APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Knight.

GANESH NARAYAN NAGARKAR (ORIGINAL PLAINTIFF), APPELLANT, *v.* VISHNU RAMCHANDRA SARAF AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1907. *September* 5.

Indian Contract Act (IX of 1872), sec. 16—Undue influence—Urgent need of money—Loan borrowed by a person in urgent need of money—Promise to pay a time-barred debt—Unfair and unconscionable bargains—Fraud—Coercion—Equity.

The defendant, a Karkun in the Government service, being heavily indebted and being very much harassed by his creditors, applied to the plaintiff for a loan on a mortgage. The plaintiff agreed to lend provided the defendant executed a *khata* for the payment of Rs. 307-4-0, originally due by the latter's father but which in 1894 had been held to be time-barred in a suit brought by the plaintiff, and also for the payment of Rs. 25, the costs of that suit. The defendant accordingly on the 16th September 1895 passed a *khata* for Rs. 332-4-0, for the amount due under which the defendant finally passed a promissory note for Rs. 600 on the 27th August 1901. Upon this promissory note the present suit was brought. The Subordinate Judge held that the defendant received from the plaintiff only Rs. 28 on the 16th September 1895 of which Rs. 10 had been repaid; and passed a decree for Rs. 36 (*viz.*, Rs. 18, the amount of principal, and Rs. 18 as interest). On appeal, the District Judge varied the decree by allowing plaintiff's claim to the further extent of Rs. 307-4-0; and disallowed the rest of the claim on the ground that it was vitiated by undue influence which the plaintiff exercised over the defendant. On appeal :—

Held, that the plaintiff's claim ought to be allowed in full. If, according to law, a promise to pay a debt barred under the Statute of Limitations is valid and is supported on the principle that in so promising the debtor is doing what every honest man, morally speaking, ought to do and would do, the same principle ought equally to apply to a further promise to pay the said debt with interest, because interest is only accessory to the principal, and is paid to the creditor because the latter has been deprived of the use of his money and the debtor has had the benefit of it.

Under section 16, clause 1, of the Indian Contract Act (IX of 1872), when two persons enter into a contract, first, there must be subsisting between them some relation of the kind described in the section and secondly, the dominating position arising out of that relation must have been used by the party holding that position to secure an *unfair* advantage over the other party.

* Second Appeal No. 601 of 1906.

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When a man who is in urgent need of money on account of his poverty and pecuniary difficulties asks for a loan from another, that other is in one sense in a position to dominate the will of the former by proposing his own terms and getting the borrower to agree to them. The borrower's necessity is in such cases the measure of the terms agreed to. That is a feature of every contract of money-lending, where the borrower is a man without credit and the lender is exposing his money to considerable risk. But that is not the vague kind of relation and domination contemplated by the plain terms of clause 1 of section 16 of the Indian Contract Act (IX of 1872).

There are well-known relations such as those of guardian and ward, father and son, patient and medical adviser, solicitor and client, trustee and *cestui que trust* and the like which plainly fall within clause 1 of the section. Where no such specific relations exist and the parties are at arm's length, being strangers, undue influence may be exerted, but its existence must be proved by evidence; and in such cases, the nature of the benefit, or the age, capacity, or health of the party on whom the undue influence is alleged to have been exerted are of great importance. In short, the test is, confidence reposed by one party and betrayed by the *other*, which means that there must be an element of fraud or coercion, under either of which the acts constituting undue influence must range themselves.

The expresion "unfair advantage" in clause 1 of section 16 of the Indian Contract Act (IX of 1872) is used as meaning an advantage obtained by unrighteous means.

A Court of Equity will not set aside a contract, merely because it flows from moral, not legal, obligations, unless it was proved that the defendant was forced, tricked or misled into it by the plaintiff by means of fraud, using that word not merely in the restricted sense of actual deceit, but in the larger sense of an unconscientious use of power arising out of certain circumstances and conditions, and showing that the defendant having been victimised by the plaintiff's unfair and improper conduct was unable to understand what he was doing.

