PRIVY COUNCIL

P. C.*
1934
March, 22

SOMESHWAR DUTT *v.* TRIBHAWAN DUTT AND ANOTHER, AND CROSS-APPEAL

[On Appeal from the Chief Court of Oudh]

Limitation—Undue Influence—Suit to set aside Deed of Gift—Time from which limitation runs—Privy Council Practice—Pleadings.

Limitation of a suit to set aside a deed of gift on the ground that it was obtained by undue influence is governed by article 91 of the Indian Limitation Act, 1908, schedule I, and the three years period runs from the date when the plaintiff discovered the true nature of the deed, not from the date when he escaped from the influence by which he alleges that he was dominated.

Janki Kunwar v. *Ajit Singh* (1), followed.

To establish a case of undue influence it is not sufficient to raise an atmosphere of suspicion, there must be clear and definite evidence of the case propounded. The acts connoted by undue influence range themselves, broadly speaking, under the heads of fraud and coercion; in the present case there was not evidence of either.

The Judicial Committee are disinclined to stress the structure of pleadings too strictly, if fair notice of the case to be made has been given and issue has been joined on an inquiry faintly adumbrated.

Decree of the Chief Court reversed.

CONSOLIDATED cross-appeals from a decree of the Chief Court of Oudh (October 13, 1930) which reversed a decree of the Subordinate Judge of Gonda (September 9, 1929) and decreed the plaintiffs' suit in part.

The suit was instituted on May, 12, 1926, by the two respondents to the first appeal against the appellant therein. The chief matters for determination in the present appeal was (*a*) whether a deed of gift executed on May 15, 1914, by the plaintiff Tirbhawan Dutt in favour of his elder brother Someshwar should be set aside; (*b*) whether the right to sue to have it set aside was barred by limitation.

The facts of the case are fully stated in the judgment of the Judicial Committee.

Present: Lord BLANESBURGH, Lord ALNESS, and Sir JOHN WALLIS.

(1) (1887) I.L.R., 15 Cal., 58; L.R., 14 I.A., 148.

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The Subordinate Judge dismissed the suit. He rejected the case of misrepresentation made by the plaintiffs, and held that upon the pleadings it was not open to them to base their claim upon undue influence; he held further that a suit on the latter ground was barred by the Indian Limitation Act, 1908, schedule I, article 91.

An appeal to the Chief Court was heard by HASAN, C. J., and PULLAN, J. and was allowed. Upon the evidence the learned Judges were of opinion that plaintiff No. 1 was not a person of ordinary intelligence capable of managing his own affairs, and that, having regard to section 16 of the Indian Contract Act, 1872, the defendant was to be deemed to have been in a position to dominate his will. They held that apart from the question of the mental capacity of plaintiff No. 1 to understand the deed of gift it should be set aside on the ground of undue influence, and that the suit was not barred by article 91. In their opinion the undue influence persisted so long as plaintiff No. 1 remained with the defendant, namely until August, 1923, and that no statements by plaintiff No. 1 during that period could be taken as proof that he had full knowledge of the facts. A decree was made for possession of the majority of the properties claimed with mesne profits. As to some of them, which were claimed as being purchased out of the proceeds of transferred properties, the claim was rejected on the facts; hence the cross-appeal.

1934. February 15, 16, 19, 20, 22, 23. *Dunne, K. C.* and *Pringle,* for the defendant. *De Gruyther, K. C.* and *Wallach,* for plaintiff No. 1.

The arguments proceeded chiefly upon the evidence. Reference was made for the defendant, on the insufficient pleading of undue influence, to *Abdool Hoosein Zenail Abadin* v. *Turner* (1), *Mahomed Buksh Khan* v. *Hosseini Bibi* (2), *Ismail Mussajee Mookerdum* v.

(1) (1877) I.L.R., 11 Bom., 620; L.R., 14 I.A., 111.

(2) (1888) I.L.R., 15 Cal., 684; L.R., 15 I.A., 81.

