A JOSEPH JOHN PETER SANDY

v.

VERONICA THOMAS RAJKUMAR & ANR.

(Civil Appeal Nos. 2178-2179 of 2004 etc.)

MARCH 12, 2013

B

[DR. B.S. CHAUHAN AND FAKKIR MOHAMED IBRAHIM KALIFULLA, JJ.]

SPECIFIC RELIEF ACT, 1963:

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s.26 – Suit for rectification of settlement deeds – Held: Appellant could not have filed the suit for rectification of settlement deed, as there was no mistake in its understanding or execution by the parties – It was only the father of the D *parties who could have sought rectification of the deed, but he was neither impleaded, nor examined before the trial court, though he was still alive at the time of institution of the suit – As respondent no. 1 was not a party to the alleged rectification deed, she was not bound by it – Besides, the memorandum of agreement relied upon by the plaintiff has not been proved* E *– Evidence – Onus of proof.*

CONTRACT ACT, 1872:

s.16 – Contract induced by undue influence – Held: High F *Court has come to the conclusion that it was a case of undue influence, as on the date of executing the alleged document, i.e. Memorandum of agreement, respondent no.1 was unmarried and was dependent on her father and brother for settling her marriage and for sustenance – She having* G *contended that plaintiff was in a position to dominate her will, the alleged document was termed as an unconscionable – The said document was clouded with suspicious and unexplained circumstances.*

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The father of the appellant and respondent no. 1 executed two registered settlement deeds on 27.8.1981 transferring House No. 23 in the name of his daughter (respondent No. 1) and House No. 22 in the name of his son (the appellant). The appellant filed O.S.No. 6331 of 1983 on 12.9.1983 for issuance of direction to defendant/ respondent no.1, to execute a Deed of Rectification and further to restrain her from interference with the appellant's possession of the suit property. It was the case of the plaintiff-appellant that after the settlement deed dated 27.8.1981, the father of the parties realised that House No. 23 which was given to the daughter, ought to have been given to him and House No. 22 to the daughter. Thus, the parties to give effect to the real intention of their father decided to exchange the properties given to them, and in furtherance thereof, executed an Agreement Deed to exchange the same on 1.6.1982 (Ext. A-3), but respondent no. 1 failed to give effect to the same. During the pendency of the suit, the settler and the appellant were stated to have executed a Rectification Deed (Ext.A-6) on 8.10.1983 by which the property in Door No.23 was given to the appellant. The said deed was signed by two witnesses. Respondent no.1/defendant filed suit O.S. No. 415 of 1984 for declaration that the agreement dated 1.6.1982 (Ext.A-3), an unregistered document, was null and void, being a forged document, and that she, under undue influence, put her signature on the blank non-judicial stamp papers. The trial court decreed the appellant's suit and dismissed that of respondent no.1. However, the High Court allowed both the appeals filed by respondent no.1.

Dismissing the appeals, the Court,

HELD: 1.1. Section 26 of the Specific Relief Act, 1963 has a limited application, and is applicable only where it is pleaded and proved that through fraud or mutual

A mistake of the parties, the real intention of the parties is not expressed in relation to an instrument. Such rectification is permissible only by the parties to the instrument and by none else. [para 7] [378-D-E]

B *Subhadra & Ors. v. Thankam,* 2010 (8) SCR 299 = AIR 2010 SC 3031; *State of Kamataka & Anr. v. K. K. Mohandas & etc,* 2007 (8) SCR 697 = AIR 2007 SC 2917 – relied on.

1.2. In the instant case, as respondent no. 1 was not a party to the document Ext A-6, she was not bound by C it. Also, the appellant could not have filed the suit for rectification of settlement deed, as there was no mistake in the understanding or execution by the parties. It was only the father of the parties who could have sought rectification of the deed, but he was neither impleaded, D nor examined before the trial court, though he was still alive at the time of institution of the suit. Even the appellant failed to examine the witnesses to the document Ext.A-3. [para 4] [377-C-D]

