Privy Council Appeal No. 13 *of* 1952

Bridget Antony - - - - - - - - - - *Appellant*

v.

Imelda Weerasekera and another - - - - - - *Respondents*

FROM

THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 8TH JULY, 1953

Present at the Hearing:

LORD NORMAND
LORD COHEN
SIR LIONEL LEACH
MR. L. M. D. DE SILVA

[*Delivered by* MR. L. M. D. DE SILVA]

The plaintiff instituted this action in the District Court of Colombo on the 11th June, 1946, to obtain a declaration that a deed of gift executed on the 12th April of that year in favour of the first defendant, a grand-daughter, was "void on the ground that it had been obtained by pressure and surprise, without making her aware of the contents and through the exercise of undue influence and by fraudulent representations." The plaintiff was then a widow of the age of 70 years. Her husband had died three years previously and she was living with her son and the 1st defendant who was the plaintiff's grand-daughter through a deceased daughter. The deceased daughter had in her lifetime first married the father of the 1st defendant, and, after his death, a Dr. Van Dort who, at the times material to this action, was in close touch with the family. The 1st defendant married the son of the 2nd defendant on the 28th June, 1947.

The two defendants filed separate answers in which the above mentioned allegation of the plaintiff was denied. The 2nd defendant pleaded further that no cause of action had arisen against him even if the facts stated in the plaint were true. He was unrepresented at the hearing before the Board, and their Lordships do not propose to go into the question, which was not argued before them, whether he should have been joined in this action.

The learned District Judge dismissed the action after examining all the relevant aspects of the case and he expressed his views upon them in detail. His judgment was affirmed by the Supreme Court. Their Lordships take the view that the Supreme Court were clearly right in doing so, and their Lordships have very little doubt that the Supreme Court before whom the case was argued for four days dismissed the appeal without giving any reasons because they were in full agreement with the findings of fact of the learned District Judge and the views taken by him on the law. Their Lordships would however have derived great assistance if the reasons for the dismissal had been stated.

The plaint which has been filed set out in outline the facts upon which the plaintiff relied to sustain her case. It stated inter alia that:—

> "The 2nd defendant commenced to visit the plaintiff in or about the year 1945 and to evince concern and interest in the plaintiff and

the 1st defendant and continued such behaviour as a self-constituted friend and adviser to the plaintiff.

In or about November, 1945, the 2nd defendant through his brother John Zoysa suggested to the plaintiff a marriage between the 2nd defendant's son and the 1st defendant to which proposal the plaintiff did not agree.

Notwithstanding the plaintiff's rejection of the said proposal the 2nd defendant continued his visits which became more frequent thereafter and gained an ascendancy over the minds of the 1st defendant and the plaintiff with a view to gaining his purpose of putting through the marriage for his son with 1st defendant and securing all the properties of the plaintiff for the benefit of his son.

With the aforesaid intent, the 2nd defendant succeeded in making the 1st defendant amenable to his wishes prior to the dates hereinafter set out."

It then proceeded to give in some detail the events of the 11th April, 1946, which led to the execution of the impugned deed. The plaintiff said she was " induced and prevailed upon " by " those present " to sign it in spite of a refusal by her so to do. The case was opened on the basis of the plaint but, as observed by the learned District Judge " In her evidence the plaintiff made it quite clear that the second defendant did not at any stage gain an ascendancy over her mind. . . . It is her case that at no time did she consult the second defendant with regard to any of her actions." She said in the course of her evidence " I have nothing to consult him (2nd defendant) about. I have nothing to do with him. . . . After my husband's death I did not find it necessary to get his advice. He gave me no advice and I did not consult him on anything." And as observed by the learned District Judge " There is no other evidence in the case . . . which indicates that the 2nd defendant had in the slightest degree gained an ascendancy over the mind of the plaintiff."

The plaint averred that the 1st defendant was aware of the facts alleged by the plaintiff. There was nothing further averred against her except that she had agreed to execute a retransfer but had not done so. The words " those present " (referred to above) were wide enough as a matter of language to include the 1st defendant, but it was no part of the argument before the Board that she " induced " or "prevailed upon " the plaintiff to execute the deed or that she did anything she should not have done. Presumably no such suggestion was made in the Courts below.

The case for the plaintiff was based on the conduct of the 2nd defendant in relation to her. It was not disputed that if undue influence was shown to have been exercised on the plaintiff by the 2nd defendant, it would vitiate the deed in favour of the 1st defendant even though the 1st defendant took no part in the exercise of that undue influence.