SECOND appeal from the decision of C. Fawcett, District Judge of Ahmednagar, varying the decree passed by H. A. Mohile, Joint Subordinate Judge at Ahmednagar.

Suit to recover a sum of money on a promissory note.

The promissory note in question was passed by the defendant, Vishnu Ramchandra, in favour of the plaintiff for Rs. 600 on the 27th August 1901. It was passed in renewal of a promissory note for Rs. 437-4-0 dated the 7th September 1898; which itself was a renewal of a *khata* (acknowledgment) for Rs. 332-4-0 dated the 16th September 1895.

At the time when the *khata* was passed the defendant was anxious to raise a loan of Rs. 480 on the security of his house. He was then a clerk in the Government service: and having been very heavily indebted and having been very much harassed by his creditors, he applied to the plaintiff for the loan. The plaintiff agreed to make the loan on the condition that the defendant should agree to pay a time-barred debt due by the defendant's father to the plaintiff. This debt was for Rs. 307-4-0. To recover it, the plaintiff had filed a suit in 1893 against the defendant; but the suit was dismissed as barred by limitation. The defendant agreed to pay this time-barred debt to which was added Rs. 25 which the plaintiff said was the amount of the costs of the abovementioned litigation. The defendant accordingly passed a *khata* for Rs. 332-4-0.

The present suit was brought in 1904.

The defendant, Vishnu Ramchandra, contended that he executed the promissory note under undue influence and that in any event under the rule of *damdupat* only a sum not exceeding the amount of the original debt should be allowed as interest.

The Subordinate Judge held that the defence of undue influence was not proved; and that on the 16th September 1895, the defendant had received only Rs. 28 in cash, of which Rs. 10 were returned by him. The Subordinate Judge therefore awarded to the plaintiff the sum of Rs. 18, the principal, and allowed Rs. 18 as interest applying the rule of *damdupat*. He passed a decree for Rs. 36 only.

The District Judge, on appeal, varied this decree, by giving the plaintiff a decree for Rs. 307-4-0. His reasons were as follows:—

"Defendant 1 was then still in Government service, and he was still pretty heavily indebted and was in fear of suits or darkhasts being brought against him. Plaintiff therefore still held a dominating position and used it to obtain an unfair advantage over defendant 1 by inducing him to pass a promissory note in renewal of the original *khata* and its successor as if the first *khata* had been given on a cash consideration bearing the usual interest.

To make the transaction unconscionable there must be some exaction which palpably shocks the conscience or offends one's sense of justice. If the plaintiff

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had made the defendant 1 pass the note for Rs. 332-4-0 in his favour without there being any rational ground (apart from defendant's necessity of raising money) for his undertaking this liability in addition to that imposed under the mortgage-deed, then the transaction might perhaps be held to be unconscionable. But here the plaintiff had what the law recognises as a moral claim—though not a legal *one*—*to* the payment of the time-barred debt of Rs. 307-4-0 in so far as it makes a promise to pay such a debt a valid contract, even without any consideration for the promise."

The plaintiff appealed to the High Court.

C. A. Rele, for the appellant:—It was an error of the lower appellate Court to hold that the transaction of 1895 was induced by undue influence within the meaning of section 16 of the Indian Contract Act (IX of 1872). The plaintiff was not then in a position to dominate the will of defendant 1. The relation of creditor and debtor had ceased to exist as plaintiff's suit to recover Rs. 307-4-0 was dismissed as time-barred. Urgent need on the part of the borrower will not of itself place the borrower in a position to be dominated by the lender. See *Rani Sundar Koer* v. *Rai Sham Krishen*[1].

Even assuming that the plaintiff was in a position to dominate the will of the defendant in 1895, it cannot be said that he was in the same position when the two promissory notes were passed in 1898 and 1901.

N. M. Samarth, for the respondents:—The monetary difficulties of defendant 1 and the fact that he was in Government service produced a temporary relation of dependence and control. The plaintiff was then in a position to dominate the will of defendant 1 and used that position to obtain an unfair advantage.