E 1.3. There is no dispute that by the settlement deed dated 27.8.1981, the father of the parties had given House No. 23 admeasuring 2413 Sq. Ft. to the daughter – respondent no.1 and House No. 22 admeasuring 730 Sq. Ft. to the son – appellant. None of the attesting witnesses F to these documents had been examined by either of the parties, to ascertain whether father of the parties, had expressed any intention in respect of the properties before them. Ext.A-6 dated 28.10.1983 an unregistered document by which the father had expressed his will that G House No. 23 should be given to the son – appellant, is subsequent to Exts.A1 and A2. The appellant has examined one of the attesting witnesses but the High Court came to the right conclusion that as respondent no.1 was not a party to the document, it has no effect, H whatsoever in law, on the case. [para 20] [384-D-F]

1.4. In the Memorandum of Agreement dated 1.6.1982, it is stated that mistakes, in the settlement deed made by the father, of the parties having been discovered only in the last week of May 1982, the parties, have decided to rectify the error and for that purpose, they would execute and register necessary documents to rectify the mistake. Thus, the document Ex.A-3 cannot be read as an "agreement to exchange." It can be read only as a rectification deed, which could have been done only by the settlor and not by the contesting parties. Considering the respective area of the properties bearing nos.22 and 23, the contract can definitely be held "unconscionable". [para 20 and 27(viii)] [384-G-H; 385-A; 388-F]

2.1. Section 16 of the Contract Act, 1872 provides that 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. [para 7] [378-F-G]

Bishundeo Narain & Anr. v. Seogeni Rai & Jagemath **1951 SCR 548 = AIR 1951 SC 280;** *Ladli Prashad Jaiswal v. The Karnal Distillery Co. Ltd., Karnal & Ors,* **1964 SCR 270 = AIR 1963 SC 1279;** *Subhash Chandra Das Mushib v. Ganga Prasad Das Mushib & Ors.,* **1967 SCR 331 =AIR 1967 SC 878;** *Afsar Shaikh & Anr v. Soleman Bibi & Ors.* **1976 (2) SCR 327 = AIR 1976 SC 163 – relied on.**

Poosathurai v. Kannappa Chettiar, **AIR 1920 PC 65 – referred to.**

2.2. In the instant case, High Court came to the conclusion that it was a case of undue influence as on the date of executing the alleged document Ext.A-3,

A **respondent no.1 was unmarried and was dependent on her father and brother for settling her marriage and for sustenance, and, as such, the plaintiff was in a position to dominate her will. It was a case, wherein, after obtaining the signatures of respondent no.1 on some**
B **papers, the document had been scribed. With respect to the document, the High Court held that the said document Ext.A-3 being a typed document, ought to have contained the name of the person who had scribed it. It further reasoned that the language used therein suggests that**
C **it was drafted by an expert in the field and thus, the whole document is clouded with suspicion and unexplained circumstances. [para 24] [386-B-E]**

Madan Mohan Singh & Ors v. Rajni Kant & Anr, **2010 (10) SCR 30 =AIR 2010 SC 2933;** *State of Bihar & Ors. v. Radha Krishna Singh & Ors.,* **AIR 1983 SC 684;** *H.Siddiqui (dead) by Lrs. v. A. Ramalingam* **2011 (5) SCR 587 = AIR 2011 SC 1492;** *Laxmibai (dead) thr. Lrs. & Anr v. Bhagwantbuva (dead) thr Lrs. & Ors.,* **JT 2013(2) SC 362 –**
E **relied on.**

Hari Singh v. Kanhaiya Lal **1999 Suppl. (2) SCR 216 = AIR 1999 SC 3325 – referred to.**

2.3. It is crystal clear that even though the document
F **may be admissible, still its contents have to be proved. In the instant case, as the appellant did not examine either the attesting witnesses of the document, nor proved its contents no fault can be found with the judgment of the High Court. Neither of the party has**
G **examined the attesting witness to document Ext.A-3. Such a witness could have explained the conduct of the parties and deposed as to who had prepared Ext. A-3. The trial court had reasoned that, even though the appellant did not examine the attesting witness of Ex.A-**
H **3, the defendant could have done it and prove the**

allegations she had made against her brother – appellant, and thus in the process had wrongly shifted the burden of proof. [para 22, 26 and 27(1)] [385-D; 386-G-H; 387-C]