Seven issues were framed by the District Judge of which the first six were suggested by counsel for the plaintiff. The seventh suggested by counsel for the 2nd defendant raised the question whether a case against him had been made out in the plaint. It is sufficient to say of the first six issues that they put in issue the facts stated in the plaint and referred to above, and raised the question whether, on the basis of those facts, undue influence or fraud had been established. The learned District Judge observed " Strictly speaking, even on the plaintiff's own evidence, these issues will have to be answered mainly against the plaintiff because, according to the evidence, even if there was any pressure, surprise or undue influence, it was not exercised as alleged in the plaint or in the circumstances set out in the plaint." From what has been said earlier and from other observations correctly made by the learned District Judge it is clear that there is much substance in this view. He however did not decide the case on that ground. He went on " to consider whether on the evidence led there was undue influence, pressure, surprise or fraudulent representation of any kind which would justify the setting aside of the deed of gift." This was a more satisfactory course. Their Lordships see no ground on which they could disturb the findings of fact of the learned

District Judge, concurred in as they must be taken to be by the Supreme Court, and they agree with him that the facts as so found do not give rise in law to a case for setting aside the deed.

The English Law relating to undue influence is part of the law of Ceylon. It was so held by the Supreme Court of Ceylon in the case of *Perera* v. *Tissera* (35 N.L.R. 257 pp. 266 and 282). The view there expressed was not challenged at the hearing of the present case before the Board or in the Courts in Ceylon. Their Lordships are of the opinion that that view is correct.

The principles upon which this case falls to be decided were laid down by Cotton L.J. in the case of *Allcard* v. *Skinner* 36 Ch. D, p. 145 and p. 171. It was there stated that voluntary gifts would be set aside in two classes of cases:—

> " First, where the Court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose; second, where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor. In such a case the Court sets aside the voluntary gift, unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justifies the Court in holding that the gift was the result of a free exercise of the donor's will. The first class of cases may be considered as depending on the principle that no one shall be allowed to retain any benefit arising from his own fraud or wrongful act. In the second class of cases the Court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused."

This case was approved and applied by Lord Hailsham (delivering the judgment of the Board) in *Inche Noriah* v. *Shaik Allie Bin Omar* 1929 *A.C.* 127. It was referred to also in the recent case of *Tufton* v. *Sperni* 1952 T.L.R. 516 in which the Master of the Rolls examined the case law relating to undue influence in great detail. He observed that the decided cases on the subject established the proposition that the jurisdiction exercised by Courts of Equity over the dealings between persons between whom there was a relationship of confidence was " not circumscribed by reference to defined limits " and that " the existence of the jurisdiction and the right and duty to exercise it must in every case depend on the special facts of that case and the inferences properly to be drawn from them." He pointed out that the cases refuted the suggestion " that to create the relationship of confidence the person owing the duty must be found clothed in the recognizable garb of a guardian, trustee, solicitor, priest, doctor, manager or the like." Of special relevance to this case is his observation, based on previous cases, that certain circumstances can give rise to a relationship between two parties which makes it " the duty of one party to take care of the other" and it is clear from what he says that the duty of taking care includes the duty of giving advice.

Before their Lordships it was stated by counsel for the plaintiff that he did not find it possible to press the plea of fraud. He said also that it was not possible to argue that this case came within the first category of cases referred to in *Allcard* v. *Skinner*, namely cases where " the gift was the result of influence expressly used." His argument was that it came within the second category. He urged that the relationship between the plaintiff and the 2nd defendant was in the circumstances of this case one of confidence giving rise to a duty on the part of the 2nd defendant to surround the plaintiff with care and to advise her. He argued that there had been a breach of that duty and that consequently a presumption of undue influence had arisen. With this contention their Lordships are unable to agree.

It is common ground that the impugned deed was signed in the house of Dr. Van Dort on the 12th April, 1946, and that there were present on that occasion the plaintiff, the two defendants, Mr. P. D. A. Mack a proctor acting for the 1st defendant, Mr. J. A. V. Modder a proctor who had been instructed to act for the plaintiff and Dr. Van Dort. Mr. Modder however had not met the plaintiff before that day, and the plaintiff stated in evidence that she was taken to Dr. Van Dort's house in the belief that she was being taken elsewhere. It is admitted that the car in which she was taken there had been procured by the 2nd defendant. She stated further that she was prevailed upon to execute the impugned deed although she had expressed unwillingness to do so on that day. These facts and these allegations called for careful investigation. Their Lordships see no reason to doubt that they received due consideration from the learned District Judge when reaching his conclusions as to the credibility of the witnesses who have been called and as to the facts which he found to be established. It is not necessary for their Lordships to refer in this judgment to more than a few of the facts so found.

