A M. RANGASAMY

v.

RENGAMMAL AND ORS.

AUGUST 25, 2003

B [Y.K. SABHARWAL AND G.P. MATHUR, JJ.]

Succession Act, 1925—Section 63(c)—Transfer of Property Act, 1882—Section 3—Evidence Act, 1872—Section 68—Gift—In favour of grand son by grandmother—By Settlement Deeds—Challenged alleging it to have been executed under undue influence—Burden to prove undue influence pleaded to be on the executant being in fiduciary relationship—Suit decreed—First Appellate Court held that the deeds did not suffer from the vices—High Court held the deeds not proved discarding evidence of attesting witnesses to the deeds for want of evidence in terms of Section 63(c)—On appeal held: Non compliance of Section 63(c) does not effect the execution of the deeds as the same are in the nature of gift deeds and it is not a case of proof of will—Testimony of attesting witnesses were discarded on wrong ground.

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Undue influence—For execution of deed—Presumption of—When arises—Merely because parties were nearly related and because donor was old or of weak character, no presumption of undue influence can arise—Generally the relations of solicitor and client, trustee and cestul que trust, spiritual adviser and devotee, medical attendant and patient, parent and child are those in which such a presumption arises—Evidence Act, 1872—Section 114.

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F *Code of Civil Procedure, 1908—Section 100—Second appeal—Reappreciation of evidence under permissibility of—Held:- not permissible.*

The suit property exclusively belonged to 'N'. After her death appellant-defendant, her grandson asserted exclusive right to the suit property. Respondent-plaintiffs, the daughters of 'N' sent a notice to the appellant requiring to restrain him from unlawful interference in the enjoyment of the properties. According to them, their mother had duly executed a registered Will whereunder she bequeathed in their favour properties in Schedule A. Schedule B properties in respect of which she died intestate,were inherited by them to the extent of 3/4th share together and 1/4th undivided share by

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defendant No.1. In reply to the notice, appellant denied their title and asserted his exclusive title over Schedule A and B properties under two settlement deeds (Exhibits B-6 and B-7) executed in his favour by 'N'. Respondents filed suit for declaration that Schedule 'A' properties belonged exclusively to them and further sought partition of Schedule B properties into four equal shares. Their case was that first defendant exercising dominating influence over his grandmother, got the settlement deeds executed exploiting her old age, dim eye-sight and mental condition; and that since he had a fiduciary relationship with his grandmother, the burden to establish absence of undue influence in executing the settlement deed was on him.

Trial Court decreed the suit holding that Exhibits B-6 and B-7 which were in the nature of gift deeds were not valid documents and the same were brought into existence by fraud, mis-representation and undue influence. In appeal, first appellate court set aside the decree of trial court holding that the Exhibits were not vitiated by any invalid circumstance as alleged in the plaint, as 'N' was physically healthy and sound disposing mind when she executed the exhibits and that she voluntarily executed the said documents with full knowledge of the nature and purport of the document she was executing. High Court reappreciated the evidence and allowed the second appeal holding that the deeds have not been proved; that the expression 'attested' is not defined in Transfer of Property Act, 1882 and that Section 63(c) of Indian Succession Act, 1925 is applicable; and the testimony of two attesting witnesses were liable to be rejected for want of evidence in terms of Section 63 of Succession Act. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1. The findings have been correctly recorded by the first Appellate Court. There is no ground on the basis whereof the High Court could reappreciate evidence and reverse the said findings while deciding a second appeal. Reappreciating evidence is not permissible while exercising jurisdiction under Section 100 CPC. [955-C; 953-A-C]

2. Section 63(c) of the Succession Act on the basis whereof the High Court has discarded the testimony of attesting witnesses of Exhibits B-6 and B-7 on the ground that the ingredients of the said Section have not been spoken by the attestators has no applicability. It is not a case of proof of will. Exhibits B-6 and B-7 are in the nature of gift deeds. High Court, while rightly holding that Exhibits B-6 and B-7 are in the nature of gift deeds, committed glaring

A **illegality in coming to the conclusion that the said documents have not been proved for want of evidence in terms of Section 63(c) of the Succession Act. High Court is not correct in observing that the expression 'attested' is not defined in the Transfer of Property Act, 1882. Section 3 of the Transfer of Property Act defines the same. [953-E, F]**

