

**(2002) 09 CAL CK 0005**  
**Calcutta High Court**  
**Case No:** S.A. No. 179 of 1979

Smt. Jhareswari Mohapatra and  
Others

APPELLANT

Vs

Santosh Kumar Mahapatra and  
Others

RESPONDENT

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**Date of Decision:** Sept. 13, 2002

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 100
- Contract Act, 1872 - Section 16, 17
- Evidence Act, 1872 - Section 111
- Specific Relief Act, 1963 - Section 34

**Citation:** (2003) 2 CALLT 514

**Hon'ble Judges:** Pradip Kumar Biswas, J

**Bench:** Single Bench

**Advocate:** Chandra Sekhar Das, for the Appellant; Ashok Kumar Jana, Prabakar Jana and Bineeta Bhattacharyya, for the Respondent

**Final Decision:** Dismissed

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**Judgement**

P.K. Biswas, J.

The present appeal is directed against the judgment and decree dated 31st July, 1978 passed by Sri A.K. Chakraborty, the learned Additional District Judge at Midnapore in Title Appeal No. 139 of 1977 affirming those dated 30th May, 1977 passed by Sri R.K. Ghose, Munsif at Danton in Title Suit No. 70 of 1974. The suit before the lower Court was filed seeking for declaration and injunction. The trial Judge after contested hearing was pleased to pass the decree in favour of the plaintiff/respondent and accordingly granted decree for declaration and permanent injunction in his favour.

2. The substantial question of law for determination of the present appeal was formulated as under:--

"Whether or not, the impugned deed of gift, allegedly executed by the plaintiff in favour of the defendant No. 1 was the mental and conscious act of the plaintiff and as to whether said deed was obtained by fraud, misrepresentation, coercion and undue influence or not."

3. For the purpose of the present appeal, the case appearing in the plaint may be summarised as follows:--

4. The plaintiff Kshema Dasi is an aged illiterate village woman. The property described in the schedule "Ka" to the plaint belonged to her husband. The plaintiff has three daughters and all are married and defendant No. 1, Jhareswari, her eldest daughter was married in the same village with Bidyadhar Mahapatra, since deceased. The second daughter, Shantamani lost her husband soon after marriage and has no issue. The youngest daughter Churamani too is married and lives at her husband's place.

5. In Aswin 1378 B.S. Bidyadhar requested plaintiff through defendant No. 1 for a loan of Rs. 500/- but since the plaintiff had not so much of money with her she agreed to sell some lands to acquire the money required by her son-in-law, Bidyadhar. The plaintiff then asked Bidyadhar to arrange for sale of land and then Bidyadhar settled to sell "Ga" schedule lands to defendant No. 2 for consideration money of Rs. 800/-. So, the plaintiff was taken to Dantan Sub-Registry Office. There at the Sub-Registry Office the illiterate plaintiff put her thumb impression and on some papers on the plea that she was executing the sale deed. Out of the consideration money of Rs. 800/-, Rs. 500/- was paid to Bidyadhar and balance amount was handed over to the plaintiff. The plaintiff had an implicit faith on her eldest son-in-law Bidyadhar who died subsequently in 1378 B.S. In Ashar 1381 B.S. defendant No. 3 Debendra came to possess the suit land described in Schedule Kha. He then disclosed that he had purchased the said property from defendant No. 1 Jhareswari who got the same from the plaintiff by virtue of deed of gift. At that time he further disclosed that the plaintiff had executed a deed of gift covering "Ka" schedule properties in favour of defendant No. 1. The plaintiff, thereafter, enquired from defendant No. 1 who affirmed and admitted sale of land of khas schedule to defendant No. 3. The plaintiff thereafter obtained the certified copy of the deed of gift.