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Hafiz Boo (1), and Order VI 2, 4; and on limitation of the suit, to *Rani Janki Kunwar* v. *Raja Ajit Singh* (2), and *Raja Rajeswar Dorai Arunachellan Chettiar* (3). For plaintiff No. 1, reference was made on undue influence to *Moxon* v. *Payne* (4), *Prem Narain Singh* v. *Parasram Singh* (5), *Farid-un-nisa* v. *Mukhtar Ahmad* (6), and *Tara Kumari* v. *Chandra Mauleshwar Prasad Singh* (7); on the practice of the Judicial Committee as to pleadings to *McLean* v *McKay* (8); on limitation to *Rahimbhoy Hubibbhoy* v. *Turner* (9), *Nibaran Chandra* v. *Nirupama Debi* (10), *Rangnath Sakharam* v. *Govind Narasinv* (11), also to the Indian Limitation Act, 1908, section 18

March 21. The judgment of their Lordships was delivered by Lord ALNESS.

The suit in the Court of the Subordinate Judge of Gonda out of which this appeal arises was brought by two plaintiffs (1) Pandit Tirbhawan Dutt, and (2) Thakur Jai Indar Bahadur Singh, with whom the first plaintiff, before its institution, entered into an agreement, whereby the second plaintiff undertook to pay the costs of the suit, on the footing that he should receive half of the property recovered in the proceedings. The Chief Court of Oudh, from which this appeal comes, have held that that agreement was not in the circumstances champertous. It is unnecessary that their Lordships should express any opinion on this point, and they refrain from doing so. The suit was directed against Pandit Someshwar Dutt, the elder brother of plaintiff No. 1. Its object was to recover possession of certain properties which the plaintiffs allege are being wrongly retained by the defendant. The learned Subordinate Judge, by decree dated the

(1) (1908) I.L.R., 33 Cal., 773; L.R., 33 I.A., 86.
(2) (1887) I.L.R., 15 Cal., 58; L.R., 14 I.A., 148.
(3) (1913) I.L.R., 38 Mad., 321.
(4) (1887) I.L.R., 8 Ch., 851, 886.
(5) (1877) L.R., 4 I.A., 101.
(6) (1925) I.L.R., 47 All., 703; L.R., 52 I.A., 342.
(7) (1931) I.L.R., 11 Pat., 227; L.R., 58 I.A., 450.
(8) (1873) L.R., 5 P.C., 327.
(9) (1892) I.L.R., 17 Bom., 341, L.R., 20 I.A., 1.
(10) (1921) 26 C.W.N., 517.
(11) (1904) I.L.R., 28 Bom., 639.

9th September, 1929, dismissed the suit. On appeal the Chief Court of Oudh, on the 13th October, 1930, in substance decreed it. The defendant appeals.

In the sequel, inasmuch as plaintiff No. 2 has no concern with the merits of the case, plaintiff No. 1 will be referred to as "the plaintiff" where that expression is used.

In 1894 the mother of the plaintiff and the defendant died, survived by her husband, and by the two sons referred to. They became jointly interested on her death in certain immovable property left by her. The defendant was born on the 22nd December, 1887; the plaintiff was born on the 29th April, 1890. After their mother's death, their father managed the property of the infant children till his death in 1899. In that year the District Judge appointed the uncle of the plaintiff and defendant guardian of their persons and property. The plaintiff and defendant both married at an early age—the plaintiff's wife being one Ram Dulari, with a brother by name Badri, whose questionable activities are very prominent in the subsequent history of the plaintiff. In December, 1908, the defendant attained majority, and in 1909 his uncle was discharged from his office as guardian of the person and property of the defendant, and also from his office as guardian of the property of the plaintiff. In March, 1911, the family, other than the plaintiff, went to Mussoorie. On the 29th April, 1911, the plaintiff attained majority, and on the same date his uncle applied for and obtained a discharge from the office of guardian of his person. In July, 1911, the defendant and the plaintiff executed a general power of attorney in favour of their ex-guardian, authorising him to manage the property on behalf of both. Thinking, apparently, that the registrar might raise some question about the mental capacity of the plaintiff because of his appearance or otherwise, a certificate was obtained from Colonel Rennie, at the instance of the defendant, affirm-

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ing the mental capacity of the plaintiff. The document was duly registered.

In May, 1911, the plaintiff had joined the family party at Mussoorie. Then followed some trouble with the plaintiff's wife, who had disappeared under circumstances which were not regarded as creditable. In point of fact, to avoid scandal, it was given out that she was dead. In February, 1912, the plaintiff's wife took proceedings for the recovery of certain lost jewellery, but these have no direct bearing on the issues in this case, and need not, therefore, be referred to in detail.

