NAGABUSHANAM v. VENKATAPAYYA.

serious notice. The relief for the refund is undoubtedly an additional relief but in no sense a consequential relief; it is not a relief consequential upon the declaration.

My decision therefore is, that, so far as the relief of declaration is concerned, the case falls under Schedule II, article 17-A (i) and that the court-fee that the plaintiff has paid is proper. In regard to the refund claimed, *ad valorem* fee on the amount should be paid.

I make no order as to costs.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Varadachariar and Mr. Justice Burn.

1934, September 6.

A. L. RAMA PATTER AND BROTHERS BY PARTNER A. L. RAMA PATTER (PLAINTIFFS), APPELLANTS,

v.

MANIKKAM ALIAS LINGAPPA GOUNDER (THIRD DEFENDANT), RESPONDENT.*

Indian Contract Act (IX of 1872), sec. 16—Scope of—Indian Trusts Act (II of 1882), sec. 89—Effect of undue influence—English Law—Applicability of—Burden of proof.

Section 16 of the Indian Contract Act deals with the exercise of undue influence on one party to a contract by the other party, whether directly or in conspiracy with or through the agency of others. But apart from that section, the principle of English cases like *Maitland* v. *Irving*, (1846) 15 Sim. 437; 60 E.R. 688, has been made applicable here by section 89 of the Indian Trusts Act, with the result that, even in India, the onus lies on a third party, who takes the benefit of a transaction with notice or knowledge of circumstances raising a presumption or

* Appeal No. 398 of 1932.

probability of undue influence by the other party to the contract on the party complaining of undue influence, of proving that he (the third party) derived no unfair advantage or that the party complaining of undue influence acted as a free agent.

The dictum of VENKATASUBBA RAO J. in *Narayana Doss Balakrishna Doss* v. *Buchraj Chordia Sowcar*, (1927) 53 M.L.J. 842, to the effect that the third party's knowledge of fiduciary relationship between the parties to a contract puts the third party under the same disability as the other party who occupied the position of confidence, *approved*.

Semble.—Whether the observations of Lord SHAW in *Poosathurai* v. *Kannappa Chettiar*, (1919) I.L.R. 43 Mad. 546 (P.C.), about the exercise of undue influence "in conspiracy with or through the agency of others" are not wide enough to take in the full scope of the doctrine as illustrated by English cases.

APPEAL against the decree of the Court of the Subordinate Judge of South Malabar at Palghat in Original Suit No. 6 of 1932.

T. M. Krishnaswami Ayyar and *C. S. Swaminathan* for appellants.

Advocate-General (*Sir A. Krishnaswami Ayyar*), *C. Unnikanda Menon* and *K. Kuttikrishnan Nair* for respondent.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by VARADACHARIAR J.—The plaintiffs-appellants are a family of landlords and money-lenders in Palghat. Defendants 1 and 2 are brothers, and the third defendant is their nephew. They too owned extensive properties in the neighbourhood of Palghat, but have latterly got into difficulties and defendants 1 and 2 were adjudicated insolvents in 1932. The suit was laid for the recovery of a sum of about Rs. 58,000 due as per account, Exhibit A. The third defendant was the only contesting defendant and the question in the appeal relates to

RAMA PATTER v. LINGAPPA GOUNDER. — VARADACHARIAR J.

his liability. The claim in the appeal has been limited to a sum of Rs. 15,000 on the ground, perhaps, that the third defendant has not assets enough to yield anything more, or on the ground that the balance could be realised from the assets of first and second defendants. But this makes no difference so far as the question to be decided is concerned.

The point in dispute was embodied in one comprehensive issue, viz., whether the third defendant's signature to Exhibit A has not been obtained under circumstances mentioned in his written statement and whether, if so, he is not liable. The story in the written statement was that the third defendant has from his infancy been living with and under the protection of defendants 1 and 2 till October 1930, that, though he attained majority in 1928, he was in the habit of affixing his signature to any paper, if so directed by the first defendant, and he must have so signed in the plaintiffs' book, Exhibit A, without understanding the matter or making any enquiry whatever, because he feared the first defendant and believed that there would be no fraud or deception in the matter. It further alleged that he subsequently discovered that he had been defrauded in the matter, and that the plaintiffs who were well aware of the circumstances of the family had conspired with defendants 1 and 2 to get the third defendant involved in this liability for their own better security.