6. It was further alleged by the plaintiff that she never consented for execution of any deed of gift nor she intended to make any gift of "Ka" schedule land to defendant No. 1 and it was further alleged by her that Bidyadhar, the son-in-law in collusion with defendant Nos. 2 and 3 and other witnesses and scribe to the deed had obtained the impugned deed of gift in favour of defendant No. 1 by exercising fraud, undue influence and misrepresentation. It was further alleged by her that the

contents of the impugned deed were never read over to her and she did not understand the contents of such deed. It was only represented to her that she was executing the sale deed. So, the plaintiff has come up with the suit praying for declaration that the impugned deed of gift dated 8.10.1972 and the sale deed by defendant No. 1 in favour of defendant No. 3 dated 23.5.1972 are null and void, inoperative and illegal and not binding on the plaintiff and she has also prayed for permanent injunction for restraining the defendants from interfering with her possession of the suit lands. 7. The defendant/appellant contested the suit by filing two separate W.S. in the suit contending, inter alia, that the suit is barred by Section 34 of the Specific Relief Act and that the plaintiff made a gift of the suit property in favour of the defendant No. 1 out of love and affection and also being satisfied with the service rendered by Bidyadhar. The defendant No. 1 has also claimed to be in possession of the suit property after the execution of the deed of gift and it has further been, claimed by her that she has transferred some of the lands to the defendant No. 3 on proper consideration. It has further been alleged by her that the plaintiff executed and registered the impugned deed after knowing the contents thereof and the plaintiff after the execution of the deed of gift was living in the house as a licensee under the defendant No. 1.

8. Mr. Chandra Sekhar Das, the learned counsel appearing for the appellant/defendant has contended that his client has come up in appeal against the judgment and decree of affirmation. Normally, concurrent finding of fact, arrived at by the Courts below upon consideration of the evidence and materials on record, are not to be disturbed by the second Appellate Court in the second appeal. But when either there is non-consideration of the material evidence or misreading of the evidence and materials on record by the first Appellate Court, the second Appellate Court is quite competent to look into the evidence and materials available before it to make its own assessment with regard to the evidence on record.

9. It has further been contended by him that in this case, the trial Court did not at all consider and make any finding with regard to the evidence of PW 10 and it was only before the Appellate Court that such finding was made by the First Appellate Court and also in doing so, the First Appellate Court has fell into error by making improper assessment of the evidence, adduced by PW 10.

10. He has further contended that in such a situation, the second Appellate Court is quite competent to make its own assessment with regard to the aforesaid evidence on record. In this connection, it has further been contended by him with reference to evidence of PW 10 that since even after lapse of 10 years, the plaintiff Kshema Dasi, since deceased had nourished love and affection for Jhareswari and Bidyadhar, in such event, it can be concluded upon such evidence that certainly there was some possibility by the plaintiff in making a deed of gift in favour of her eldest daughter, Jhareswari.

11. Mr. Das, learned counsel appearing for the appellant/defendant drawing my attention to the plaint allegation itself has submitted before me that the plaintiff in this case has not specifically pleaded fraud in the plaint. He has submitted further that in this case neither fraud has been proved in course of evidence by the plaintiff, nor there is any element of coercion in the plaint as also in the evidence and in such circumstances; the findings by both the Courts below to the effect that the impugned deed was vitiated by fraud and undue influence cannot at all be accepted and this should be regarded as findings against the weight of the evidence and as such it is untenable in law.

12. Mr. Das referring to Section 16 of the Indian Contract Act has submitted before me that in order to succeed in a case of "undue influence" one has to prove by cogent and material evidence, the following ingredients:--

1. Will or intention has to be proved for doing certain things.
2. Change has been affected by the domination of the other.

13. Sri Das has further contended that on the available materials it is quite clear that none of the two ingredients has been proved or established by the plaintiff by adducing any cogent and reliable evidence. So, relying only on the circumstantial evidence, both the Courts below were not at all justified in granting the decree in favour of the plaintiff holding that the impugned deed of gift was obtained by fraud and mis-representation.

14. He has further contended that the finding arrived at by both the Courts below being not based on the evidence and material on record, it should be termed as perverse one and in that the second Appellate Court should interfere with the findings arrived at by the Courts below and on the available materials this Court is quite competent to come to separate finding after giving its own assessment.

