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The High Court, Calcutta v. Amal Kumar Roy

Sinha C.J.

defendants-appellants allowed the case to be decided against them without placing all relevant considerations before the Trial Court, particularly the fact that r. 55-A did not apply to members of the State Judicial Service, we direct that each party will bear its own costs, here and below. The appeal is accordingly allowed, but without costs.

Appeal allowed.

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April 9.

MST. KHARBUJA KUER

v.

JANGBAHADUR RAI

(A. K. SARKAR, K. SUBBA RAO and J. R. MUDHOLKAR, JJ.)

Pardanashin lady—Execution of deed—Binding nature—Burden of proof.

R, the husband of the appellant, had separated from his uncle J. in 1924. After the death of R, J got a maintenance deed executed by the appellant containing recitals that there had been no separation between R. and J. The appellant filed a suit for a declaration of her title to the property and for a declaration that the deed having been got executed by fraud was not binding on her. The trial court decreed the suit holding that R and J had separated, that the appellant was an ignorant pardanashin lady and that she did not execute the deed after understanding the contents thereof. On appeal the first appellate court confirmed the findings and decree. In second appeal the High Court reversed the findings of facts on the ground that the onus was on the appellant to prove that the deed had been got executed by fraud. The appellant contended that the

High Court was wrong on the question of burden of proof and that it had no jurisdiction to interfere with the findings of facts.

Held, that the High Court was not justified in interfering in second appeal with findings of fact of the first two Courts and it had wrongly placed the onus on the appellant. The burden of proof was always upon the person who sought to sustain a transaction entered into with a pardanashin lady to establish that the document was executed by her after clearly understanding the nature of the transaction. It had to be established not only that it was her physical act but also that it was her mental act. The burden could 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.

Farid Un-Nisa v. *Mukhtar Ahmed*, (1925) L. R. 52 I. A. 342, *Geresh Chunder Lahoree* v. *Mst. Bhuggobutty Debia*, (1870) 13 M. I. A. 419, *Kali Baksh* v. *Ram Gopal*, (1913) 41 I. A. 23 and *Jagadish Chandra* v. *Debnath*, A. I. R. 1940 P. C. 134, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 522 of 1959.

Appeal by special leave from the judgment and decree dated December 2, 1957, of the Patna High Court in S. A. No. 791 of 1963.

D. P. Singh, for the appellant.

Sarjoo Prasad and *K. P. Gupta*, for the respondents.

1962. April 9. The Judgment of the Court was delivered by

Subba Rao J.

SUBBA RAO, J.—This appeal by special leave is preferred against the judgment of a single Judge of the Patna High Court. The facts that gave rise to this appeal may be briefly stated. To appreciate the findings of the various courts and the conten-

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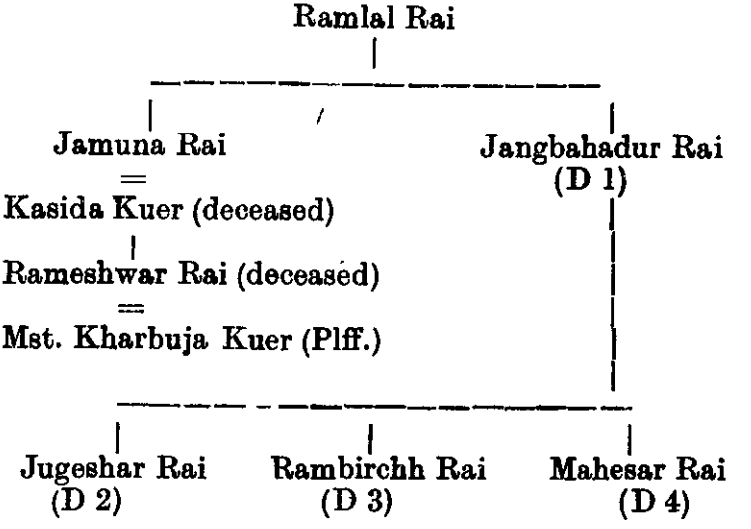
tions of the parties, the following genealogy will be useful.



