

## APPELLATE CIVIL

Before Sir Hasil Scott, Kt., Chief Justice and Mr. Justice Hayward.

GOVIND RAMAJI GANJALE (ORIGINAL DEFENDANT), APPELLANT v. SAVITRI  
KOM RAMA GENU THOSAR (ORIGINAL PLAINTIFF), RESPONDENT.\*

1918.

July 5.

*Indian Trusts Act (II of 1882), section 88—Sale deed in favour of uncle—  
Fiduciary relationship of contracting parties—Undue influence—Voidable  
contract—Indian Contract Act (IX of 1872), sections 19 and 19A—Hindu  
Law—Marriage—Asura form—Succession.*

Two sisters M and S executed a sale deed in favour of their uncle. After the death of M, S sued for a declaration that the sale deed was obtained by the uncle through fraud, misrepresentation and undue influence, and to recover possession of the property from him. S claimed the property both in her own right and also as the heir of M. The lower Courts allowed the plaintiff's claim holding that the uncle was in a fiduciary relation to his nieces and the consideration paid under the sale deed was inadequate. On appeal to the High Court, two contentions were raised: (1) that S was not the heir of M and (2) that claiming through M, S had no right to exercise the option to void the deed as to one moiety of the property since M in her life time did not exercise the option,

*Held*, that S was the heir of M as M's marriage was performed in *asura* form.

*Held* further, that on the facts found the case fell within the scope of section 88 of the Indian Trusts Act, 1882, and the sale deed was, therefore, null and void.

SECOND appeal against the decision of R. B. Milne, Assistant Judge at Poona, confirming the decree passed by A. Majid, Additional Subordinate Judge at Khed.

Suit for a declaration.

The plaintiff and her sister Manjoola were the daughters of one Krishna. Being very young at the time of their father's death, they were taken care of by their paternal uncle (the defendant). On the 3rd August 1911, the defendant got a sale deed executed in his favour

\* Second Appeal No. 172 of 1917.

1918.

GOVIND  
RAMAJI  
v.  
SAVITRI.

by the plaintiff and her sister Manjoola. Manjoola died in February 1912. In 1914, the plaintiff sued for a declaration that the sale deed was null and void as it was obtained by the uncle through fraud, misrepresentation and undue influence and without paying any consideration. The plaintiff also claimed to recover possession of the property in her own right and as heir to her sister Manjoola.

The defendant denied the plaintiff's allegations as to fraud, undue influence and misrepresentation and pleaded that the consideration paid under the sale deed was applied towards the satisfaction of the prior mortgages existing on the property; that the plaintiff was not the heir of her sister Manjoola under the Hindu law and therefore she alone could not sue.

The Subordinate Judge held that the plaintiff was the heir of her sister Manjoola as the latter's marriage was performed in *asura* form and declared the sale deed void being obtained by fraud, misrepresentation and undue influence. He, therefore, passed a decree in favour of the plaintiff.

On appeal, the Assistant Judge, confirmed the decree.

The defendant appealed to the High Court.

*Coyojee* with *K. H. Kelkar*, for the appellants:—We submit, first, that Manjoola's interest passes not to her sister but to her husband. It was wrong to say that the marriage was in an unapproved form because *dej* was paid. The lower Court should have ascertained what this *dej* was. In this case there is no direct evidence as to the form of marriage and as no evidence is adduced the presumption is it is in approved form. Though the parties are *kumbis* and *asura* form of marriage is common among them, the Hindu law does not prohibit to those classes the more approved forms

of marriage: *Jaikisondas Gopaldas v. Harkisondas Hullochandas*<sup>(1)</sup>; *Hira v. Hansji Pema*<sup>(2)</sup>.

1918.

---

GOVIND  
RAMAJI  
v.  
SAVITRI.

Secondly, accepting the finding of fact that the deed was obtained by fraud and undue influence, we submit that the plaintiff cannot avoid the deed to the extent of Manjoola's share and to that extent the lower Court's decree is erroneous. The transaction, entered into by the plaintiff and her sister Manjoola, was voidable and not void and it was open to the latter to exercise her option to avoid the deed during her life time: see sections 19 and 19A of the Indian Contract Act, 1872. Manjoola not having chosen to avoid the deed, the plaintiff in her representative capacity as heir of Manjoola will have no right to challenge the validity of the deed so far as Manjoola's share is concerned. The wording of section 19 'voidable at the option of the party whose consent was caused' clearly supports our contention. In sections 37, 42 and 45 of the Indian Contract Act, 1872, clear provision is made for the representatives to fulfil the performance of the promise, but no analogous provision is made under sections 19 or 19A of the Act, and therefore the option would not be transmissible to heirs or representatives.

Section 86 of the Indian Trusts Act, 1882, which is similar in its provisions to sections 19 and 19A of the Indian Contract Act, 1872, is open to similar criticism since sections 81 and 83 refer expressly to the representatives, while section 88 apparently refers to the life time of the transferor.