Exhibit A is an account book beginning from September 1928. But it is clear from the evidence that the plaintiffs had been lending moneys to defendants 1 and 2 for at least two years before

that date. Exhibit A is headed as an account of plaintiff's dealings with defendants 1 and 2. It begins with an entry, dated 29th of September 1928, whereby defendants 1 and 2 acknowledge liability for a sum of Rs. 13,702-11-0, said to be due for principal and interest under a pronote of earlier date. Between October 1928 and February 1929 there were further borrowings to a considerable extent; but no amount seems to have been repaid. In September 1929 defendants 1 and 2 wanted a further advance of Rs. 8,000; but, as they were heavily indebted to plaintiffs even by that time, the plaintiffs refused to lend more, unless defendants 1 and 2 gave security. According to the evidence of the first witness for plaintiff (who is one of the plaintiffs), the first defendant then said that it was not possible to give security at that time and that he would get his brother's son (third defendant) also to sign. The witness adds that, as the Vakil whom he consulted advised him that money might be advanced if third defendant also signed, he intimated the same to the first defendant, that accordingly the three defendants came to the plaintiffs' shop on the evening of 22nd September 1929 and received Rs. 8,000 after signing an entry in the plaintiffs' book (Exhibit A) in the following terms :—"Having admitted that I am liable for the balance of principal amount and interest and for future credit and debit found under this book, I have signed this." Seven days later, the account for the Malayalam year was struck and the three defendants signed on a one anna stamp below the entry showing the debit balance due on that date. It is on the strength of these signatures

RAMA PATTER v. LINGAPPA GOUNDER.

VARADACHARIAR J.

of the third defendant in Exhibit A that the plaintiffs seek to hold him liable.

The evidence shows that the third defendant's father had died in 1913, and the widow and the third defendant, then an infant, continued to live with defendants 1 and 2, who were in management of the family properties. The boy was at school up to March 1931, and in the partition suit (Original Suit No. 63 of 1922) which another uncle had filed against these defendants, the present first and second defendants were conducting a common defence on behalf of the third defendant as well, though his mother was the guardian *ad litem* on record. He attained majority in September 1928 but continued to live with defendants 1 and 2 till October 1930. Though in the plaint it was alleged that defendants 1 and 2 had borrowed the amounts shown in Exhibit A for the "common necessities" of the family of defendants 1 to 3, no serious attempt was made to prove this allegation. The onus of proving the same would by no means have been light, in view of the fact that the third defendant was only a nephew of the defendants 1 and 2 and defendants 1 and 2 were in possession of extensive properties yielding a large income. There have, no doubt, been litigations since 1922, in which considerable sums must have been spent. But as no attempt has been made to bind the third defendant on the ground of family necessity, we need not pursue this question. Mr. T. M. Krishnaswami Ayyar (for the appellants) suggested that, though the binding character of the loans could not be said to have been proved, the possibility of the utilization of the loans for family purposes

might have been one of the reasons that induced the third defendant to take upon himself an express liability for these loans, and to this extent, the presumption or inference of undue influence would be negatived. But there are no materials on the record to afford sufficient basis even for this argument.

There appears to have been considerable discussion in the lower Court as to the exact nature of the plea raised by the third defendant, namely, whether it is one of fraud or one of undue influence. But, as the matter has really to be dealt with on the facts appearing in the case, Mr. Krishnaswami Ayyar did not press this objection as to the form of the plea. After all, as shown by the judgment of Lord HARDWICKE in *Chesterfield (Earl of)* v. *Janssen*(1), the equitable jurisdiction based on undue influence is only a development of the principle of relief on the ground of fraud; see also *Lancashire Loans, Ld.* v. *Black*(2).

The defence of the third defendant was in substance set forth in Exhibit III, a notice which he sent to the plaintiff as early as 22nd October 1930. This was sent within a few days after the third defendant began to live separate from defendants 1 and 2. It has been suggested that it was sent at the instance of another uncle of the third defendant who had quarrelled with defendants 1 and 2 and who is now helping the third defendant. This might be true; but that is just the way the thing would have happened even if the third defendant's plea of undue influence by defendants 1 and 2 is well founded. We have only

(1) (1750) 2 Ves. Sen. 125; 28 E.R. 82.
(2) [1934] 1 K.B. 380, 403, 404.

RAMA PATTER v. LINGAPPA GOUNDER. — VARADACHARIAR J.

got to see whether the facts proved in the case support that plea and we are not much concerned with the motives or circumstances that led the third defendant to repudiate his liability.

