

HIGH COURT OF CHHATTISGARH, BILASPUR

Second Appeal No.65 of 2003

Order reserved on: 20-2-2019

Order delivered on: 5-3-2019

1. Bachchi Devi, W/o Babao, aged about 60 years.
2. Sitaram, S/o Babao, aged about 38 years.
3. Rajaram, S/o Babao, aged about 30 years.

Appellant No.1 to 3 are R/o Village Kewra, Police Station Bhaiyathan, Tahsil Surajpur, Distt. Surguja (C.G.)

4. Shanti, D/o Babao, W/o Ram Dular, aged about 45 years, R/o Village Pariyadanh, Police Station Bhaiyathan, PO Dawna, Tahsil Surajpur, Distt. Surajpur (C.G.)
5. Krishna, D/o Babao, W/o Bhuneshwar, aged about 38 years, R/o Village/Post Sirsi, Police Station Bhaiyathan, Tahsil Surajpur, Distt. Surguja (C.G.)
6. Rukman, W/o late Ganga Ram, aged about 50 years.
7. Dharamraj, S/o late Gangaram, aged about 30 years.
8. Ramadheen (Dead) Through LRs

(a) Sonamati, W/o Late Ramadhin, Aged about 50 years, Occupation Agriculture

(b) Ramvilas, S/o Late Ramadhin, Aged about 30 years, Occupation Agriculture

(c) Kailash, S/o late Ramadhin, Aged about 25 years, Occupation Agriculture

(d) Avilas, S/o Late Shri Ramadhin, Aged about 18 years, Occupation Agriculture

(e) Amarnath, S/o late Shri Ramadhin, Aged about 16 years, Occupation Student, Minor Through Guardian Mother Sonamati, Respondent No.8 (A)

Respondent No.8(a) to 8(e) are R/o Village Kevra, P.S. Bhaiyathan, Tahsil Surajpur, Distt. Surguja (C.G.)

9. Shivadheen, S/o Sonsai, aged about 36 years.

Appellant No.6, 7 and 9 are R/o Village Kevra, Police Station Bhaiyathan, Tahsil Surajpur, Distt. Surguja (C.G.)

10. Raimat (Dead) Through LR

(a) Shivnath, S/o late Nanka Ram, aged about 52 years, R/o Karkoti, Bhaiyathan, Tahsil Bhaiyathan, District Surajpur (C.G.)

11. Rameshwar, S/o Bhagirathi, aged about 28 years.

(Plaintiffs)
---- Appellants

Versus

1. Radheshyam Gupta (Dead) Through LRs

(a) Urmila Gupta, widow of late Radhey Shyam Gupta, aged about 51 years,

(b) Anand Gupta, S/o late Radhey Shyam Gupta, aged about 30 years,

(c) Vishudhyanand. S/o late Radhey Shyam Gupta, aged about 27 years,

All R/o Village Manendragarh Road, Surajpur, District Surajpur (C.G.)

2. State of Chhattisgarh, through Collector, Surguja, Ambikapur (C.G.)

3. C.P. Baghel (Nayab Tahsildar) (Deleted)

(Defendants)
---- Respondents

For Appellants: Mr. Ashok Kumar Shukla and Mr. Atanu Ghosh,
Advocates.

For Respondents No.1(a) to (c): -
Mr. H.B. Agrawal, Senior Advocate with Mrs. Prabha
Sharma, Advocate.

For Respondent No.2 / State: -
Mrs. Meha Kumar, Panel Lawyer.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Judgment

1. This plaintiffs' second appeal was admitted for hearing on the following substantial question of law: -

“Whether the Courts below were justified in holding that the plaintiffs are not entitled to get the alleged registered

deed of sale, dated 29.10.1975 (Exhibit D/1) as null and void as its executor Chunnilal has failed to assail the same during his lifetime despite knowing the fact that it was not validly executed?"

(Parties hereinafter will be referred as per their status shown and ranking given in the plaint before the trial Court.)