Thiruvengada Pillai v. Navaneethammal & Anr, **2008 (3) SCR 23 = AIR 2008 SC 1541;** *K. Laxmanan v. Thekkayil Padmini & Ors.,* **2008 (16) SCR 1117 = AIR 2009 SC 951; and** *Krishna Mohan Kul @ Nani Charan Kul & Anr. v. Pratima Maity & Ors.* **2003 Suppl. (3) SCR 496 = AIR 2003 SC 4351 – referred to.**

2.4. Document Ex. B3 dated 29th July 1983 is subsequent to document Ex.A-6, wherein settlor wrote to respondent No.1 that he had given Door No.23 to her. Thus, the settlor never intended otherwise. [para 27(vi)] [388-C]

Case Law Reference:

2010 (8) SCR 299	relied on	para 6
2007 (8) SCR 697	relied on	para 6
1951 SCR 548	relied on	para 8
AIR 1920 PC 65	referred to	para 9
1964 SCR 270	relied on	para 10
1967 SCR 331	relied on	para 11
1976 (2) SCR 327	relied on	para 12
1999 (2) Suppl. SCR 216	referred to	para 13
AIR 1983 SC 684	relied on	para 14
2010 (10) SCR 30	relied on	para 15
2011 (5) SCR 587	relied on	para 15
JT 2013(2) SC 362	relied on	para 15

A	**2008 (3) SCR 23**	**referred to**	**para 16**
	2008 (16) SCR 1117	**referred to**	**para 17**
	2003 (3) Suppl. SCR 496	**referred to**	**para 18**

B CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 2178-2179 of 2004.

From the Judgments & Orders dated 16.07.2003 of the High Court of Judicature at Madras in A.S. No. 1104 of 1987 and Transferred A.S. No. 1120 of 2001.

C WITH

C.A. Nos. 2184-2185 of 2004.

R. Balasubramanian, S. Nanda Kumar, R. Satish Kumar, D Parivesh Singh Anjali Chauhan, Karunakaran, S.K. Bandhyopadhya, Rakesh K. Sharma, V.N. Raghupathy for the Appellant.

Shyam Nandan, Neha Aggarwal, Karun Mehta, W. Aman, Varun Tandon, Subramonium Prasad for the Respondents.

E

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. These appeals have been preferred against the impugned judgment and decree dated F 16.7.2003 passed by the High Court of Madras in A.S. No. 1104 of 1987 and Transferred A.S. No. 1120 of 2001, wherein it has set aside the judgment and decree of the trial court which had decreed the suit of the appellant and dismissed the suit of the respondent No.1.

G 2. The facts and circumstances giving rise to these appeals are:

A. The contesting parties are the son and the daughter of late B.P. Sandy. Though late B.P. Sandy had several children, H considering his old age, he decided to transfer/settle his two

houses bearing nos.22 and 23, Peria Palli Street, Raja Annamalai Puram, Chennai-28 in favour of his youngest son and daughter (the contesting parties herein) respectively. Therefore, the father of the parties executed two registered settlement deeds on 27.8.1981 bearing nos. 1690/81 and 1691/81 at the office of Sub-Registrar, Mylapore, Chennai, transferring House No. 23 in the name of his daughter (Respondent No. 1) and House No. 22 in the name of his son (Appellant).

B. It is alleged by the appellant that the father of the parties had only at a later point of time realised that the House No. 23 which was given to the daughter, ought to have been given to him and House No. 22 to the daughter. Thus, the parties to give effect to the real intention of their father decided to exchange the properties given to them, and in furtherance thereof, executed a Agreement Deed to exchange the same on 1.6.1982. The said document was witnessed by Sheila Doss and Mrs. Mary Doss, who were neighbours and teachers and colleagues of the daughter – respondent no.1. Since, the said agreement dated 1.6.1982 (Ex.A-3) had not been given effect to by the respondent no.1, the appellant filed O.S.No. 6331 of 1983 on 12.9.1983 in the court of City Civil Judge, Chennai, for issuance of direction to the defendant/respondent no.1, to execute a Deed of Rectification and further to restrain her from interference with the appellant's possession of the suit property. During the pendency of this suit, Shri B.P. Sandy and the appellant executed a Rectification Deed (Ex.A-6) on 8.10.1983 by which property in Door No.23 was given to the appellant. The said deed was signed by two witnesses Susan Muthu and A. Bernard. The respondent no.1/defendant filed suit O.S. No. 415 of 1984 before the same court for declaration that the agreement dated 1.6.1982 (Ex.A-3), an unregistered document, was null and void, being a forged document, and that she has under undue influence put her signature on the blank non-judicial stamp papers.