The learned Subordinate Judge has found that

> "the plaintiffs were anxious to get the third defendant also to sign the hand-book as the money advanced was fairly large and as defendants 1 and 2 wanted more money. They must have therefore asked defendants 1 and 2 to get the third defendant also to sign the hand-book. . . . That the third defendant signed the book when he was under the influence of defendants 1 and 2 cannot be doubted. . . . I am of opinion that the third defendant did not appreciate the magnitude of the liability he was undertaking when he signed Exhibit A. . . . The plaintiffs can be said to have notice of the influence exercised on the third defendant by defendants 1 and 2. The first defendant was in a position to dominate the will of the third defendant . . . He has taken an unfair advantage over the third defendant."

As to the law, he said that, in the circumstances, the burden lay on the plaintiffs to show a free consent, i.e., that the third defendant had such protection as would secure to him a free and unfettered judgment, independent of any sort of control. Following the decision of VENKATASUBBA RAO J. in *Narayana Doss Balakrishna Doss* v. *Buchraj Chordia Sowcar*(1), the learned Subordinate Judge held that, on the facts found, the plaintiffs could not hold the third defendant liable.

Mr. Krishnaswami Ayyar contended that the third defendant sought to rely on the ground that the plaintiffs in collusion with defendants 1 and 2 fraudulently caused him to sign Exhibit A, and, no such fraud having been made out, the plaintiffs'

(1) (1927) 53 M.L.J. 842.

claim against the third defendant should have been upheld. He further pointed out that on more than one matter the third defendant has not spoken the truth and that his version of the transaction should not be accepted. Even if it were permissible to deal with the case as one of undue influence, he maintained that the onus lay on the third defendant to prove the exercise of undue influence and that it had not been discharged. In particular, he insisted that, whatever might have happened between defendants 1 and 2 on the one hand and the third defendant on the other, there was no proof that the plaintiffs exercised any undue influence over the third defendant and thereby obtained an unfair advantage. As to the law, he argued that the decision of VENKATASUBBA RAO J. in *Narayana Doss Balakrishna Doss* v. *Buchraj Chordia Sowcar*(1) ought not to be followed, because it is based upon the decisions of English Courts of Equity in disregard of the warning contained in several pronouncements of the Judicial Committee, viz., that in this country questions as to undue influence must be decided on the provisions of the Indian Contract Act alone and that the principles on which English Courts of Equity deal with similar questions are entirely inapplicable.

As we have already pointed out, the written statement of the third defendant sets out all material facts and his claim to relief must be decided with reference to them independently of their being labelled as fraud or undue influence; see *Smith* v. *Kay*(2), Per Lord CRANWORTH. The mere fact that on one or two matters the lower

(1) (1927) 53 M.L.J. 842. (2) (1859) 7 H.L.C. 750; 11 E.R. 299.

RAMA PATTER v. LINGAPPA GOUNDER. — VARADACHARIAR J.

Court was not prepared to accept the third defendant's evidence will not disentitle him to relief, for, in such cases, the conclusion of the Court rests not so much upon direct evidence showing that any deception was practised, as upon inference arising from the situation of the parties and the nature and effect of the transaction. That the transaction is seriously detrimental to the interests of the third defendant can admit of no doubt. With very little thought as to and without due appreciation of its nature and effect, the third defendant undertakes liability not merely for the amount actually advanced at the moment of his signing but also for all the advances taken by defendants 1 and 2 from the plaintiffs in the past and, what is more curious, for all loans which may be taken by them in the future. That defendants 1 and 2 stood in a fiduciary relation to the third defendant can again admit of no doubt; and that they used their influence to obtain an unfair advantage to themselves can scarcely be disputed.

It is noteworthy that defendants 1 and 2 have not been examined in this case. We are unable to agree with Mr. Krishnaswamy Ayyar that it was for the third defendant to examine them. It is true that at one stage the first defendant had been summoned on behalf of the third defendant, but the plaintiffs could not have been misled by this step, because they began to lead evidence only after the third defendant's case had been closed.

That the plaintiffs gained a substantial advantage by reason of the third defendant making himself jointly liable for the amounts advanced

and to be advanced to defendants 1 and 2 can scarcely admit of any doubt. It is also clear from the evidence on the plaintiffs' side that they knew of the circumstances of the defendants' family, and that the third defendant had only recently come of age. It is also fairly clear that it was at their instance that the third defendant was brought into the transaction.