CHANDAVARKAR, J.:—The facts found by the District Judge, so far as they are material for the purposes of the point of law urged in support of this second appeal, are briefly these. The promissory note (Exhibit 27) on which this suit was brought is a renewal of the *khata* (Exhibit 25) executed by the defendant in September 1895. At that time the defendant was a Karkun on a monthly salary of Rs. 25 in the Revenue Department, and was heavily indebted. Being very much harassed by his creditors,

(1) (1906) L. R. 34 I. A. 9: 34 Cal. 150.

he turned to the plaintiff for a loan on a mortgage. The plaintiff agreed to lend, povided the defendant executed a *khata* for the payment of Rs. 307-4-0 which the latter's father had owed, but which, in 1894, had been held to be time-barred in a suit brought by the plaintiff. The plaintiff also insisted that the *khata* should include Rs. 25 for the costs he had incurred in the said suit. To this the defendant agreed, because he was then, as the District Judge observes, "obliged to raise money immediately to meet pressing liabilities," and, besides, he was afraid lest, being a Government servant, his pecuniary difficulties should come to the knowledge of his superiors and "he should get into trouble" with them.

Upon these facts the District Judge has held that when the *khata* (Exhibit 25) was executed by the defendant "the plaintiff was in a position to dominate his will" within the meaning of that term in clause 1 of section 16 of the Contract Act. Under that clause "a contract is said to be induced by *undue influence* where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other." That is, when the two persons enter into a contract, first, there must be subsisting between them some relation of the kind described, and secondly, the dominating position arising out of that relation must have been used by the party holding that position to secure an *unfair* advantage over the other party. When the defendant turned to the plaintiff for a loan on a mortgage, there was no relation subsisting between him and the defendant so as to enable the former to dominate the will of the latter. The relation of creditor and debtor, which had at one time existed, had ceased by virtue of the decree in the suit in which the plaintiff had failed to recover his debt. Both were at arm's length. The defendant was free to borrow money for his immediate necessities from any other person. It is not even suggested that the plaintiff tricked the defendant into approaching him for a loan to relieve his pressing difficulties or that the defendant reposed any confidence in the plaintiff, which the latter betrayed and by such betrayal led the defendant into the

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contract. The finding of the District Judge amounts to no more than that when the defendant sought the plaintiff's help, the plaintiff, taking advantage of the defendant's urgent need of money and his impecunious position, agreed to lend only on certain terms; but, as has been pointed out by the Judicial Committee of the Privy Council in *Sundar Koer* v. *Sham Krishen*(1), urgent need on the part of a borrower will not of itself place him in a position to be dominated by his lender, unless there are special circumstances from which an inference of undue influence can be legitimately drawn. There are no special circumstances found proved, according to the finding of the District Judge here, unless they be that the defendant, being heavily indebted, was harassed by his creditors, and was anxious to conceal his pecuniary embarrassments from his official superiors. Those special circumstances coupled with what the District Judge describes as "the inadequacy of the consideration for the *khata*" (Exhibit 27) would indeed be evidence of undue influence, if, as the result of his poverty and necessity, the defendant's mind was so incapacitated by mental distress that he was practically at the mercy of his lender and the latter was on that account able to impose upon the defendant whatever terms he chose to exact. Such a case might fall both under clause 1 and clause 2 (*b*) of section 16. It might fall under the former, because, the parties being on unequal terms on account of the mental incompetence of the borrower, there was a relation brought about between the two which gave the lender an opportunity of bringing improper pressure to bear upon the weakness of mind of the borrower and thereby dominating his will. And, as the District Judge has rightly observed in his judgment, clause 2 (*b*) is only illustrative of clause 1. But he has declined to draw any such inference of fact from the evidence. Concurring with the Subordinate Judge in that respect, he holds that "there is nothing to justify the inference that the defendant's mental capacity was affected by reason of mental distress so as to bring the case within sub-section (2) (*b*) of section 16 of the Indian Contract Act. I agree that there is no sufficient evidence to show this. The