The Legal Representatives' Suits Act (XII of 1855), though it gives a right to the representatives to sue for compensation for wrongs which have caused pecuniary loss to the estate of a deceased person does not give any right of suit to avoid contracts for wrongful action.

(1) (1876) 2 Bom. 9.

(2) (1912) 14 Bom. L. R. 1182.

1918.

GOVIND  
RAMAJI  
v.  
SAVITRI.

The Probate and Administration Act, 1881, section 88, shows that an executor or administrator has the same power to sue as the deceased in respect of all causes of action that survive the deceased. In the case of contracts brought about by undue influence, however, there would be no cause of action surviving till the person unduly influenced has indicated his intention to avoid the contract.

The observations in *Jugaldas v. Ambashankar*<sup>(1)</sup> and *Rangnath Sakharam v. Govind Narasim*<sup>(2)</sup> are in our favour.

*Jayakar with K. A. Padhye* :—We submit that fraud was not the only ground on which our cause of action was based. We also alleged ‘want of consideration’ as an alternative cause of action. Both the causes of action are mixed up in one suit and the latter cause of action, viz., failure of consideration, would survive to the representative of the deceased. Sections 19 and 19A of the Indian Contract Act, 1872, have, therefore, no application to the facts of the present case.

[SCOTT & J. :—Section 89 of the Probate and Administration Act is against you.]

The rule laid down in that section is limited to cases where the damage is personal as in the case of collision: see *Phillips v. Homfray*<sup>(3)</sup>.

The observations in *Mitchell v. Homfray*<sup>(4)</sup> and *Allcard v. Skinner*<sup>(5)</sup> would go to show that action would survive unless the party influenced had ratified the deed during his life time. In our case, however, there is nothing to show that Manjoola or our client had ratified the transaction with knowledge of their rights.

(1) (1888) 12 Bom. 501.

(3) (1883) 24 Ch. D. 439.

(2) (1904) 28 Bom. 639.

(4) (1881) 8 Q. B. D. 587.

(5) (1887) 36 Ch. D. 145 at p. 187.

We submit that the case falls under section 88 of the Indian Trusts Act, 1882, as it has been found that the defendant was in the position of a trustee towards the plaintiff and her deceased sister and as such he had gained the advantage of his position by the exercise of undue influence. In such a case the representative of a party over whom undue influence was exercised will be entitled to set aside the transaction: see *Holman v. Loynes*<sup>(1)</sup>; *Wright v. Vanderplank*<sup>(2)</sup>.

1918.

GOVIND  
RAMAJI  
v.  
SAVITRI.

*Coyajee* in reply.

SCOTT, C. J.:—The plaintiff sued for a declaration that a sale deed executed by her and her sister Manjoola on the 3rd August 1911 in favour of their uncle, the defendant, was null and void, and to recover possession of the property described therein. Manjoola, the plaintiff's sister, died in February 1912, and the plaintiff claims both in her own right, and in the right of Manjoola as her heir, to recover the property.

The first question is whether the plaintiff is the heir of Manjoola. That depends upon the question whether Manjoola was married by the *asura* form of marriage or by an approved form. If she was married by the *asura* form, then the plaintiff is her heir. It is held by both Courts that *dej* was paid on Manjoola's marriage, and that the defendant postponed that marriage because the *dej* had not been paid. They, therefore, came to the conclusion that the *dej* was paid to the defendant as a bride price. The marriage was, therefore, in the *asura* form.

It has been held by the lower Courts that the appellant was in a fiduciary relation to his nieces. They were brought up in his house and acted under his influence. The Courts also held that the price paid under

(1) (1854) 4 Deg. M. & G. 270.

(2) (1856) 8 Deg. M. & G. 133.

1918.

GOVIND  
RAMAJI

S. SAVITRI.

the sale deed as a consideration for the transfer of the plaintiff and her sister's property to the defendant was inadequate.

Assuming the plaintiff is the heiress of Manjoola it is contended that claiming through Manjoola she has no right to exercise the option to avoid the deed as to one moiety of the property since Manjoola in her lifetime did not exercise the option and a right dependent on the will of an individual is not transmissible to his heirs to exercise at their will and not that of the person through whom they claim.

The argument may be put thus :—

Under the Indian Contract Act all agreements fulfilling the conditions of section 10 are contracts.

One of those conditions is free consent of competent parties. But the absence of free consent from causes specified in section 14, namely, coercion, &c., does not prevent the agreement from being a contract. The contract only becomes voidable at the option of the party whose consent is caused (sections 19 and 19A).

In dealing with performance of such contracts in Chapter IV, section 64, the Act reserves no right expressly to the representative of the party whose unfree consent was obtained although section 45 of the same Chapter provides for devolution of certain contractual rights where but for express provision the death of a joint promisee would bar such devolution.

Moreover section 86 of the Indian Trusts Act which is in *pari materia* with sections 19 and 19A of the Indian Contract Act is open to similar criticism since sections 81 and 83 refer expressly to representatives, while section 86 apparently only relates to the life time of a transferor.