With these indisputable circumstances it will be instructive to compare the findings on which FRY J. based his decision in *Bainbrigge* v. *Browne*(1) in favour of the creditor. The learned Judge there found that the creditors did not even know the age of the plaintiff who sought relief on the ground of undue influence, that they did not know that the plaintiff was resident under his father's roof or was in any way under his control, that they had reason to believe he was assisted by a solicitor as well as by certain family friends and were led to believe that the plaintiff was acting independently of the father ; Cf. *Cobbett* v. *Brock*(2).

As regards the part taken by the plaintiffs in the exercise of undue influence, there can be no doubt that under the English authorities, the result will be the same whether the plaintiffs themselves exercised the undue influence or took the benefit of a transaction with notice that that transaction was the result of undue influence, exercised by their debtors, defendants 1 and 2. As observed by VENKATASUBBA RAO J. at page 852 of *Narayana Doss Balakrishna Doss* v. *Buchraj Chordia Sowcar*(3), once it is shown that the plaintiffs

(1) (1881) 18 Ch. D. 188. (2) (1855) 20 Beav. 524 ; 52 E.R. 706.
(3) (1927) 53 M.L.J. 842.

RAMA PATTER v. LINGAPPA GOUNDER.

VARADACHARIAR J.

were aware of the existence of a fiduciary relationship between the first and third defendants, they are under the same disability as the party who occupied the position of confidence.

Mr. Krishnaswami Ayyar's main contention therefore was that, in this country, the question must be decided solely with reference to the terms of section 16 of the Contract Act, *Lala Balla Mal* v. *Ahad Shah*(1), *Raghunath Prasad* v. *Sarju Prasad*(2) and *Gafur Mohammad* v. *Mohammad Sharif*(3); that, under that section, the undue influence must be shown to have been exercised by the *other* party to the contract, whether directly or in conspiracy with or through the agency of others, *Poosathurai* v. *Kannappa Chettiar*(4); and that mere notice or knowledge of circumstances raising a presumption or probability of undue influence as between the defendants *inter se* did not throw on the plaintiffs the onus of proving that they had derived no unfair advantage or that the third defendant acted as a free agent.

It may be conceded that section 16 of the Contract Act deals in terms with the exercise of undue influence by one party to the contract on the other. Indeed, this is the ordinary type of cases of undue influence. The question of the effect of undue influence exercised by somebody other than the grantee or promisee does not seem to have arisen in the cases that went up to the Judicial Committee from India, except in *Poosathurai* v. *Kannappa Chettiar*(4). We are not sure whether the observation of Lord SHAW in that case about the exercise of influence "in conspiracy with or through the agency of others"

(1) (1918) 35 M.L.J. 614 (P.C.).
(2) (1923) I.L.R. 3 Pat. 279 (P.C.).
(3) (1932) 63 M.L.J. 54 (P.C.).
(4) (1919) I.L.R. 43 Mad. 546 (P.C.).

is not wide enough to take in the full scope of the doctrine as illustrated by the English cases ; for "agency" may in such cases well include instances in which the creditor or transferee knowingly or intentionally leaves everything in the hands of his principal debtor. As observed by their Lordships in *Turnbull & Co.* v. *Duval*(1), the creditor who conveniently leaves everything to be managed by another "must abide the consequences". Further examination of the question became unnecessary in *Poosathurai* v. *Kannappa Chettiar*(2) because the Judicial Committee came to the conclusion that the transferee had obtained no unfair advantage and that the sale had not been shown to have been for an undervalue.

Confining ourselves however to the statute law of India, it is clear that the principle of the English Cases referred to by VENKATASUBBA RAO J. has been made applicable in this country by section 89 of the Indian Trusts Act. As early as *Roop Laul* v. *Lakshmi Doss*(3) the application of these rules in this country was recognized by SANKARAN NAIR J. (see pages 21 and 22) and when that case went up on appeal before three Judges, they too observed that it made no difference that the claim under the deed was made not by the person who exercised the undue influence but by a third party ; see *Lakshmi Doss* v. *Roop Laul*(4). In that particular case the third party was a *volunteer* and some of the earlier English cases are also cases relating to volunteers, but numerous later decisions in England have applied the same principles even to creditors or transferees for value, provided they had notice of all the relevant facts.

(1) [1902] A.C. 429.
(2) (1919) I.L.R. 43 Mad. 546 (P.C.).
(3) (1905) I.L.R. 29 Mad. 1.
(4) (1906) I.L.R. 30 Mad. 169.

RAMA PATTER v. LINGAPPA GOUNDER.

VARADACHARIAR J.