Next followed, in June, 1912, a partition suit, in which the plaintiff, at the instigation of Badri, sought to obtain his half share in the property held jointly by him and his brother. This suit was defended by Someshwar Dutt on the alleged ground, amongst others, that the plaintiff was insane and an idiot. It was ultimately compromised, and the property was equally divided between the plaintiff and the defendant.

On the 28th June, 1912, the defendant applied to have the family property placed under the care of the Court of Wards, asserting again that the plaintiff was quite incapable of managing his own affairs. After certain procedure, the petition was ultimately refused In connection with these proceedings certificates regarding the mental state of the plaintiff were obtained, and they have been much canvassed before the Board. The plaintiff, still being under the influence of Badri, then proceeded to bond his share in the family property, in order to obtain loans from money-lenders at a high rate of interest.

In May, 1914, the plaintiff, escaping from Badri and his surroundings came to live with the defendant at Sitapur. On the 12th May, 1914, the plaintiff executed a power of attorney in favour of his uncle as his mandatory.

On the 15th May, 1914—a critical date—the plaintiff executed a deed of gift of his whole property in favour

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of the defendant; and, of even date, the defendant undertook, by deed, subject to certain conditions, to maintain the plaintiff. On this, mutation proceedings followed, and the defendant was entered on the register, instead of the plaintiff, as now being in possession of the latter's property. In these mutation proceedings the plaintiff admitted that he had executed a deed of gift in favour of the defendant.

Thereafter certain proceedings were instituted by the plaintiff against Badri and other persons. It is unnecessary to resume them in detail. What is more important is that, in August, 1917, the plaintiff instituted proceedings against the defendant, alleging that the latter was not paying him the allowance due to him under the deed of maintenance to which reference has already been made.

Such, in brief and scanty but, for present purposes, probably sufficient outline, is the history of the proceedings which led up to the suit out of which this appeal arises, the object of which was to get rid of the deed of gift of the 15th May, 1914.

The problem with which, in reference to that suit, the Board is *in limine* confronted is to determine the ground on which it is based That basis must, of course, be sought for and found in the plaint and relative pleadings. So regarding the enquiry, their Lordships are satisfied that the Subordinate Judge was right in holding that the basis of the suit is fraudulent misrepresentation by the defendant to the plaintiff of the character of the principal deed which the latter was invited to sign, and did sign. It was represented by the defendant to the plaintiff, according to the plaint, to be a deed of management of his property only, whereas in truth it was a deed of gift of his entire estate. Having regard to the structure of paragraphs 10 and 13 of the plaint, and the rejoinder made, in which the plaintiffs themselves declare that the limitation period applicable is one of 12 years, the basis of the suit seems

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to their Lordships to be a matter which is too plain for argument. The deed, owing to the fraudulent misrepresentation by the defendant of its nature and effect, is said to have been a nullity, and not therefore binding on the plaintiff. No substantive case of undue influence, to which a limitation period of three years would have been applicable, and the result of which, had it been exercised, would have been that the deed was voidable only, is raised. Their Lordships agree in that matter with the Subordinate Judge and differ from the Chief Court.

The pleadings do, however, disclose that, while fraudulent misrepresentation is the basis of the claim made, the weakness of mind of the plaintiff on the one hand, and the commanding position of the defendant on the other hand are alleged to have rendered the fraud feasible. These allegations appear to their Lordships to be merely ancillary to the main charge, and do not present a substantive case of undue influence. Their Lordships are disinclined to stress the structure of the pleadings in a suit too strictly, if fair notice of the case to be made by the plaintiff has been given, and issue has been joined on an enquiry but faintly adumbrated in the pleadings (cf. *McLean* v. *McKay*) (1). Even so, their Lordships cannot differ from the conclusion on this matter at which the Subordinate Judge arrived.

In that view, the most convenient avenue of approach to the problem before the Board will be to enquire how stands the evidence regarding (*a*) the alleged mental deficiency of the plaintiff, and (*b*) the domination over him said to have been exercised by the defendant—these being regarded as but ancillary and introductory to the main charge.