15. Mr. Ashok Jana, in opposing the contention of the learned counsel appearing for the appellant has contended that in paragraph 2 of the plaint, the plaintiff has made out a case of "undue influence" precisely in securing the aforesaid impugned document. The defendant in paragraph 10 of the W.S. has traversed the allegation of the plaint, which only contained evasive denial, and from paragraph 18 of the W.S. it will be crystal clear that defendant No. 1 and her husband were in a dominating position to influence the "will" or "intention" of the plaintiff for doing such things.

16. Mr. Jana has further submitted that "undue influence" is not always capable of direct proof and must depend on conclusion drawn from the nature of the transaction and from the circumstances in which it has its" origin. It is, therefore, necessary to examine very closely all the circumstances of the case. He has further submitted that it is true that initial burden of proving undue influence lies on the person who alleges it and in order to succeed or to raise a presumption of the

undue influence, it is essential to prove:--

1. Relationship of the contracting parties were such that one was in a position to dominate the will of the other; and that

2. The position was used to obtain an unfair advantage.

17. Both these must be proved specifically and on proof of these two facts the exercise of undue influence will be presumed.

18. He has further submitted that from the judgments of both the Courts below and from the materials and evidence on record, it has been clearly established that the plaintiff Khema Dasi due to her old age placed utmost reliance on the defendant No. 1 and her husband and her entire matters were looked after by them. Both the Courts below in course of their judgment have discussed the evidence and materials on record and have come to a specific finding with regard to the impugned deed so as to say that it was not a mental or conscious act of the plaintiff in executing the deed of gift.

19. Mr. Jana placing reliance on a decision reported in [Mst. Kharbuja Kuer Vs. Jangbahadur Rai](#), in the case of Mst. Kharbuja Kuer v. Jangbahadur Rai and Ors., has submitted that in India, "pardanashin" ladies have been given a special protection in view of the social conditions of the times; they are presumed to have an imperfect knowledge of the world, as by the pardah system they are practically excluded from social intercourse and communion with the outside world.

20. In this connection, he has further submitted that as regards the documents taken from paradanashin women the Court has to ascertain that the party executing them has been a free agent and duly informed of what she was about. The reason for the rule is that the ordinary presumption that a person understands the document to which he has affixed his name does not apply in the case of a pardahnashin woman. The burden of proof shall always rest upon the person who seeks to sustain a transaction entered into with a pardanashin lady to establish that the said document was entered into by her after clearly understanding the nature of the transaction. It should be established that it was not her physical act but also her mental act and this 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.

21. Sri Jana has further submitted that in connection with the present matter both the Courts below upon perusal of the evidence and materials on record and placing reliance on the similar ratio, as stated above, in the judgment of the Apex Court reported in AIR 1983 SC 1203 (supra) have come to a specific finding with regard to the impugned deed of gift itself holding that the transaction in question was void or in other words, the impugned deed of gift was never any mental and conscious act of the plaintiff as the plaintiff never executed it by understanding the contents and

purports of such deed.

22. So, even if there is no specific case of fraud and mis-representation, clearly pleaded and proved by the plaintiff in this trial, yet, there was clear pleading and the evidence adduced on behalf of the plaintiff to infer undue influence in executing the impugned transaction and since both the Courts below have come to a concurrent findings with regard to the impugned deed in question there is no earthly reason for this Court, sitting in second appeal, to disturb such concurrent findings arrived at by the Courts below.

23. Mr. Jana drawing my attention to Section 111 of the Indian Evidence Act has also submitted that the provisions of Section 111 read with provisions of Section 16 of the Indian Contract Act will make it clear that since the transaction entered into by persons between whom there was a fiduciary relationship, the burden of proof here in this particular case, rested upon the defendant. And as has been found by the both the Courts below that since the defendant/respondent has failed to discharge the aforesaid burden certainly both the Courts below were justified in coming to such a finding and such findings arrived at by the Courts below cannot at all be termed to be a perverse one necessitating interference by the second Appellate Court.