A C. The trial court decided both the suits together vide judgment and decree dated 21.8.1986 by way of which the appellant's suit was decreed and that of respondent no.1 was dismissed.

B D. Aggrieved, the respondent no.1 filed an appeal before the learned District Judge, however, it was subsequently transferred to the High Court and the High Court has allowed both the appeals filed by respondent no.1.

It may also be pertinent to mention here that during the C pendency of the appeals, the appellant got the Trial Court decree executed through the court and subsequently sold the property no.23 to the respondent no.2.

Hence, these appeals.

D 3. Shri R. Balasubramanian, learned senior counsel appearing for the appellant, has submitted that the High Court has committed an error in interpreting the statutory provisions of law and it was not necessary, that the agreement between the parties, tantamount to an agreement to sell, may be a E registered document as required under Section 17 of the Registration Act or by any provision of the Transfer of Property Act and, therefore, the High Court erred in holding the Ex.A-3 was inadmissible and inoperative in law. Once the document (Ex.A-3) had been admitted in the evidence without any F objection being raised, its contents were bound to be admitted and relied upon. In fact, the said document had been executed by the parties in order to give effect to the real intention of their father. Therefore, the question of undue influence could not have been inferred. The judgment of the trial court ought not to have G been reversed by the appellate court. The parties having jointly taken a loan, an agreement was reached between the parties that in consideration for the appellant paying the entire loan taken for the marriage and maintenance of the respondent no.1, she would transfer the property stood in her name. Thus, the H appeals deserve to be allowed.

4. Shri Shyam D. Nandan, learned counsel appearing on behalf of the respondent No.1, has submitted that the High Court has rightly reversed the judgments and decree of the trial court interpreting and applying the statutory provisions in correct perspective. It was a clear cut case of undue influence. The Rectification Deed (Ex.A-6) executed by the father and appellant ought not to have been given effect to.

In the instant case, as the respondent no. 1 was not a party to the document Ex.A-6, she was not bound by it. Also, the appellant could not have file the suit for rectification of settlement deed– Ex.A-1, as there was no mistake in the understanding or execution by the parties. The father of the parties was neither impleaded, nor examined before the trial court, though he was still alive at the time of institution of the suit. Even the appellant failed to examine the witnesses to the document Ex.A-3. He examined only Shri A. Bernard, the witness of document (Ex.A-6), who had no bearing to the instant case. Thus, the appeals lack merit and are liable to be dismissed.

5. We have considered the rival submissions made by the learned counsel for the parties and perused the records. Before entering into merits of the case, it is desirable to examine the legal issues.

LEGAL ISSUES :

I. Section 26 of Specific Relief Act, 1963:

Section 26 of the Special Relief Act 1963 (hereinafter referred to as 'Act') provides for rectification of instruments, where through fraud or a mutual mistake of the parties, an instrument in writing does not express the real intention, then the parties may apply for rectification. However, clause 4 thereof, provides that such a relief cannot be granted by the court, unless it is specifically claimed.

6. In *Subhadra & Ors. v. Thankam,* AIR 2010 SC 3031, this Court while deciding upon whether the agreement suffers

A from any ambiguity and whether rectification is needed, held that when the description of the entire property has been given and in the face of the matters being beyond ambiguity, the question of rectification in terms of Section 26 of the Act would, thus, not arise. The provisions of Section 26 of the Act would B be attracted in limited cases. The provisions of this Section do not have a general application. These provisions can be attracted in the cases only where the ingredients stated in the Section are satisfied. The relief of rectification can be claimed **where it is through fraud or a mutual mistake of the** C **parties that real intention of the parties is not expressed in relation to an instrument.**

A similar view has been reiterated by this Court in *State of Karnataka & Anr. v. K. K. Mohandas & etc,* AIR 2007 SC 2917.