On the question of the mental condition of the plaintiff there is a large mass of evidence—much of it of a meticulous and unhelpful character. Certain facts, however, stand out, and do not admit of discussion or

(1) (1873) L.R., 5 P.C., 327, 337.

debate. This suit is, as has already been stated, instituted by two plaintiffs. The first plaintiff is tendered as a person in full possession of his senses, who does not need to invoke the aid of a next friend, and who comes into court avowing that he has made a certain agreement relating to his property with the second plaintiff (an associate, it is suggested, of Badri), which he must, in the circumstances, be assumed to have understood. The actual case made for the plaintiff is that he is a fool. The complexion of the present suit, as explained, affords a bad start to a case of that kind. But there is more—much more—than that. All that the plaintiff has said and done for a number of years would seem to belie the idea that he is a mere puppet or a simpleton. He gave evidence for five days before the Subordinate Judge in these proceedings, and the Judge, in language which it may not be possible to applaud as entirely felicitous, held him merely to be "a little below the ordinary type of sense." That evidence, which their Lordships have carefully read and weighed, cannot, they think, be reconciled with the view that the plaintiff is a simpleton. He withstood cross-examination on a number of complicated transactions better than many men of normal intelligence could do. Moreover, the plaintiff instituted, over a period of years, one Court proceeding after another, some of which are detailed in the statement of facts *supra*, and one of which included a suit for his proper maintenance by the defendant under one of the deeds which he (the plaintiff) now seeks to impeach and avoid. The plaintiff, moreover, entered into a variety of agreements, with which he does not quarrel; and in many other ways he demonstrated his capacity and intelligence. As regards the medical evidence, a number of doctors were examined—several for the plaintiffs and several for the defendant—as to the plaintiff's mental state. The earlier certificates, to which reference has already been made, were also canvassed, and it is enough to say that the net yield of

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their testimony, in their Lordships' opinion, may be fairly regarded as neutral.

In the result, their Lordships agree with the Subordinate Judge in affirming the plaintiff's mental capacity, and in negativing, as he plainly did, the issue whether the plaintiff is of weak intellect.

As regards the alleged domination of the plaintiff by the defendant—treating that question also as ancillary to the main question of fraudulent misrepresentation—their Lordships cannot discover any evidence of pressure, far less of coercion, exercised by the defendant over the plaintiff. The latter does not in terms assert any such pressure or coercion. He, no doubt, says that he signed the deeds impeached "at the instance of my brother"; but that is far short of a case to the effect that the defendant, taking advantage of his superior position, impetrated the deeds from the plaintiff. The plaintiffs, in the opinion of the Board, seek to substitute an atmosphere of suspicion for clear and definite evidence of the case which they propound in their pleadings. This will not, in the opinion of the Board, do.

Their Lordships, accordingly, unhampered by any proved weakness of mind on the part of the plaintiff, and by any proved domination over him by the defendant, proceed to the main enquiry in the suit, which is this—Does the evidence disclose that the deed of gift was obtained by the defendant from the plaintiff by fraudulent misrepresentation of its character? Of misrepresentation, fraudulent or otherwise, there is in this case no substantive evidence at all. Indeed, the plaintiff in his testimony nowhere makes that charge. In any event, it is negatived by the defendant's evidence. The deed is plain in its terms, and was, on the evidence, duly explained to the plaintiff before signature, and was fully understood by him. Their Lordships cannot refrain from adding that the Chief Court did not accurately state the issue in the case. It was an issue of fraudulent misrepresentation—nothing less, nothing more.

Their Lordships accordingly have no hesitation in agreeing with the Subordinate Judge that the case of misrepresentation which the plaintiffs set out to prove is not established. Indeed, in their Lordships' view, it is negatived. Their Lordships desire to add that, having carefully scrutinized the judgment of the Chief Court, they have been unable to discover that that Court differed from the Subordinate Judge in his finding on this topic.

Their Lordships think it proper to determine whether the attitude of the defendant to the plaintiff was that of an altruist or of a villain. Counsel for the plaintiffs did not hesitate to espouse the latter theory, and attributed to the defendant a series of ingenious machinations which, according to their contention, bear out that view. Their Lordships cannot, however, accept that contention, which appears to be disconform from the view which was adopted and expressed by the Chief Court—a view fully borne out by the evidence.

Their Lordships are therefore prepared to hold, and do hold, that, regarding the plaintiffs' substantive. and indeed only, case as one of fraudulent misrepresentation, that case fails.