The case of the plaintiff, who is the widow of Rameshwar Rai, is that her husband and Jangbahadur, defendant 1, effected a partition of the family property in or about 1924, that after the partition he was in exclusive possession of the property that fell to his share, that he died in the year 1930, that thereafter she and her mother-in-law continued to be in possession of the said property, that her mother-in-law died in 1938, that the first defendant asked her and her mother-in-law to execute a power of attorney in his favour, that they, being pardhanashin ladies, executed a document in his favour on August 24, 1935, believing it to be a power of attorney, that subsequently they came to know that it was a maintenance deed containing false recitals to the effect that there was no separation and that the property was joint family property. They also alleged in the plaint that the deed in question was never read out to them, that the scribe and the attesting witnesses were partisans of the first defendant. It was also alleged that the document was

always in the custody of the first defendant, that the plaintiff and her mother-in-law, till the latter's death, were getting the income from the property as they were getting before the execution of the said document and that they came to know of the fraud only in 1355 fasli, when the first defendant began to interfere with the possession and occupation of the property by the plaintiff and disclosed to several people that she had only a right to maintenance and thereafter when she got the document read over to her and discovered the fraud. With those allegations, among others, the plaintiff filed a suit in the Court of the Munsif, Muzaffarpur, for the following reliefs:

> "On a consideration of the aforesaid facts and also on adjudicating the plaintiff's title and the absence of title of the defendants, it may be adjudged by the court that the deed of agreement for maintenance is altogether fraudulent and not binding upon the plaintiff."

The relief claimed is rather involved, but in substance it is a relief for a declaration of the plaintiff's title to the suit property and for a declaration that the maintenance deed, having been executed by fraud, was not binding on her. The defendant denied the allegations contained in the plaint and alleged that the deed of maintenance was read over and explained to the plaintiff and her mother-in-law and that one Babu Ramnath Singh, brother of the plaintiff, was present at the time of the execution and affixed his signature on behalf of the plaintiff. He denied that he had committed any fraud. On the pleadings the following issues, among others, were framed:

> *Issue No.* 3—"Is the allegation of separation between Rameshwar Rai and defendant

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No. 1 in the month of Asardh 1334 Fs. (19-7) correct?"

Issue No. 4—"Is the document dated 24-8-1935 legal and valid? Was the same read over to the plaintiff and the plaintiff executed it with the full knowledge of the contents?"

Issue No. 5—"Are the plaintiffs entitled to the reliefs claimed?"

It will be seen from the issues that the burden of proof to establish separation was placed on the plaintiff and that to prove that the document was read over to the plaintiff and executed by her with full knowledge of the contents was laid on the defendant.

On a consideration of the entire evidence, the learned Munsif found on issues 3 and 4 that Rameshwar Rai died in state of separation from Jangbahadur, that the plaintiff and her mother-in-law were ignorant pardhanashin ladies, that the two ladies had full confidence in the 1st defendant, and that the document, Ex. C. was not read over to the plaintiff and she did not execute it after understanding the contents thereof. On those findings the suit was decreed in terms of the plaint prayer. On appeal, the learned Subordinate Judge considered the entire evidence over again and accepted the said two findings given by the learned Munsif and confirmed the decree. But, on second appeal, Imam, J., set aside the concurrent findings of the two courts mainly on the ground that the courts had thrown the burden of proof wrongly on the defendant. In the words of the learned Judge, "it was the duty of the plaintiff to prove that there was fraud committed and as that had not been established the question whether the document had been read over and explained to the plaintiff, in my opinion, in the circumstances,

does not arise." He considered the evidence from that standpoint and held that the plaintiff had not established her case; and on that finding, he dismissed the suit.

Mr. D. P. Singh, learned counsel for the appellant, raised before us two contentions, namely, (1) the learned Judge of the High Court was wrong on the question of burden of proof; and (2) the learned Munsif and the learned Subordinate Judge had not only thrown the burden of proof rightly on the defendant, but they had also given their findings on the entire evidence, and therefore the burden of proof became immaterial and the findings of fact given by the said courts were binding on the High Court under s. 100 of the Code of Civil Procedure.