(1) (1906) L. R. 34 I. A. 9, at p. 16: 34 Cal. 150.

defendant 1 was a Government servant of an highly intelligent class, and his mental *capacity* would probably remain quite unaffected by his financial embarrassments." If, then, there was no mental incompetence on the part of the defendant, it follows that what the defendant did was done deliberately and voluntarily. What relation could in that case subsist between him and the plaintiff at the time of the contract to enable the latter to dominate the will of the former so as to obtain an unfair advantage over him, unless it be that of a man, heavily indebted indeed, but intelligent and suffering from no mental or physical disability, seeking a loan from a money-lender to relieve his pressing liabilities? When a man who is in urgent need of money on account of his poverty and pecuniary difficulties asks for a loan from another, that other is in one sense in a position to dominate the will of the former by proposing his own terms and getting the borrower to agree to them. The borrower's necessity is in such cases the measure of the terms agreed to. That is a feature of every contract of money-lending, where the borrower is a man without credit and the lender is exposing his money to considerable risk. But that is not the vague kind of relation and domination contemplated by the plain terms of clause 1 of section 16. If it were, every borrower able to judge for himself and take care of his interests, who has urgent need of money, might deliberately and voluntarily agree to any terms proposed by the lender and afterwards successfully repudiate the contract on the mere ground of folly, imprudence or want of foresight. The doctrine of undue influence was never meant to protect such persons. See *Allcard* v. *Skinner* (1).

It has been observed in some cases decided under the English Law, that the difficulty as to the law of undue influence consists not in any uncertainty of the law on the subject, but in its application to the circumstances of each case. But the terms of the law embodied in section 16 of the Contract Act are explicit and admit of no ambiguity. There should be no difficulty as to their application. The law contained in the section is, as has

(1) (1887) 36 Ch. D. 145, at pp. 182, 183.

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been pointed out in *Bhimbhat* v. *Yeshwantrao*[1], a substantial reproduction of the principles expounded by this Court in *Kedari* v. *Atmarambhat*[2]. There are well-known relations such as those of guardian and ward, father and son, patient and medical adviser, solicitor and client, trustee and *cestui que trust* and the like which plainly fall within clause 1 of the section. Where no such specific relations exist and the parties are at arm's length, being strangers, undue influence may be exerted, but its existence must be proved by evidence; and in such cases, the nature of the benefit, or the age, capacity, or health, of the party on whom the undue influence is alleged to have been exerted are of great importance—*Rhodes* v. *Bate*[3]; *Baker* v. *Monk*[4]; *Clark* v. *Malpas*[5]. This rule of law cannot be better stated than in the words of Lord Kingsdown in *Smith* v. *Kay*[6]: "The principle" of undue influence, "applies to every case where influence is acquired and abused, where confidence is reposed and betrayed. The relations with which the Court of Equity most ordinarily deals, are those of trustee and *cestui que* trust, and such like. It applies specially to those cases, for this reason and this reason only, that from those relations the Court presumes confidence put and influence exerted. Whereas in all other cases...the confidence and the influence must be proved extrinsically." In short, the test is, confidence reposed by one party and *betrayed* by the other, which means that there must be an element of fraud or coercion, under either of which the acts constituting undue influence must range themselves—per Lord Cranworth in *Boyse* v. *Rossborough*[7].

We cannot agree, therefore, with the District Judge's view of law that the facts found by him satisfy the first condition of undue influence laid down in clause 1 of section 16 of the Contract Act. Nor can we uphold his view of the law as applied to the facts with reference to the second condition. Those facts are that the defendant agreed by the *khata* (Exhibit

(1) (1900) 25 Bom. 126.
(2) (1866) 3 Bom. H. C. R. A. C. J. 11.
(3) (1866) L. R. 1 Ch. 252 at p. 257.
(4) (1864) 4 D. F. & S. 388.
(5) (1862) 4 D. F. & J. 401.
(6) (1859) 7 H. L. Cas. 750 at p. 779.
(7) (1857) 6 H. L. Cas. 2 at p. 45.