The Board are, however, unwilling to rest their decision solely upon a view which depends largely on the state and structure of the pleadings. They are therefore willing to assume—contrary to the view already expressed, and contrary also to the view of the Subordinate Judge—that a substantive case of undue influence is open to the plaintiffs on the pleadings. Their Lordships would in the first place observe that the Chief Court, as they read their judgment, do not affirm that, on the evidence, a case of undue influence has been established. The Chief Court ride off on what they describe as a question of law relating to undue influence, without in terms affirming its existence. Now their Lordships have already expressed the opinion that, treating the case of undue influence as ancillary to the

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substantive case of fraud, the latter case is not made out by the evidence, and they do not propose to repeat in this connection what they have already said. The evidence for the defence, moreover, which their Lordships are prepared to accept, negatives any such case—assuming, contrary to their Lordships' opinion, that a *prima facie* case of undue influence had been made out in evidence by the plaintiffs. On what acts are connoted by the phrase "undue inflence," Lord CRANWORTH in the case of *Boyse* v. *Rossborough* (1), said: "It is sufficient to say that, allowing a fair latitude of construction they must range themselves under one or other of these heads—coercion or fraud." Of neither is there, in their Lordships' opinion, evidence in this case. Accordingly the plaintiffs' case, in so far as based on undue influence, assuming it to be open to them, like their case on fraudulent misrepresentation, also fails.

One further consideration on this head falls to be mentioned. If a substantive case of undue influence may be deemed—contrary to their Lordships' view—to have been disclosed in the pleadings, and established in evidence, then the present suit is plainly barred by time, as the Subordinate Judge held. In the view taken by their Lordships, the plaintiff, not being of weak intellect, was aware of the character of the transaction at the date when it was entered into. But, apart from that, the plaintiff, on his own confession, became aware of the true character of the deed which he signed within a few months of its execution. It was suggested that the phrase "a deed of gift" may be ambiguous, and that in a sense a deed of management may be regarded as a deed of gift. But, even assuming that to be so, the plaintiff makes it quite clear, in the passage cited, that he came to know, a few months after its execution, that he had signed, not a deed of management, but a deed of gift of his property. If that be so, the suit is plainly out of time, and is barred by article 91 of the Limitation

(1) (1857) 6 H.L.C., 1, 49; 10 E.R., 1192, 1211.

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Act (cf. *Rani Janki Kunwar* v. *Raja Ajit Singh*) (1). The error into which the Chief Court fell, in their Lordships' opinion, is that they thought the three years permitted by the Limitation Act began to run, not from the discovery of the plaintiff of the true nature of the deed which he had signed, but from the date when he escaped from the influence by which, according to the plaintiff, he was dominated. Whether the facts as proved bring the claim within the limitation period even on this view is a question on which their Lordships express no opinion. It suffices to say that for the doctrine of the Chief Court their Lordships are unable to find any sufficient justification.

Their Lordships will therefore humbly advise His Majesty that the appeal of the defendant should be allowed, and that the decree of the Subordinate Judge of the 9th September, 1909, be restored. It follows that the cross-appeal falls to be dismissed. The plaintiffs must pay the costs here and in the Chief Court.

Solicitors for defendant-appellant: *Ranken Ford and Chester.*

Solicitors for plaintiffs-respondents: *T. L. Wilson and Co.*

REVISIONAL CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava and Mr. Justice J. J. W. Allsop

J. HOLLOWAY (DEFENDANT-APPLICANT) *v.* J. HOLLAND (PLAINTIFF-OPPOSITE PARTY)*

1933
October 4

Limitation Act (IX of 1908), Articles 36 and 115—Contract Act, section 151—Defendant borrowing plaintiff's car—Car meeting an accident while driven by defendant—Negligent driving —Defendant coming in collision with a tonga, *while trying to pass a lorry—Defendant's failure to hold up the car, when he saw a* tonga *coming from opposite direction, whether negligent—Damages to the car—Suit to recover amount spent in repairs—Suit governed by article 115, Limitation Act and not article 36.*

*Section 25, Application No. 61 of 1933, against the order of M. Humayun Mirza, Judge, Small Cause Court, Lucknow, dated the 10th of July, 1933.

(1) (1887) I.L.R., 15 Cal., 58; L.R., 14 I.A., 148.