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7. Thus, in view of the above, it can be held that Section 26 of the Act has a limited application, and is applicable only where it is pleaded and proved that through fraud or mutual mistake of the parties, the real intention of the parties is not E expressed in relation to an instrument. Such rectification is permissible only by the parties to the instrument and by none else.

II. <u>Undue influence - Section 16 of Contract Act, 1872:</u>

F Section 16 of the Contract Act provides that 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.

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8. In *Bishundeo Narain & Anr. v. Seogeni Rai & Jagernath,* AIR 1951 SC 280, while dealing with the issue, this Court held:

"....in cases of fraud, 'undue influence' and coercion, the H parties pleading it must set forth full particulars and the

case can only be decided on the particulars as laid. There can be no departure from them in evidence. General allegations are insufficient even to amount to an averment of fraud of which any court ought to take notice however strong the language in which they are couched may be, and the same applies to undue influence and coercion." A B

9. The Privy Council in *Poosathurai v. Kannappa Chettiar,* AIR 1920 PC 65, reasoned that it is a mistake to treat undue influence as having been established by a proof of the relations of the parties having been such that the one naturally relied upon the other for advice and the other was in a position to dominate the will of the first in giving it. Up to that point "influence" alone has been made out. Such influence may be used wisely, judiciously and helpfully. But whether by the law of India or the law of England, more than mere influence must be proved so as to render influence, in the language of the law, 'undue'. C D

10. In *Ladli Prashad Jaiswal v. The Karnal Distillery Co. Ltd., Karnal & Ors,* AIR 1963 SC 1279, this Court held: E

"The doctrine of 'undue influence' under the common law was evolved by the Courts in England for granting protection against transactions procured by the exercise of insidious forms of influence spiritual and temporal. The doctrine applies to acts of bounty as well as to other transactions in which one party by exercising his position of dominance obtains an unfair advantage over another. The Indian enactment is founded substantially on the rules of English common law. The first sub-section of S.16 lays down the principle in general terms. By sub-section (2) a presumption arises that a person shall be deemed to be in a position to dominate the will of another if the conditions set out therein are fulfilled. Sub-section (3) lays down the conditions for raising a rebuttable presumption that a transaction is procured by the exercise of undue influence. The reason for the rule in the third sub-section is that a F G H

A person who has obtained an advantage over another by dominating his will may also remain in a position to suppress the requisite evidence in support of the plea of undue influence."

B 11. In *Subhash Chandra Das Mushib v. Ganga Prasad Das Mushib & Ors.*, AIR 1967 SC 878, 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 C 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 D 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, E trustee and cestui que trust, spiritual adviser and devotee, medical attendant and patient, parent and child are those in which such a presumption arises.

12. In *Afsar Shaikh & Anr v. Soleman Bibi & Ors.*, AIR F 1976 SC 163, this Court held:

"The law as to undue influence in the case of a gift inter vivos is the same as in the case of a contract. Sub-section (3) of Section 16 contains a rule of evidence. According to this rule, if a person seeking to avoid a transaction on G the ground of undue influence proves-

(a) that the party who had obtained the benefit was, at the material time, in a position to dominate the will of the other conferring the benefit, and

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(b) that the transaction is unconscionable,

the burden shifts on the party benefiting by the transaction to show that it was not induced by undue influence. If either of these two conditions is not established the burden will not shift. As shall be discussed presently, in the instant case the first condition had not been established; and consequently, the burden never shifted on the defendant. The Privy Council in *Raghunath Prasad v. Sarju Prasad,* (AIR 1924 PC 60) expounded three stages for consideration of a case of undue influence. It was pointed out that the first thing to be considered is, whether the plaintiff or the party seeking relief on the ground of undue influence has proved that the relations between the parties to each other are such that one is in a position to dominate the will of the other. Upto this point, 'influence' alone has been made out. Once that position is substantiated, the second stage has been reached - namely, the issue whether the transaction has been induced by undue influence. That is to say, it is not sufficient for the person seeking the relief to show that the relations of the parties have been such that the one naturally relied upon the other for advice, and the other was in a position to dominate the will of the first in giving it. Upon a determination of the issue at the second stage, a third point emerges, which is of the onus probandi. *If the transaction appears to be unconscionable,* then the burden of proving that it was not induced by undue influence is to lie upon the person who was in a position to dominate the will of the other. Error is almost sure to arise if the order of these propositions be changed. The unconscionableness of the bargain is not the first thing to be considered. The first thing to be considered is the relation of the parties. Were they such as to put one in a position to dominate the will of the other"