B **3. Section 68 of Evidence Act deals with proof of execution of document required by law to be attested. Proviso to Section 68, inter alia, provides that it is necessary to call an attesting witness in proof of the execution of any document unless its execution by the person by whom it purports to have been executed is specifically denied. The two attesting witnesses have been examined**
C **by the appellant. Their testimony has been ignored for the reasons which are wholly untenable. Further, a perusal of the plaint shows that the execution of Exhibits B-6 and B-7 has, in fact, not been disputed by the plaintiffs. The case set up by them is that the first defendant, exercising dominating influence over the grandmother, got the two settlement deeds executed from her exploiting her old age, dim eye-sight and mental condition.**
D **[953-G, H; 954-A, B]**

4. High Court, in view of the relationship of the appellant with his grandmother, presumed undue influence and held that the documents Exhibits B-6 and B-7 were executed in view thereof in favour of the appellant. The approach of High Court cannot be sustained. If the transaction appears to be
E **unconscionable, then the burden of proving that the contract was not induced by undue influence lies upon the person who is in a position to dominate the will of the other. Merely because the parties were nearly related to each other or merely because the donor was old or of weak character, no presumption of undue influence can arise. Generally speaking the relations of solicitor and**
F **client, trustee and cestul que trust, spiritual adviser and devotee, medical attendant and patient, parent and child are those in which such a presumption arises. High Court presumed undue influence merely on account of near relationship. The presumption made by the High Court on the basis of relationship was not warranted by law. [955-D, F-H]**

G *Subhas Chandra Das Mushib* **v.** *Ganga Prasad Das Mushib and Ors.* **AIR (1987) SC 868, referred to.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5199 of 1997.

From the Judgment and Order dated 25.3.97 of the Madras High Court
H in S.A.No.1300 of 1983.

Dr. A. Francis Julian, Sumit Kumar for M/s. Arputham and Aruna & Co., for the Appellant. A

C. Jayaraj and Ms. V. Mohana for the Respondents.

The Judgment of the Court was delivered by

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Y.K. SABHARWAL, J. Appellant is defendant No.1 in the suit out of which the appeal has arisen. Three sisters were plaintiffs in the suit. The suit properties originally belonged to Nanjammal @ Kuttiammal, mother of the three plaintiffs and father of defendant No.1 who was brother of three plaintiffs. Father of defendant No.1 pre-deceased his mother Nanjammal. The husband of Nanjammal, i.e., father of the plaintiffs and grandfather of defendant No.1 C also pre-deceased his wife. Nanjammal died on 11th September, 1979 at an old age.

According to the plaintiffs, their mother in sound disposing mind duly executed on 20th August, 1966 a registered will whereunder she bequeathed in their favour properties described in Schedule A to the plaint. Schedule B D properties also belonged absolutely to Nanjammal which, according to the allegations in the plaint, were inherited to the extent of 3/4th share by the three plaintiffs together and 1/4th undivided share by defendant No.1 according to law of succession Nanjammal having died intestate in respect of the said properties. After death of Nanjammal, the appellant began to assert his exclusive E title to suit properties as a result whereof the plaintiffs sent a notice to him requiring him to restrain from unlawful interference in the enjoyment of the properties. In reply to the notice, the appellant denied the title of the plaintiffs to Schedule A and B properties and asserted his exclusive title under two settlement deeds dated 27th October, 1976 alleged to have been executed in his favour by Nanjammal. The plaintiff on receipt of the reply notice obtained F copies of the said deeds and then only became aware about the said deeds which, it was claimed, were not validly executed. Under these circumstances, the plaintiffs who are respondents before us sought a declaration that plaint A Schedule properties belong exclusively to them and sought injunction restraining the appellant/first defendant from interfering and disturbing the G plaintiffs' exclusive possession and enjoyment of those properties through their tenant and further sought partition of Schedule B properties into 4 equal shares so as to allot three shares to the plaintiffs altogether and one share to defendant No.1.

The trial court held that the settlement deeds dated 27th October, 1976 H

A which were in the nature of gift deeds in favour of the first defendant were not valid documents and the said deeds were brought into existence by fraud, misrepresentation and undue influence. The suit was, therefore, decreed.