2. The suit property was originally held by Jaina. He had two sons and one daughter namely Sonsai, Chunnilal and Nanki, respectively. Chunnilal executed sale deed dated 29-10-1975 in favour of defendant No.1 and died on 22-1-1976. The original plaintiff was Sonsai (died during the pendency of suit). He had filed suit for setting aside the sale deed executed by Chunnilal in favour of defendant No.1 on the ground that the sale deed was obtained by fraud, as Chunnilal was taken for treatment and got the sale deed executed fraudulently. Defendant No.1 filed his written statement denying and opposing the plaint allegations and stated that the sale deed was executed for legal necessity and it is in accordance with law. The trial Court after appreciating oral and documentary evidence on record, came to the conclusion that the suit land was jointly owned by plaintiff Sonsai, Chunnilal and defendant No.2 Nanki; and the plaintiff has $\frac{1}{3}^{\text{rd}}$ share, defendant No.2 Nanki has $\frac{1}{3}^{\text{rd}}$ share and Chunnilal has also $\frac{1}{3}^{\text{rd}}$ share in the suit property. Chunnilal had no legal necessity to sell the suit land of his share and the sale deed was executed on 29-10-1975 fraudulently, but the sale deed cannot be set aside by virtue of the provisions contained in Section 19 of the Indian Contract Act, 1872, as though Chunnilal was aware of the fraudulent act, but he did not challenge the sale deed during his lifetime and the plaintiff cannot

question the validity of the sale deed and also held that Bharos and Vanshgopal were also necessary party. On appeal being preferred by the plaintiffs, the first appellate Court maintained the finding of the trial Court with regard to the fact that the plaintiffs cannot question the sale deed being third party / strangers, but set aside the finding with regard to necessary party and non-impleadment of the State as party defendant in the suit against which this second appeal has been filed in which substantial question of law has been formulated and which has been set-out in the opening paragraph of the judgment.

3. Mr. Ashok Kumar Shukla, learned counsel appearing for the appellants / plaintiffs, would submit that both the Courts below have concurrently committed grave legal error in holding that the plaintiffs are like strangers / third party to question the sale deed dated 29-10-1975 (Ex.D-1). He would further submit that in the suit property the plaintiff had also undivided share and since the sale deed was obtained by fraud as concurrently recorded by both the Courts below, the Courts below committed legal error by dismissing the suit being hit by Section 19 of the Indian Contract Act, 1872, therefore, the sale deed be declared null and void by granting the appeal and by setting aside the concurrent finding of the two Courts below with regard to issue No.3(b).
4. Mr. H.B. Agrawal, learned Senior Advocate appearing for LR's of the original defendant No.1 / respondents No.1(a) to (c) herein, would support the impugned judgment & decree and submit that Chunnilal had right to alienate his undivided share of the suit property and

that was for legal necessity as he was ill and money was required for his treatment, as such, both the Courts below have rightly held the suit to be barred by Section 19 of the Indian Contract Act, 1872.

5. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the records with utmost circumspection.
6. The plaintiffs' suit for declaration and for setting aside the sale deed Ex.D-1 dated 29-10-1975 was dismissed by the trial Court after having held that the suit land scheduled in Schedule 'A' of the plaint is joint family property of the plaintiff & defendant No.2; the plaintiff, defendant No.2 & executor of the sale deed Chunnilal, each one of three, had $\frac{1}{3}^{\text{rd}}$ share in the said property; Chunnilal had no legal necessity for alienating the suit land; and defendant No.1 got the sale deed (Ex.D-1) executed in his favour by playing fraud with said Chunnilal, but since the said sale is only voidable by operation of Section 19 of the Indian Contract Act, 1872, it cannot be declared void at the instance of the plaintiff / third party. The issues cast and their findings recorded by the trial Court are as under: -

	वाद प्रश्न	निष्कर्ष
1 (अ)	क्या वाद भूमि परिशिष्ट "ऊ" की भूमि वादीगण एवं प्रतिवादी क्रमांक-02 की संयुक्त स्वामित्व की भूमि है?	हाँ
(ब)	क्या वाद भूमि में वादीगण का 1/3 हिस्सा तथा प्रतिवादी क्रमांक-02 का 1/3 हिस्सा एवं स्व० चुन्नीलाल का 1/3 हिस्सा स्वत्व है?	हाँ
2	क्या स्व० चुन्नीलाल को वाद भूमि के अपने हिस्से को बिक्री करने की कोई आवश्यकता नहीं थी?	हाँ
3 (अ)	क्या दिनांक-29/10/1975 को प्रतिवादी क्रमांक-01 के नाम विक्रय-पत्र स्व० चुन्नीलाल को धोखा देकर निष्पादित कराया गया?	हाँ
ब	क्या उपरोक्त विक्रय-पत्र बिना प्रतिफल का तथा स्वतंत्र इच्छा से निष्पादित न होने के कारण अवैध एवं शून्य है?	प्रथम भाग का है ।
4	क्या प्रतिवादी क्रमांक-02 को वाद प्रस्तुती के कारण 3,000 रुपये वार्षिक की क्षति हो रही है? यदि हाँ तो सहायता ।	प्रमाणित नहीं

5	सहायता एवं व्यय?	वादीगण का वाद खारिज दोनों पक्ष अपना-अपना वाद व्यय स्वयं वहन करेंगे ।
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7. The first appellate Court on appeal being preferred by the plaintiffs principally agreed with the findings of the trial Court and dismissed the appeal affirming the judgment & decree of the trial Court. In this second appeal, the following two questions arise from the substantial question of law formulated: -

1. Whether the plaintiff has right and authority to question the sale deed Ex.D-1 executed by Chunnilal in favour of defendant No.1, as, admittedly, he did not challenge during his lifetime?
2. Whether the alleged contract / sale deed, though obtained by causing fraud is only voidable, cannot be set-aside by declaring void by operation of Section 19 of the Indian Contract Act, 1872?