Again Act XII of 1855, though it gives a right to representatives to sue for compensation for wrongs

which have caused pecuniary loss to the estate of a deceased person, does not give any right of suit to avoid contracts for wrongful action.

The Probate and Administration Act, section 88, gives the executor or administrator the same power to sue as the deceased in respect of all causes of action *that survive the deceased*. But it is contended that there is no cause of action till the person unduly influenced has indicated his election to avoid the contract.

This argument might be pertinent and require serious consideration if we were dealing with a case of a contract effected by undue influence in which the parties were not in a fiduciary relation to each other and in which the influencing party had not acquired possession of property of the party influenced. When property has been acquired by a party by using for his own advantage his fiduciary position the case falls under section 88 of the Indian Trusts Act, which runs as follows :—

“Where a trustee, executor, partner, agent, director of a Company, legal adviser, or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained.”

This section embodies a principle acted on in many English cases. It is sufficient to mention *Stump v. Gaby*<sup>(1)</sup> and *Gresley v. Mousley*<sup>(2)</sup>, where devisees of the party influenced were allowed to set aside conveyances of their testators to solicitors on the ground that the testator by reason of the breach of trust of his grantee still retained a devisable right to the property in equity.

<sup>(1)</sup> (1852) 2 Deg. M. & G. 623 at p. 630. <sup>(2)</sup> (1859) 4 Deg. & J. 78 at p. 93.

1918.

---

 GOVIND  
 RAMAJI  
 v.  
 SAVITRI.

1918.

GOVIND  
RAMAJI  
v.  
SAVITRI.

In *Stump v. Gaby*<sup>(1)</sup> it was said:—"I do not deny that a deed may be so fraudulent as to be set aside at law; this, however, is not such a case; but I will assume that the conveyance might have been set aside in equity for fraud: what then is the interest of a party in an estate which he has conveyed to his attorney under circumstances which would give a right in this Court to have the conveyance set aside? In the view of this Court he remains the owner, subject to the repayment of the money which has been advanced by the attorney, and the consequence is that he may devise the estate, not as a legal estate, but as an equitable estate, wholly irrespective of all questions as to any rights of entry or action, leaving the conveyance to have its full operation at law, but looking at the equitable right to have it set aside in this Court. The testator, therefore, had a devisable interest. My strong impression is that this very point is concluded upon authority, but if not I am ready to make an authority on the present occasion, and to decide that, assuming the conveyance to have been voidable, the grantor had an equitable estate which he might have devised, and that being so he has in the clearest terms devised the estate, and thereby prevented the descent to his heir-at-law. I give no opinion as to what would have been the case if he had not devised the estate."

Apparently this is the idea underlying suits by representatives such as *Holman v. Loynes*<sup>(2)</sup> and *Wright v. Vanderplank*<sup>(3)</sup>.

In such cases one comes very near treating the conveyances as void in equity and thus taking them in substance out of the range of voidable contracts.

(1) (1852) 2 Deg. M. & G. 623 at p. 630. (2) (1854) 4 Deg. M. & G. 270.

(3) (1856) 8 Deg. M. & G. 133.

The English Courts, however, have applied to them the tests applicable to cases of voidable contracts, such as that lapse of time without rescinding will furnish evidence that the party influenced has determined to affirm the contract though delay is not imputable against him till he has such knowledge as he was bound to avail himself of, the onus being on the other side to prove such knowledge and the time of its acquisition; see Leake on Contract, Part I, Chapter VI, section 11.

Since the facts of this case as found by the lower Courts clearly bring it within the scope of section 88 of the Indian Trusts Act, we affirm the decree declaring the sale deed to be null and void. We direct an inquiry as to the amount of the consideration paid by the appellant in discharging the mortgages which were binding on the estate and that on the respondent paying within six months the sum which may be found due on such account, the appellant do deliver to her possession of the property in suit.

The costs of this appeal and the costs in the lower Courts up to date to be paid by the appellant.

*Decree confirmed.*

J. G. R.

### PRIVY COUNCIL

RATANLAL CHUNILAL PANALAL *v.* MUNICIPAL COMMISSIONER  
FOR CITY OF BOMBAY AND ANOTHER—APPEAL: TWO APPEALS CONSOLIDATED.

[On appeal from the High Court of Judicature at Bombay.]

*Bombay City Municipal Act (Bombay Act III of 1888), Sections 297, 301—  
City of Bombay Improvement Trust Act (Bombay Act IV of 1898), sections 41, 42, 45 (2)—Bombay Street Scheme—Setting back of new buildings,*

\* *Present.*—Lord Shaw, Sir John Edge, Mr. Ameer Ali, and Sir Walter Phillimore, Bart.

ILR 3

1918.

GOVIND  
RAMAJI  
*v.*  
SAVITRI.

P. C. \*

1918.

June 13, 14,  
17, 18—  
July 26.