the plaintiff that the mother of defendant because of the relationship and earlier acquaintance was not very much interested in insisting the fair market price from the plaintiff. Moreso, when the plaintiff was paying rent of Rs. 1,000/- per month for a portion and there were other tenants, the consideration as said to have been fixed does not prima facie appears to be conscionable. In view of the peculiar relationship and other surrounding circumstances as those emanate from the evidence, the plaintiff in my considered view was under legal obligation to do so that by Ext. 1 he was not going to take any undue advantage by abusing the relationship. There are other suspicious features with regard to the placement of the signatures of Jagadei on Ext. 1. All these lead me to hold that the plaintiff has not been able to discharge the onus of proof of due execution of Ext. 1 by leading clear, cogent and acceptable evidence as required such as independent advise, understanding the true nature of the transaction, that it was both mental and physical act, and that too by removing all other doubtful and suspicious features by proving adequacy of the consideration as fixed etc. and absence of undue advantage and abuse of position or relationship founded upon faith and reposition of confidence.

11.4 It is seen that the trial court has ignored all these aspects of the case and evidence and has rather approached the evidence in finally deciding the issues in favour of the plaintiff without even noting the fact that the case is based upon the execution of a document by an old widow as well as these circumstances as discussed above in detail. Having lost sight of the important aspects, the trial court in a general manner examined the evidence in holding that Ext. 1 was duly executed. The approach is not proper and this court is not in a position to concur with the same.

For the discussion as above, this Court without least hesitation records the disagreement with the view of the trial court that Ext. 1 the document in question was duly executed by Jagadei with a true understanding mind. Accordingly, issue No. 4; is answered against the plaintiff.

12. Next comes the issue No. 5 which concerns with the document Ext. 4, the so called agreement for sale of the property to have been executed by the defendant. First of all this Ext. 4 makes a strong reference to Ext. 1 and that stands practically as the foundation, which has already been found to have not been duly executed by Jagadei, the mother of the defendant. Therefore, this Ext. 4 can be well said to have stemmed of misrepresentation. Perusal of Ext. 4 to the naked eye raises a suspicion looking at the seat of the signature of so called executant which is a departure and deviation from the ordinary manner as usually done and cannot be lightly brushed aside. It is also a document executed by a lady of conservative family who had read upto class IV in a Marwari school as per the case of the plaintiff. The purpose of this execution of Ext. 4 is said to meet the debt incurred for the performance of funeral rites of mother. P.W. 1 now states in para. 96 of deposition that defendant was then financially sound but she told that her own money would not be utilized for sudhi kriyas and for that reason she decided to borrow, which sounds absurd and not acceptable to a person having modicum common

sense. It again does not find indication that the plaintiff was at any point of time a tenant. When admittedly the entire land and building was by then not in actual physical possession of the plaintiff or even under his control, the same is not indicated in Ext. 4 the plaintiff on the other hand has gone to pay house rent to defendant vide Ext. 5 series. This circumstance is sought to be explained away by saying that the defendant when demanded more consideration, it was so decided but even if that is accepted it does not appeal as to why it would at all be paid in shape of rent. Moreover the explanation itself appears to be absurd and for that sake only. It is also the admitted position that the relationship between the plaintiff and defendant was continuing as before as it was with the mother of the defendant. The defendant's case is that the papers were purchased for the purpose of execution of power of attorney and she admits to have signed on the blank paper. The relationship since long was such that the plaintiff was in a position of dominating the will being the only person so relied upon by mother of the defendant as found from the fact that he was earlier given a power of attorney Ext. 3.

13. Learned counsel for the respondent submitting the decisions in the case of [Alapati Sivaramakrishnayya Vs. Alapatti Kashivishwanandham and Others](#), and in case of O.P. Verma Vrs. Lala Gohirlal and another AIR 1962 Raj.-232, submits that when in both the cases of Exts. 1 & 4 the signatures of the executants stand admitted, the presumption stands in favour of the execution. The facts and circumstances of the cited cases are quite distinguishable from the facts and circumstances of the present case. Therefore, these decisions do not come to the aid of the case of the plaintiff in proving the execution.

14. Except leading evidence in a general manner that Ext. 4 was written under the instruction of the defendant and then the contents were read over & explained, no further evidence as is required in view of the special relationship between the parties is forthcoming here. The scribe P.W. 8 does not support it at the cost of repetition, it may be stated that this document Ext. 4 makes a reference to Ext. 1 and that is taken practically as the foundation to go for Ext. 4 giving due regard and weightage to the act of Jagadei, mother of the defendant. But the said document, having no value in the eye of law, the foundation stands removed and the very basis of coming into being of Ext. 4 is thus no more visible and Ext. 4 gets pushed as a document having its root to the misrepresentation. When it is stated about some further arrangement being made with regard to payment of rent by the plaintiff to the defendant, Ext. 4 does not find mention about that nor such arrangements have been reduced into writing. The explanations are prima facie not acceptable when cumulatively viewed with the facts and circumstances of the case. Rather it appears that to avoid the adverse impact of payment of rent to defendant such arrangement has been conceived of and designedly projected by the plaintiff. No such immediate conduct of the plaintiff on insisting the defendant for creating documents evidencing such arrangements for which papers were said to have been handed over; nor those papers were asked to be returned. On meticulous examination of evidence on record, here again I find that the answer given by the trial court on issue No. 5 is indefensible and is thus liable to be set at naught. This court therefore, answers the

same against the plaintiff.

In view of above answers on issue Nos. 4 & 5 that the plaintiff has failed to prove due execution of Exts. 1 & 4, the proposed agreements for sale in his favour on which the entire suit of the plaintiff based, the other issues are not required to be further delved into.

In the wake of the aforesaid, the judgment and decree impugned in this appeal are set aside. Consequently the appeal stands allowed and in the circumstances without cost throughout.