Mr. Sarjoo Prasad, learned counsel for the respondents, on the other hands, contends that the finding on the question of separation was halting and was clearly illegal, not having been based on evidence, either oral or documentary, and that though the initial burden to prove that the document was read over and explained to the widows was on the defendant, the evidence and the circumstances of the case clearly discharged that burden.

It is settled law that the High Court has no jurisdiction to entertain a second appeal on the ground of erroneous finding of fact. In the instant case the learned Munsif and, on appeal, the learned Subordinate Judge found concurrently that the two widows put their thumb marks without understanding the true import of the document. Imam, J., in second appeal reversed the said findings on the ground that they were vitiated by an erroneous view of the law in the matter of burden of proof. The judgment, if we may say so with respect, consists of propositions which appear to be contradictory. The learned Judge, after reviewing the case

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law on the subject, concludes his discussion by holding that it was the duty of the plaintiff to prove that there was fraud committed and that, as that had not been established, the question whether the document was read over and explained to the plaintiff, in his opinion, in the circumstances, did not arise. This proposition, in our view, is clearly wrong and is contrary to the principles laid down by the Privy Council in a series of decisions. In India pardahnashin 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. In *Farid-Un-Nisa* v. *Mukhtar Ahmad* (1), Lord Sumner traces the origin of the custom and states the principle on which the presumption is based. The learned Lord observed:

> "In this it has only given the special development, which Indian social usages make necessary, to the general rules of English law, which protect persons, whose disabilities make them dependent upon or subject them to the influence of others, even though nothing in the nature of deception or coercion may have occurred. This is part of the law relating to personal capacity to make binding transfers or settlements of property of any kind."

The learned Lord also points out :

> "Of course fraud, duress and actual undue influence are separate matters".

It is, therefore, manifest that the rule evolved for the protection of pardahnashin ladies shall not be confused with other doctrines, such as fraud, duress and actual undue influence, which apply to all

(1) (1925) L.R. 52 I.A. 342, 350, 352.

persons whether they be pardanashin ladies or not.

The next question is what is the scope and extent of the protection. In *Geresh Chunder Lahoree* v. *Mst. Bhuggobutty Debia* (1) the Privy Council held that as regards documents taken from pardanashin women the court has to ascertain that the party executing themhad 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 pardanashin woman. In *Kali Baksh* v. *Ram Gopal* (2), the Privy Council defined the scope of the burden of a person who seeks to sustain a document to which a pardanashin lady was a party in the following words :

> "In the first place, the lady was a pardanashin lady, and the law throws round her a special cloak of protection. It demands that the burden of proof shall in such a case rest, not with those who attack, but with those who found upon the deed, and the proof must go so far as to show affirmatively and conclusively that the deed was not only executed by, but was explained to, and was really understood by the grantor. In such cases it must also, of course, be established that the deed was not signed under duress, but arose from the free and independent will of the grantor".

The view so broadly expressed, though affirmed in essence in subsequent decisions, was modified, to some extent, in regard to the nature of the mode of discharging the said burden. In *Farid-Un-Nisa* v. *Mukhtar Ahmad* (3) it was stated :

> "The mere declaration by the settlor,

(1) [1870] 13 M. I. A. 419. (2) [1913] 41 I. A. 23, 29.
(3) (1925) L.R. 52. I. A. 342, 350, 352.

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subsequently made, that she had not understood what she was doing, obviously is not in itself conclusive. It must be a question whether, having regard to the proved personality of the settlor, the nature of the settlement, the circumstances under which it was executed, and the whole history of the parties, it is reasonably established that the deed executed was the free and intelligent act of the settlor or not. If the answer is in the affirmative, those relying on the deed have discharged the onus which rests upon them".