The appeal filed by the appellant challenging the judgment and decree of the trial court was, however, allowed by the Additional District Judge and
B setting aside the judgment and decree of the trial court, the suit was dismissed with costs in favour of the appellant both of the first appeal and also of the suit. It was held that Exhibits B-6 and B-7 were validly and voluntarily executed with full knowledge of contents thereof and with intention to gift the properties in favour of the appellant.

C In the second appeal that was preferred by the plaintiffs, the High Court has held that the aforesaid deeds have not been proved and are void for all purposes. Resultantly, setting aside the judgment of the lower appellate court, the judgment and decree of the trial court has been restored. Under these circumstances, the original first defendant has preferred this appeal.

D The High Court has come to the conclusion that Exhibits B-6 and B-7 are not valid documents for lack of evidence in proof thereof; absence of knowledge of Nanjammal in respect of contents of documents and doubts about the execution thereof, and, the burden being on the appellant to prove the validity of the documents which he has failed to discharge.

E For reaching the aforesaid conclusion, the High Court has said that the expression 'attested' is not defined in the Transfer of Property Act, 1882, and that Section 63(c) of the Indian Succession Act, 1925 (for short, 'the Succession Act) is applicable which has not been complied. The High Court has also observed that under Section 68 of the Indian Evidence Act, 1872, a document
F which requires attestation shall not be used as evidence until one attestator at least is examined and proves execution thereof but the testimony of the two attesting witnesses DW2 and DW3 has been discarded by the High Court on the ground that their testimony does not speak anything about compliance of the ingredients of Section 63 of the Succession Act. Thus, the High Court
G has concluded that although the attestators DW2 and DW3 were examined but the attestation of Exhibits B-6 and B-7 has not been proved and the question of undue influence or fraud, even if pleaded, will come into play only when execution of the document is properly proved in which attempt the appellant has miserably failed. Further, on reappreciation of evidence, the testimony of Sub-Registrar (DW6) who had registered the two documents
H was also discarded holding that the registration was done in a perfunctory

manner holding that at the time of registration, the executant did not have proper eye-sight nor was she in a position to hear properly.

We are unable to sustain the judgment of the High Court on any of the aforesaid count. Besides reappreciating evidence which is not permissible while exercising jurisdiction under Section 100 of the Code of Civil Procedure, on all other aforesaid counts also the High Court has committed glaring illegalities.

Firstly, the High Court is not correct in observing that the expression 'attested' is not defined in the Transfer of Property Act, 1882. Section 3 of the Transfer of Property Act defines the expression 'attested'. It reads :

> " 'attested', in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgement of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary."

Secondly, Section 63(c) of the Succession Act on the basis whereof the High Court has discarded the testimony of attesting witnesses of Exhibits B-6 and B-7 on the ground that the ingredients of the said section have not been spoken by the attestators (DW2 and DW3), has no applicability. It is not a case of proof of will. Exhibits B-6 and B-7 are in the nature of gift deeds. The High Court, while rightly holding that the said documents are in the nature of gift deeds, committed glaring illegality in coming to the conclusion that the said documents have not been proved for want of evidence in terms of Section 63(3) of the Succession Act. It is because of this illegality that the High Court holds that the question of undue influence or fraud, even if pleaded by the plaintiffs, will come into play only if execution of the documents is properly proved and since the appellant has failed miserably to prove those documents, the question of undue influence or fraud becomes insignificant.

Section 68 of the Indian Evidence Act deals with proof of execution of document required by law to be attested. Proviso to Section 68, inter alia, provides that it is necessary to call an attesting witness in proof of the

A execution of any document unless its execution by the person by whom it purports to have been executed is specifically denied. The two attesting witnesses, as aforesaid, have been examined by the appellant. Their testimony has been ignored for the reasons which are wholly untenable. Further, a perusal of the plaint shows that the execution of Exhibits B-6 and B-7 has, in fact, not been disputed by the plaintiffs. The case set up by them is that
B the first defendant, exercising dominating influence over his grandmother, got the two settlement deeds executed from her exploiting her old age, dim eye-sight and mental condition. It has been further pleaded that first defendant had a fiduciary relationship with his grandmother and, therefore, though normally it would be for a person who pleads undue influence to establish
C the said fact, but in view of this relationship, it is for the first defendant to prove that the gift deeds were the result of free exercise of independent will by the executant.