8. The trial Court recorded a finding that Chunnilal executed the questioned sale deed Ex.D-1 on 29-10-1975 and died on 22-1-1976, but did not question the sale deed though he was aware of fraud played upon him by defendant No.1 while getting the sale deed executed and therefore original plaintiff Sonsai is precluded from questioning the sale deed though it was obtained by playing fraud upon Chunnilal relying upon **Sunderlal v. Anupkunwarbai**¹.

9. The suit property on the date of alienation on 29-10-1975 was held jointly by Chunnilal & Sonsai (original plaintiff) and defendant No.2 and they were residing together at that point of time and as such it

¹ 1960 MPLJ NOC (154)

was undivided family property with no partition between them to which Chunnilal – transferor had no complete right to transfer the suit property in all respects, though he could alienate his undivided interest in the said property, but could not deliver possession of specific portion of the suit property, but in the light of the finding recorded by the two Courts below that Chunnilal was issue-less and he had no legal necessity to alienate the suit property and on the pretext of treatment he was taken from his house by two persons, as he was seriously ill at that time and defendant No.1 managed to get the sale deed executed in his favour from Chunnilal. Original plaintiff Sonsai naturally being brother (real) of Chunnilal seeks to avoid transfer on the allegation that it was made to defeat his legitimate claims, had no right vested on him at the time of transfer, but got a right on the suit land as successor-in-interest to transferor Chunnilal and he can challenge the transaction only if fraud had been committed with the transferor qua the character of the document.

10. There can be no doubt that it is open to the heirs of the executant of a document to raise the plea of fraud vitiating it. (See Rash Behari Naskar v. Haripada Naskar².)
11. The Supreme Court in the matter of Muddasani Venkata Narsaiah (dead) Through Legal Representatives v. Muddasani Sarojana³ has held that passing of consideration under a sale deed cannot be questioned by third party. It was observed as under: -

2 AIR 1934 Cal 762

3 (2016) 12 SCC 288

“17. It is also settled law that passing of consideration under a sale deed cannot be questioned by third party. Defendant 3 has not been able to establish her case that she is an adopted daughter of the deceased Yashoda and thus, she being the third party, could not have questioned the execution of the sale deed by Buchamma on the ground of passing of consideration as rightly laid down by the High Court of Madhya Pradesh in *Ramjilal Tiwari v. Vijai Kumar*⁴. The High Court of Patna has also held that passing of consideration can be questioned by a party or his representative in *Akli v. Daho*⁵. Similar is the view of the High Court of Nagpur in *Maroti Bansi Teli v. Radhaba*⁶. Thus, the High Court has erred in law on this ground also in dismissing the suit.”

12. It is pertinent to mention here that in the present case, original plaintiff Sonsai is not a stranger, he is brother of Chunnilal who had executed sale deed Ex.D-1 in favour of defendant No.1 and Chunnilal died issue-less. Naturally, original plaintiff Sonsai being the successor-in-title is entitled to avoid the transaction which has admittedly been obtained by playing fraud as held concurrently by the two courts, therefore, the plaintiff was competent to question and avoid the sale deed Ex.D-1 and he cannot be branded as third party dis-entitling him to question the sale deed Ex.D-1.

13. Now, I have to consider the effect of Section 19 of the Indian Contract Act, 1872 to declare the sale deed Ex.D-1 as void.

14. Section 19 of the Indian Contract Act, 1872 (for short, 'the Act of 1872') provides as under: -

“19. Voidability of agreement without free consent.—When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

A party to contract, whose consent was caused by

4 1969 SCC OnLine MP 55 : 1970 Cri LJ 1176 : 1970 MPLJ 50

5 1927 SCC OnLine Pat 200 : AIR 1928 Pat 44

6 1943 SCC OnLine MP 128 : AIR 1945 Nag 60

fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

Exception.—If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

Explanation.—A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.”