While affirming the principle that the burden is upon the person who seeks to sustain a document executed by a pardanashin lady that she executed it with a true understanding mind, it has been held that the proof of the fact that it has been explained to her is not the only mode of discharging the said burden, but the fact whether she voluntarily executed the document or not could be ascertained from other evidence and circumstances in the case. The same view was again reiterated by the Judicial Committee, through Sir George Rankin, in *Jagadish Chandra* v. *Debnath* (1). Further citation is unnecessary. The legal position has been very well settled. Shortly it may be stated thus: The burden of proof shall always rest upon the person who seeks to sustain a transaction entered into with a pardanashin lady to establish that the said document was executed by her after clearly understanding the nature of the transaction. It should be established that it was not only her physical act but also her mental act. The burden can be discharged not only by proving that the document was explained to her and that she understood it, but also by other evidence, direct and circumstantial.

If that be the law, a perusal of the judgments of the three courts demonstrates that while the

(1) A.I.R. 1940 P.C. 134.

learned Munsif and the learned Subordinate Judge approached the case from a correct perspective, the High Court misled itself by a wrong approach. The relevant issue we have already extracted shows that the burden was thrown upon the defendant. The first two courts approached the evidence from that standpoint and gave a concurrent finding that it had not been established that the plaintiff executed the document after understanding the nature of the transaction. Apart from the burden of proof, also on the facts found they came to the same conclusion. The High Court, having wrongly held that the approach of the two courts was not correct and having wrongly thrown the burden upon the plaintiff considered the evidence afresh and set aside that finding. As the two courts approached the evidence from a correct perspective and gave a concurrent finding of fact, the High Court had no jurisdiction to interfere with the said finding.

Learned counsel for the respondents contends that on one of the crucial findings which influenced the first two courts in coming to the conclusion which they did, namely, the finding on the partition in the family, was not based on evidence and that, indeed, both the parties agreed that that question was irrelevant to the main question raised in the suit. He further said that the learned Munsif, having rightly held that the burden of proof to establish separation was on the plaintiff and having held that there was no acceptable oral evidence and that the documentary evidence adduced was not sufficient to sustain partition, should have found that the presumption under the Hindu law was not rebutted. It is true that before the learned Munsif the Advocates appearing for the parties contended that it was not necessary to give any finding on issue No. 3 and that the suit could be disposed of without giving any finding thereon. But the learned Munsif rightly did not accept the said suggestion and held that the issue had been framed on the

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pleadings and that all the relevant evidence had been adduced and that it was only proper to give a finding thereon. The learned Subordinate Judge pointed out that the main point for consideration was not the matter of jointness or separation, but only the validity or genuineness of the deed itself, and that "the question of separation or jointness thus only becomes a link in the chain to judge the validity or otherwise of the document, Ex. C". This statement of the learned Subordinate Judge is unobjectionable. The question of partition in the family was a circumstance which would have an important bearing on the question of probability of the widows executing a document admitting that there was no partition in the family and that they had no absolute interest in the said property.

Now coming to the evidence, we cannot accept the argument of learned counsel for the respondents that there was no evidence in the case to rebut the presumption of Hindu law that a family is joint. The learned Munsif said that there was no documentary evidence on behalf of the plaintiff to prove separation; by that statement he meant that the partition was not effected by a written document, for the next sentence made it clear when he said that it was due to the fact of alleged oral partition. Then he considered the documents filed by the defendants in great detail and came to the conclusion that the said documents were not inconsistent with partition. Then he discussed the oral evidence. He had considered the evidence of five witnesses examined on behalf of the plaintiff and of seven witnesses examined on behalf of the defendants. He also noticed pieces of circumstantial evidence. After considering the entire evidence, oral, documentary and circumstantial, he came to the following conclusion :

> "Although the oral evidence on both the sides on the point of jointness and separation

> is not satisfactory but from the circumstances adduced from the facts of the case I am convinced that Remeshwar died in states of separation from Jangbahadur."

It cannot be said from the said finding that he rejected the oral evidence. It may be that the oral evidence adduced on behalf of the plaintiff was not as satisfactory as it should be, but he preferred that evidence, which supported partition, in view of the circumstances found on the evidence. The finding, whether it is correct or not, is certainly a finding of fact and it cannot be said that it is not based on evidence.