25 and Exhibit 27) to pay not only a time-barred debt, but also interest thereon and the costs of the suit in which it had been held that the plaintiff had lost his remedy to recover the debt under the Statute of Limitations. So far as the *khata* related to the amount of the time-barred debt, the District Judge allows that the plaintiff cannot be held to have obtained an *unfair* advantage over the defendant by reason of the latter's promise to pay that amount. He is of opinion, however, that the promise to pay interest and the costs of the suit, which amounted to Rs. 25, has "an element of unfairness," because neither was legally recoverable from the defendant. The term "unfair advantage" in clause 1 of section 16, is used as meaning an advantage obtained by *unrighteous* means. It is not found by the District Judge and neither the pleadings nor evidence suggest that any such means were used by the plaintiff. If, according to law, a promise to pay a debt barred under the Statute of Limitations is valid and is supported on the principle that in so promising the debtor is doing what every honest man, morally speaking, ought to do and would do, the same principle ought equally to apply to a further promise to pay the said debt with interest, because interest is only accessory to the principal, and is paid to the creditor because the latter has been deprived of the use of his money and the debtor has had the benefit of it. As to the costs of the suit, the amount was only Rs. 25 and if the defendant, as an honest man, was morally, if not legally, bound to pay the debt, instead of compelling the plaintiff to sue him, those costs must be regarded as a part of the debt itself which it was competent for the defendant in all honesty to repay to the plaintiff. The transaction cannot be regarded as being in itself harsh and unconscionable. On the other hand, it is just what a right-minded person, with some sense of honour, would enter into, and no Court of Equity would set aside such a contract, merely because it flows from moral, not legal, obligations, unless it was proved that the defendant was forced, tricked or misled into it by the plaintiff by means of *fraud,* using that word not merely in the restricted sense of actual deceit, but in the larger sense of an *unconscientious* use of power arising out of certain circumstances and conditions—*Smith*

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v. *Kay*[1], and showing that the defendant having been victimised by the plaintiff's unfair and improper conduct was unable to understand what he was doing. The District Judge's finding as to the defendant's mental competence negatives any such inference as the latter.

For these reasons, we must vary the decree of the District Judge and award the claim as against defendant 1, who should pay to the plaintiff half the costs throughout. We cannot pass the usual order that costs shall follow the event, having regard to the fact commented upon by the District Judge that the plaintiff made a false case as to the consideration for the promissory note on which the suit was brought. Cross-objections stand dismissed.

Decree varied.

R. R.

(1) (1859) 7 H. L. Cas. 750 at p. 779.

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Before Mr. Justice Chandavarkar and Mr. Justice Knight.

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October 1.

DEU MARD DADA GAVLI (ORIGINAL DEFENDANT No. 3), APPLICANT, v. SITARAM CHIMNAJI (ORIGINAL PLAINTIFF), OPPONENT.*

Mámlatdárs' Courts Act (Bombay Act II of 1906), sec. 19, cl. (b)†—*Possessory suit—Landlord and tenant—Trespasser dispossessing the tenant during the duration of tenancy—Landlord suing to recover possession within six months from the determination of the lease.*

On the 5th June 1905, the plaintiff let certain lands to defendants Nos. 1 and 2. During the continuance of the tenancy defendant No. 3, a trespasser, dispossessed defendants Nos. 1 and 2 and got into possession of the lands in November 1905. The tenancy determined on the 6th June 1906. On the

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*Civil Application No. 168 of 1907.

†The Mámlatdárs' Courts Act (Bombay Act II of 1906), section 19, clause (*b*), runs as follows:—

19. (1) On the day fixed, or on any day to which the proceedings may have been adjourned, the Mámlatdár shall, subject to the provisions of section 16, proceed