In view of Mr. Krishnaswami Ayyar's insistence on the inapplicability of the English rule, it is interesting to find, that, in the footnote to section 89 of the Indian Trusts Act in Stokes' Anglo-Indian Codes, reference is made to *Maitland* v. *Irving*(1) (though the reference is wrongly printed as 15 Simon 43). Its significance lies in the fact that, as stated by him in the introduction, Dr. Whitely Stokes was the draftsman of the Indian Trusts Act and the footnotes refer to the English decisions on which the sections were founded. *Maitland* v. *Irving*(1), thus relied on by him, was a case very much like the present. A and B consented to postpone the payment of £5,000 due to them from C in consideration of C procuring and giving them the plaintiff's guarantee for that sum ; and C at the same time informed A and B that the plaintiff was his niece and was possessed of considerable property, that she had resided with him for some time, that he had been her guardian and that she had been of age for about a year and a half. The guarantee thus given was held unenforceable by the creditors. The Vice-Chancellor observed :

"It seems very extraordinary that with full knowledge of those circumstances, they should have at once acceded to the proposal without making any enquiry or taking any pains to ascertain whether the young lady was a free agent and perfectly willing, with a full knowledge of the consequences, to do what the guardian said he would invite her or propose to her to do . . . They must have perceived that by adopting the suggestion of McLean (the debtor) they relied on the influence that he had over the young lady . . . Knowing the defenceless situation of the young lady, they combined with McLean, who disclosed it to them, in order that advantage might be taken of her defenceless situation for

(1) (1846) 15 Sim. 437 ; 60 E.R. 688.

the benefit of all the three and my opinion is that they must all three be considered as standing in the same situation."

When it is found that the principle of this decision has been adopted by the Indian Legislature in enacting section 89 of the Trusts Act, there is no substance in the contention that later English authorities of the same type furnish no guidance to us in the application of the rule.

It is unnecessary to refer again to the cases reviewed by VENKATASUBBA RAO J. We therefore content ourselves with noting the latest decision of the Court of Appeal in England in *Lancashire Loans, Ld.* v. *Black*(1). A married daughter living with her husband and away from her mother had, at the mother's request, entered into transactions with the mother's creditors with a view to help her. The Court of Appeal refused to hold the transactions binding on the daughter. LAWRENCE L.J. observed that in cases of this kind

> "the question is not merely whether the son or the daughter knew what he or she was doing, had done or proposed to do, but how the intention was produced . . . The law protects young persons of an impressionable age, when gratitude, affection and respect for a parent are fresh and strong, not by curtailing their capacity to deal with others but by binding the consciences of those who deal with them . . . The mother seems to have taken it for granted that she could get the daughter to comply with her request . . . and it never seemed to have occurred to the daughter to do otherwise than accede to whatever her mother asked her to do . . . The transaction was never properly explained to the daughter and she did not fully understand what she was doing."

As to the position of the creditors, the Lord Justice said :

> "It is plain that they knew or had notice of all the relevant facts . . . They were permitting, if not inducing,

(1) [1934] 1 K.B. 380.

RAMA PATTER v. LINGAPPA GOUNDER.

VARADACHARIAR J.

a young woman . . . to enter into a transaction the whole burden of which they anticipated would fall on her . . . They are in no better position than the mother would have been in, had the daughter assigned her reversion directly to her, instead of to the respondents, for her benefit."

[See also *O'Connor* v. *Foley*(1), *Kempson* v. *Ashbee*(2) and the cases collected in the note in 16 Madras Law Journal, page 252, of the journal portion.]

With reference to the observation of BROUGHTON J. in *Raj Coomar Roy* v. *Alfuzuddin Ahmed*(3) from which VENKATASUBBA RAO J. dissents, we may state that, even there, the learned Judge does not seem to have felt any doubt as to the applicability of the English rule. It does not even seem to us wrong to say, as he did, that where a third party stands in no confidential relation to the promisor or grantor, the onus does not *in the first instance lie* on the former to show that no undue influence was used. It is only when he is found or could be assumed to have had notice of the exercise of undue influence by another or at least of circumstances raising a presumption or probability of undue influence that the onus will be shifted on to him.

We are of opinion that the principles followed by Courts of Equity in England in dealing with similar transactions are equally applicable in this country and, judging the suit transaction by those principles, the plaintiffs cannot hold the third defendant liable. The appeal therefore fails and is dismissed with costs.

G.R.

(1) [1905] 1 Ir. Rep. 1. (2) (1874) L.R. 10 Ch. App. 15.
(3) (1881) 8 C.L.R. 419.