24. Mr. Jana also placed reliance on a decision reported in AIR 1975 Gau 30 in the case of Guljan Bibi v. Naziruddin Mia, and has stated further that the ratio of the aforesaid decision applies fully to the facts and circumstances of the present case.

25. Mr. Jana in elaborating his argument has submitted further that if a position of dominance, if proved to exist, is deemed to continue till its termination is established. When once it has been established that one party to the contract possessed a general influence and dominance over the "will" of another, it need not be shown how in the particular instance it was used, and it will be presumed to have been used unless contrary is shown.

26. Referring to the material and evidence on record, he has submitted that it has come out in the evidence on record that the defendant No. 1 and her husband had influence and dominance over the will of the plaintiff as it has come out in the pleadings as well as in the evidence that both of them used to look after the affairs of the plaintiff in all matters. And that being the position, both of them were in a dominant position to influence the "will" or "intention" of the plaintiff and by exercising such dominance they have influenced the "will" or "intention" of the plaintiff in securing the deed of gift, although the plaintiff never intended to execute the same.

27. He, therefore, submits that in view of the concurrent findings arrived at by the Courts below, placing reliance upon the aforesaid overwhelming evidence and materials on record that the impugned deed of gift was never any mental and conscious act of the plaintiff, there is no scope for this second Appellate Court to go

into such aspect as it does not come within the scope of the Section 100 of the CPC and the question as formulated in this appeal cannot be regarded as a substantial question of law involved in this appeal.

28. I have given my anxious considerations in respect of the submissions made by the parties before me. Here, in this case, upon perusal of the entire materials, available on record, it appears to me that the concurrent findings of the Courts below floating on facts, evidence and materials on record have laid both the Court below to come to a decision that the impugned deed in question was not the mental and conscious act of the plaintiff and this concurrent findings cannot be interfered by High Court in a routine and casual manner by substituting its subjective satisfaction in place of lower Court.

29. It is quite true that the second appeal cannot be decided on mere equitable grounds and the concurrent findings floating on facts also howsoever, erroneous cannot be disturbed by the High Court in exercise of the powers under this section and the substantial question of law has to be distinguished from a substantial question of fact.

30. It is now quite well settled that in a case where from a given set of circumstances two inferences are possible, one drawn by lower Appellate Court is binding on the High Court in second appeal and adopting any other approach is not permissible. The High Court cannot substitute its opinion for the opinion of the first Appellate Court unless it is found that the conclusions drawn by the lower Appellate Court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of pronouncements made by the Apex Court, or was based upon inadmissible evidence or arrived at without evidence.

31. In this connection, reference may be made to the decisions reported in [Kondiba Dagadu Kadam Vs. Savitribai Sopan Gujar and Others](#), in the case of Kondiba Dagadu Kadam v. Savitribai Sopan Gujar and Ors., and AIR 1999 SC 3067 in the case of Karnataka Board of Wakf v. Anjuman-E-Isma'il Madris-Un-Niswan as relied on by Mr. Jana, learned advocate appearing for the respondent/plaintiff.

32. Now upon ultimate analysis of the materials available and applying the ratio of the aforesaid two cases, I am rather prompted to hold that it cannot be said that conclusions drawn by the lower Appellate Court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of the pronouncements made by the Apex Court or were based upon inadmissible evidence or arrived at without the evidence. Rather the evidence and materials available in connection with this case go to suggest conclusively that the conclusions drawn by the lower Appellate Court was based on the evidence and materials on record and it was drawn upon established principles and procedure.

33. That being the position, I hold that no points which appear to be substantial question of law is there to be decided in this appeal.

34. In view of what I have stated in the foregoing paragraphs, I am to hold in conclusion that there is no merit in the contention of the learned counsel for the appellant/defendant and as such, the appeal should be dismissed.

In the result, the appeal fails. Accordingly, the judgment and decree under consideration are hereby affirmed. The appeal is accordingly dismissed.

Parties will bear their respective costs.