(Emphasis added)

13. If there are facts on the record to justify the inference

A of undue influence, the omission to make an allegation of undue influence specifically, is not fatal to the plaintiff being entitled to relief on that ground; all that the Court has to see is that there is no surprise to the defendant. In Hari Singh v. Kanhaiya Lal, AIR 1999 SC 3325, it was held that mere lack of details in the B pleadings cannot be a ground to reject a case for the reason that it can be supplemented through evidence by the parties.

III. **ADMISSIBILITY OF A DOCUMENT:**

14. In *State of Bihar & Ors. v. Radha Krishna Singh & C Ors.*, AIR 1983 SC 684, this Court held as under:

"Admissibility of a document is one thing and its probative value quite another - these two aspects cannot be combined. A document may be admissible and yet may D not carry any conviction and weight of its probative value may be nil....

Where a report is given by a responsible officer, which is based on evidence of witnesses and documents and has "a statutory flavour in that it is given not merely by an E administrative officer but under the authority of a Statute, its probative value would indeed be very high so as to be entitled to great weight.

The probative value of documents which, however ancient F they may be, do not disclose sources of their information or have not achieved sufficient notoriety is precious little."

15. Reiterating the above proposition in *Madan Mohan Singh & Ors v. Rajni Kant & Anr,* AIR 2010 SC 2933, this Court held that a document may be admissible, but as to G whether the entry contained therein has any probative value may still be required to be examined in the facts and circumstances of a particular case. (See Also : *H.Siddiqui (dead) by Lrs. v. A.Ramalingam* AIR 2011 SC 1492; *Laxmibai (dead) thr. Lrs. & Anr v. Bhagwantbuva (dead) thr Lrs. & Ors.*, JT 2013(2) SC H 362)

IV. ONUS OF PROOF:

16. In *Thiruvengada Pillai v. Navaneethammal & Anr.*, AIR 2008 SC 1541, this Court held that when the execution of an unregistered document put forth by the plaintiff was denied by the defendants, the ruling that it was for the defendants to establish that the document was forged or concocted is not a sound proposition. The first appellate Court proceeded on the basis that it is for the party who asserts something to prove that thing; and as the defendants alleged that the agreement was forged, it was for them to prove it. But the first appellate Court lost sight of the fact that the party who propounds the document will have to prove it. It was the plaintiff who had come to Court alleging that the first defendant had executed an agreement of sale in his favour. The defendant having denied it, the burden was on the plaintiff to prove that the defendant had executed the agreement and not on the defendant to prove the negative.

17. In *K. Laxmanan v. Thekkayil Padmini & Ors.*, AIR 2009 SC 951, this Court held that when there are suspicious circumstances regarding the execution of the Will, the onus is also on the propounder to explain them to the satisfaction of the Court and only when such responsibility is discharged, the Court would accept the Will as genuine. Even where there are no such pleas, but circumstances give rise to doubt, it is on the propounder to satisfy the conscience of the Court. Suspicious circumstances arise due to several reasons such as with regard to genuineness of the signature of the testator, the conditions of the testator's mind, the dispositions made in the Will being unnatural, improbable or unfair or there might be other indications in the Will to show that the testator's mind was not free. In such a case, the Court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last Will of the testator.