It is clear from what has been stated earlier that the plaintiff in her evidence had disavowed any suggestion that she consulted the 2nd defendant or took his advice. Consequently the case for her could be put and was pressed before their Lordships only on the basis that the duty which it was suggested the 2nd defendant owed the plaintiff arose on the 12th April, 1946. It was argued that the 2nd defendant was the prospective father-in-law of the 1st defendant and that he had been instrumental in securing the presence of the plaintiff at the house of Dr. Van Dort, on that day. She was there asked to sign the impugned deed to which she had given no thought till that day. It was argued that in these circumstances, taking into account that the proctor who usually attended to her affairs was not present, it was the duty of the 2nd defendant to warn the plaintiff against signing the deed or at least to explain to her its implications. The findings of fact destroy this argument.

The learned District Judge had no doubt about the credibility of Dr. Van Dort who gave evidence. Dr. Van Dort said that he had earlier in 1946, probably in February or March, told the 1st defendant in the course of a conversation about her affairs, that she should have independent advice with regard to her share of her grandfather's (plaintiff's husband) intestate estate ; that with the plaintiff's approval Mr. Mack was retained by him to act for the 1st defendant ; that in the course of investigation Mr. Mack discovered that certain valuable properties had been transferred by the plaintiff to her son ; that he (Dr. Van Dort) informed the plaintiff that she had " signed away " these properties and that she appeared to be angry when she realised what she had done ; that some days before its execution the plaintiff asked him to get a lawyer to prepare the deed which is now impugned " before her son forced her to sign other things away " ; that he asked Mr. Mack to prepare the deed but Mr. Mack was unwilling as he was acting for the 1st defendant and that Mr. Modder was thereafter secured to do the work. This evidence is corroborated by Mr. Mack whom the learned District Judge regards, no doubt correctly, as a person of integrity with a high standing in his profession.

It will thus be seen that the train of events which led to the execution of the impugned deed was set on foot by Dr. Van Dort. The reason for its execution was the idea entertained by the plaintiff that she had " signed away " properties to her son and that immediate provision should be made for the 1st defendant. It is not necessary for their Lordships to go into the question whether this idea was correct or not. She certainly entertained it. On the findings in the Court below their Lordships have formed the view that without doubt the plaintiff went to Dr. Van Dort's house on the 12th April, 1946, with the object of executing the impugned deed having given instructions for its preparation earlier. It is impossible to accept the suggestion that the 2nd defendant alone or with others lured her to Dr. Van Dort's house and asked her to sign a deed which had not been under contemplation by her prior to that day. There are no facts established in this case upon which it can be suggested that a duty was cast upon the 2nd defendant

to advise the plaintiff or to surround her with care. Even if there was it is difficult to see why the 2nd defendant, upon such knowledge of facts as could be supposed he had, should have advised the plaintiff not to execute the deed. Even if the plaintiff's knowledge of the facts was faulty there is nothing to show that the 2nd defendant knew better. There is nothing in this case upon which the impugned deed can be assailed on the principles discussed earlier.

Their Lordships feel that reference should be made to an application made at the trial by the counsel for the plaintiff to call evidence in rebuttal after the case for the defendant had been closed. It was urged that certain evidence led for the defendant, namely that the plaintiff was surprised when she learnt that she had transferred certain properties to her son, had not been put to the plaintiff in cross-examination. And also that an incident spoken of by the 1st defendant as having taken place on the 11th April was not so put. With regard to the first point it is to be observed that in examination-in-chief one Father Bourgeois, the first witness called by the plaintiff, made reference to a statement made by the plaintiff to him that " people told her that she had signed away valuable things belonging to her and she did not know what she had signed." This evidence was, in the context in which it was given, materially the same as the evidence complained of and consequently it was unnecessary for the defence to put the latter in cross-examination to the plaintiff. The incident of the 11th April was put to one of the plaintiff's witnesses who was one of the principal participants in it. Their Lordships do not attach much importance to the failure to put it to the plaintiff. Upon the view their Lordships have formed on these two points certain submissions of law relating to the calling of evidence in rebuttal, and involving a consideration of certain sections of the Ceylon Civil Procedure Code, which were made in the Courts below (but not argued before their Lordships) do not arise for comment in this judgment.

For the reasons they have stated their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellant must pay the costs of the appeal.

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In the Privy Council

BRIDGET ANTONY

v.

IMELDA WEERASEKERA
AND ANOTHER

DELIVERED BY MR. L. M. D. DE SILVA

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