It stands proved and has also not been disputed that the grandmother was living with her grandson, i.e., the appellant since 1971. The plaintiffs were
D married daughters, settled and living separately. They had not met the mother for the last 5-6 years before her death. These aspects have not been properly appreciated by the High Court.

Thirdly, the first appellate court, on consideration of the evidence on record, came to the conclusion that Exhibits B-6 and B-7 were not vitiated by
E any invalid circumstance as alleged in the plaint and the appellant was entitled to Schedule A and B properties absolutely under those documents. The first appellate court has also noticed that Exhibits B-6 and B-7 were not only deeds executed by grandmother in favour of the appellant for the first time as previously too she had executed documents in respect of other
F properties in his favour. The said documents have been detailed in the judgment of the first appellate court. Regarding the lack of proper eye-sight, hearing and stage of senility and not been in a position to move about freely, the first appellate court, on examination of the averments in the plaint, has concluded that it does not contain any details as to the acts of frauds or undue influence committed by the appellant in the matter of execution of the
G settlement of deeds. The first appellate court has further noticed that PW1, the first plaintiff, has not said anything about fraud in her deposition; there is no allegation that the appellant represented those documents to be one contrary to what the same were and, in fact, in the plaint it is admitted that since 1971 Nanjammal was living with the appellant who alone was looking
H after her. The settlement deeds had been executed nearly three years before

her death. The plaintiffs had no contact with their mother. They had not visited her. They learnt about the settlement deeds and obtained copies thereof on receipt of reply notice from the appellant as noticed hereinbefore and thereafter obtained the copies from the office of the Sub-Registrar. The first appellate court also referred to the testimony of the Sub-Registrar (DW6) and held that he was satisfied about the good health and sound disposing mind of Nanjammal. The first appellate court has also referred to the fact of Nanjammal having attended a family function where she had gone alone and the reliance was placed on the photographs taken at the said function which events had taken place about an year after the execution of Exhibits B-6 and B-7. On consideration of the evidence on record, the first appellate court concluded that Nanjammal was physically healthy and in a sound disposing mind when she executed Exhibits B-6 and B-7 and that she voluntarily executed the said documents with full knowledge of the nature and purport of the documents she was executing. These findings, in our view, have been correctly recorded by the first appellate court. Be that as it may, we see no ground on the basis whereof the High Court could reappreciate evidence and reverse the said findings while deciding a second appeal.

Further, the High Court, in view of the relationship of the appellant with his grandmother, presumed undue influence and held that the documents Exhibits B-6 and B-7 were executed in view thereof in favour of the appellant. We are unable to sustain the approach of the High Court.

In *Subhas Chandra Das Mushib* v. *Ganga Prasad Das Mushib and Ors.*, AIR (1967) SC 868, this Court held that the Court trying the case of undue influence must consider two things to start with, namely, (1) are the relations between the donor and the donee such that the donee is in a position to dominate the will of the donor, and (2) has the donee used that position to obtain an unfair advantage over the donor? Upon the determination of these two issues a third point emerges, which is that of the onus probandi. If the transaction appears to be unconscionable, then the burden of proving that the contract was not induced by undue influence lies upon the person who is in a position to dominate the will of the other. It was further said that merely because the parties were nearly related to each other or merely because the donor was old or of weak character, no presumption of undue influence can arise. Generally speaking the relations of solicitor and client, trustee and cestui que trust, spiritual adviser and devotee, medical attendant and patient, parent and child are those in which such a presumption arises. The High Court presumed the undue influence merely on account of near relationship.

A The presumption made by the High Court on the basis of relationship was not warranted by law. The whole approach of the High Court was wrong and it cannot be sustained.

Before parting, we wish to note the level of assistance rendered in the matter by learned counsel for the respondents. In reply to submissions of B learned counsel for the appellant, one sentence submission was made by learned counsel that he adopts what has been said in the impugned judgment by the High Court in favour of his clients and has nothing more to add.

For the aforesaid reasons, we set aside the impugned judgment of the High Court and allow the appeal. The judgment and decree of the trial court C is set aside and that of the first appellate court is restored. Resultantly, the suit shall stand dismissed. The appellant shall also be entitled to his costs throughout.

K.K.T. Appeal allowed.