18. In *Krishna Mohan Kul @ Nani Charan Kul & Anr. v. Pratima Maity & Ors.*, AIR 2003 SC 4351, it was held that when fraud, mis-representation or undue influence is alleged by a

A party in a suit, normally, the burden is on him to prove such fraud, undue influence or misrepresentation. But, when a person is in a fiduciary relationship with another and the latter is in a position of active confidence the burden of proving the absence of fraud, misrepresentation or undue influence is upon
B the person in the dominating position, he has to prove that there was fair play in the transaction and that the apparent is the real, in other words that the transaction is genuine and bona fide. In such a case the burden of proving the good faith of the transaction is thrown upon the dominant party, that is to say,
C the party who is in a position of active confidence.

19. The instant case is required to be exercised in the light of the aforesaid settled proposition of law.

20. There is no dispute that by the settlement deed dated 27.8.1981, late Shri B.P. Sandy had given House No. 23
D admeasuring 2413 Sq. Ft. to the daughter – respondent no.1 and House No. 22 admeasuring 730 Sq. Ft. to the son – appellant. None of the attesting witnesses to these documents had been examined by either of the parties, to ascertain whether late B.P. Sandy, father of the parties, had expressed
E any intention in respect of the properties before them. Ex.A-6 dated 28.10.1983 a unregistered document is subsequent to Exs.A1 & A2, by which the father had expressed his will that House No. 23 should be given to the son – appellant. The appellant has examined one of the attesting witnesses Shri A.
F Bernard but the High Court came to the right conclusion that as the respondent no.1 was not a party to the document, it has no effect, whatsoever in law, on the case. Thus, in such a fact-situation, it remains to be seen as what is the effect of document dated 1.6.1982 Ex.A-3, the Memorandum of
G Agreement, and as to whether it had been obtained by the appellant by undue influence. In the document, it is stated that **mistakes**, in the settlement deed made by their father, having been discovered only in the last week of May 1982, the parties, have decided to **rectify** the error and for that purpose, they
H would execute and register necessary documents to **rectify** the

mistake. The intention behind such rectification being, to make the appellant entitled to House No.23 and respondent No.1 to House No. 22.

21. Before the trial court, only the parties and Shri A. Bernard, the attesting witness to the Deed (Ex.A-6), were examined. The appellant also did not examine his father who was alive till 26.12.1983. The appellant could have taken resort to the provisions under Order XVIII Rule 16 of the Code of Civil Procedure, 1908, to examine this witness immediately. The examination of Shri A. Bernard, (PW-2) as to the genuineness of Ex.A-6 was a futile exercise, as the said document could not have any bearing on the decision of the case.

22. The trial court had reasoned that, even though the appellant did not examine the attesting witness of Ex.A-3, the defendant could have done it and prove the allegations she had made against her brother – appellant, and thus in the process had wrongly shifted the burden of proof. The Court, further held that it was the appellant who had wanted to get Ex.A-3 executed, thus, onus to prove was on him, had he discharged the same, only then it could be shifted to the respondent no.1/ defendant.

23. The court further held that as the respondent was an educated woman and was serving as a teacher, her allegation of undue influence to sign on blank non-judicial stamp papers, cannot be relied upon and, thereby concluded that Ex.A-3 was a document executed by her voluntarily and by free will and, hence, it was binding on her and it was not permissible for her to say that it was a forged document.

The learned trial court had also taken note of a letter dated 19.7.1983 (Ex.B-3) written by the father of the parties to respondent no.1 in which it was stated that he had given her House No. 23. However, the said letter was simply brushed aside by the court without giving any reason whatsoever.

24. The High Court while dealing with the above issues, came to the conclusion that Ex.A-6 was totally incongruous to

A the natural human conduct and if the settlor i.e. the father of the parties, had so intended to rectify the mistake, he could have very well registered the rectification deed. The court further held that once the Trial Court came to the conclusion that Ex.A-6 was not worth of acceptance, it was not permissible for it to grant B an equitable relief of rectification of deed. After relying upon a large number of judgments of this Court, the High Court further came to the conclusion that it was a case of undue influence and as on the date of executing the alleged document Ex.A-3, the respondent no.1 was unmarried and was dependent on her C father and brother for settling her marriage and for sustenance, as her marriage was solemnised only on 1.6.1983. The respondent no.1 having contended that the plaintiff was in a position to dominate her will, thus, the document Ex.A-3 was termed as an unconscionable. It was a case, wherein, after D obtaining the signatures of the respondent no. 1 on some papers, the document had been scribed. With respect to the document, the High Court held that the said document Ex.A-3 being a typed document, ought to have contained the name of the person who had scribed it. It further reasoned that the language used therein suggests that it was drafted by an expert E in the field and thus, the whole document is clouded with suspicion and unexplained circumstances.