Now coming to the appellate court, the learned Subordinate Judge reviewed the entire evidence, oral, documentary and circumstantial, and arrived at the following findings:

> "In view of the facts and the circumstance narrated above, while the probabilities are that there was a disruption in the joint family of Rameshwar and Jangbahadur as alleged by the plaintiff, the defendants have failed to prove beyond all doubts that the family continued to be joint at the time of Rameshwar's death, or that they came in exclusive possession of the properties left behind by him. Judging Ex. C, in this light, we find that if the fact of separation between Rameshwar and Jangbahdur as alleged by the plaintiff, be accepted to be true, as has been shown above, then the fraud in the execution of this document is patent, and no discussion is required to declare it as a forged and fradulent document."

It is true the finding could have been more explicit, but that does not detract from its finality. In the first part of the finding, the learned Subordinate Judge says in effect that, having regard to the facts and circumstances he had discussed earlier the

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burden shifted to the first defendant, who did not adduce acceptable evidence to dislodge the circumstances against jointness. But in the second part of the finding he makes it clear that he had found that there was partition in the family. The finding is again a finding of fact. That a part, the High Court did not in any way question the correctness of the finding of the learned Munsif and the learned Subordinate Judge, but only ignored it on the ground that it was not the duty of the lower appellate court to deal with that question at all. We cannot appreciate the observations of the learned Judge of the High Court, for, in our view, that finding, as the learned Munsif pointed out, arose on the pleadings and, as the lower appellate court pointed out, had a direct impact on the main question to be decided in the case. We, therefore, hold that the said finding was binding upon the High Court.

Even if that finding was ignored, there was sufficient material to sustain the finding of the first two courts. Both the courts found that the first defendant, on whom the burden lay, not only did not establish that it was executed by the plaintiff with the knowledge of its contents, but that even apart from the burden of proof, that they also found that the plaintiff and her mother-in-law put their thumb marks on the decument under the impression that it was a power of attorney. The finding is one of fact and was based upon the following relevant facts : (1) The plaintiff and her mother-in-law were pardanashin and illiterate women—one of them was old and the other was middle-aged. (2) They had full confidence in the first defendant. (3) Babu Ramnath Singh, who wrote the names on the document was not proved to be the brother of the plaintiff. (4) The document was in the custody of the defendant. (5) The plaintiff and her mother-in-law were in enjoyment of the property as they were enjoying it even

before the execution of the document. (6) The defendant had not examined either Babu Ramnath Singh or other important witnesses who could have proved the fact that the plaintiff and her mother-in-law had the knowledge of the nature of the document. (7) The defendant managed to get this document by fraud to facilitate mutation of the property in his name. And (8) the plaintiff gave acceptable evidence in support of her case. The finding of the both the courts is supported by evidence, and there is no permissible ground for interference with it in second appeal.

For the aforesaid reasons, we find that the learned Judge of the High Court had erroneously interferred with the concurrent findings of fact arrived at by the first two courts. In the result, we allow the appeal, set aside the decree of the High Court and decree the suit with costs throughout.

Appeal allowed.

NAWAB ZAIN YAR JUNG AND OTHERS

v.

THE DIRECTOR OF ENDOWMENTS AND ANOTHER

(B. P. SINHA, C. J., P. B. GAJENDRAGADKAR, K. N. WANCHOO, N. RAJAGOPALA AYYANGAR and T. L. VENKATARAMA AIYAR, JJ.)

Trust Property—Wakf and Public Charitable Trust—Distinction—Rule of interpretation of documents—The Wakf Act, 1954 (29 of 1954), ss. 3(l), 9, 28—Hyderabad Endowment Regulation, 1348-F (1939).

The appellants were appointed trustees by the Nizam of Hyderabad by a trust deed executed on June 14, 1954. On March 2, 1959, respondent No. 1, who was the Director of Endowments and Joint Secretary, Board of Revenue, served a notice on the appellants calling upon them to register the said