25. The High Court further held that Ex.A-3 being an unregistered document, could not have been relied upon and F it had wrongly been admitted. In our opinion, such a view may not be legally correct. However, reversal of the said finding would not tilt the balance in favour of the appellant.

26. In view of the law referred to hereinabove, it is crystal clear that even though the document may be admissible, still G its contents have to be proved and in the instant case, as the appellant did not examine either the attesting witnesses of the document, nor proved its contents, no fault can be found with the judgment impugned before us. Section 26 of the Act, provides for rectification of a document if the parties feel that H they have committed any mistake. Also, it was only, the father

of the parties who could have sought rectification of the deed. Mere rectification by parties herein does not take the case within the ambit of Section 26 of the Act. Taking note of the statutory provisions of Section 16 of the Contract Act and the parameters laid down by this Court for application of doctrine on undue influence, the High Court has reached a correct conclusion.

27. In view of the above, we reached the following inescapable conclusions:

(i) Neither of the party has examined the attesting witness to document Ex.A-3. As such a witness could have explained the conduct of the parties and deposed as to who had prepared the document Ex.A-3.

(ii) It is evident from the language of the deed (Ex.A-3) that it has been prepared either by a lawyer or a deed writer.

(iii) The said document (Ex.A-3) does not bear either the signature, or the address of the scribe. The appellant has also not examined the scribe, nor has he disclosed who such person was. This would have revealed the correct position with respect to whether the respondent no.1 had signed blank papers, or whether she had come to him for the execution of the document with the attesting witnesses and appellant. Additionally, the scribe could have explained who had bought the non judicial stamp paper for the document Ex. A-3.

(iv) The consideration for executing document (Ex.A-3) seems to be the redemption of the property mortgaged jointly by both the parties, to one Advocate Krishnaswamy, with whom the deeds of title Ex.A1 and Ex.A2 had been kept as security. The said mortgagee has not been examined by the appellant to show as to whether the respondent No.1 was also a party to the mortgage and who had placed the title deed of her property with him.

(v) In his examination-in-chief, the appellant had made a false statement that he was not made aware of the settlement

A deed Ex.A-1 till 26th June of 1982, as it was given to him by his mother on that date before her death. Such a statement stands completely falsified, as the document Ex.A-1 reveals, that he had been put in possession by his father, with the permission of respondent No.1 , as the property in Door No.23 B had been given to her and it was made clear that the respondent No .1 had absolute right of enjoyment to the said property.

(vi) Document Ex. B3 dated 29th July 1983 is subsequent to document Ex.A-6, wherein settlor Mr. Sandy had written to C respondent No.1 that he had given Door No.23 to her. Thus, the settlor never intended otherwise.

(vii) The document Ex.A3 shows that the **mistake** was discovered in the last week of May 1982. So it was agreed to **rectify** the error, therefore the parties undertook the same as D a rectification under Section 26 of the Act. In the written statement filed by the appellant, in the suit filed by the respondent No.1 , Paragraph no. 7 & 9 refers to the mistake and also, the rectification. Thus, the document Ex.A-3 cannot be read as an "agreement to exchange." It can be read only E as a rectification deed, which could have been done only by the settlor and not by the contesting parties.

(viii) Considering the respective area of the properties bearing nos.22 and 23, the contract can definitely be held "unconscionable". F

28. In view of the above, we are of the considered opinion that appeals are devoid of any merit. The same are accordingly dismissed. No costs.

CIVIL APPEAL NOs. 2184-2185 OF 2004

G These appeals are squarely covered by the aforesaid decision in the main matters i.e. C.A No. 2178-2179 of 2004. The same are, accordingly, dismissed.

R.P. Appeals dismissed.

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