15. A focused perusal of the aforesaid provision would show that it declares that an agreement entered into as a result of coercion, fraud or misrepresentation is voidable at the option of the aggrieved party. In case of fraud or misrepresentation he may either choose to avoid the contract altogether or may insist on the same being carried out subject to his right of being put in the same position in which he would have been if the representation made had been true. The explanation to this section enunciates the well-established rule that a deceit which does not deceive is not fraud. The exception to the aforesaid provisions states that a contract cannot be avoided on the ground of misrepresentation, or silence amounting to fraud under Section 17 if a party to whom an untrue or misleading statement was made had the means of discovering the truth with reasonable diligence. The word “fraud” has been defined under Section 17 of the Act of 1872 as under: -

“17. “Fraud” defined.—“Fraud” means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce

him to enter into the contract:

- (1) the suggestion, as a fact, of that which is not true by one who does not believe it to be true;
- (2) the active concealment of a fact by one having knowledge or belief of the fact;
- (3) a promise made without any intention of performing it;
- (4) any other act fitted to deceive;
- (5) any such act or omission as the law specially declares to be fraudulent.

Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak unless his silence is in itself equivalent to speech.”

16. Fraud thus, implies that there is an intention to deceive and gives right to an *action ex delicto* in addition to its effect of avoidance of the contract and in case of fraud, as a general rule, it does not lie in the mouth of the person making the false or reckless statement to say that the plaintiff had the means of discovering the truth with ordinary diligence.

17. Now, the question is, what is the distinction between void and voidable agreements?

18. In this connection, the following passage in Salmond on Jurisprudence, Twelfth Edition at page 341 states about the distinction as under: -

“... A valid agreement is one which is fully operative in accordance with the intent of the parties. A void agreement is one which entirely fails to receive legal recognition or sanction, the declared will of the parties being wholly destitute of legal efficacy. A voidable agreement stands midway between these two cases. It is not a nullity, but its operation is conditional and not

absolute. By reason of some defect in its origin it is liable to be destroyed or cancelled at the option of one of the parties to it. On the exercise of this power the agreement not only ceases to have any efficacy, but is deemed to have been void *ab initio*. The avoidance of it relates back to the making of it. The hypothetical or contingent efficacy which has hitherto been attributed to it wholly disappears, as if it had never existed. In other words, a voidable agreement is one which is void or valid at the election of one of the parties to it. ...”

19. This distinction has been judicially noticed in the Privy Council judgment delivered in the matter of **Satgur Prasad v. Harnarain Das**⁷ and also quoted with approval by Their Lordships of the Supreme Court in the matter of **G. Annamalai Pillai v. District Revenue Officer and others**⁸.

20. The question is, what would be the legal position if there is fraudulent misrepresentation not merely as to the contents of the document but as to its character also?

21. The question so posed is no longer *res integra* and stood determined authoritatively and conclusively as well way back in the year 1968 by Their Lordships of the Supreme Court in the matter of **Ningawwa v. Byrappa Shiddappa Hireknrabar and others**⁹ considering Section 19 of the Act of 1872 in which it has been held that a contract or other transaction induced or tainted by fraud is not void, but only voidable at the option of the party defrauded. Until it is avoided, the transaction is valid, so that third parties without notice of the fraud may in the meantime acquire rights and interests in the matter which they may enforce against the party defrauded. The legal position will be different if there is fraudulent

7 AIR 1932 PC 89

8 (1993) 2 SCC 402

9 AIR 1968 SC 956

misrepresentation not merely as to the contents of the document but as to its character also, then the transaction is void. It was observed in paragraph 5 of the report as under: -

“(5) The legal position will be different if there is a fraudulent misrepresentation not merely as to the contents of the document but as to its character. The authorities make a clear distinction between fraudulent misrepresentation as to the character of the document and fraudulent misrepresentation as to the contents thereof. With reference to the former, it has been held that the transaction is void, while in the case of the latter, it is merely voidable. In *Foster v. Mackinon*, (1869) 4 C.P. 704 the action was by the endorsee of a bill of exchange. The defendant pleaded that he endorsed the bill on a fraudulent representation by the acceptor that he was signing a guarantee. In holding that such a plea was admissible, the Court observed:

"It (signature) is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended The defendant never intended to sign that contract or any such contract. He never intended to put his name to any instrument that then was or thereafter might become negotiable. He was deceived, not merely as to the legal effect, but as to the 'actual contents' of the instrument."

This decision has been followed by the Indian courts: [Sanni Bibi v. Siddik Hossain](#), AIR 1919 Cal 728 and *Brindaban v. Dhurba Charan*, AIR 1929 Cal 606. It is not the contention of the appellant in the present case that there was any fraudulent misrepresentation as to the character of the gift deed but Shiddappa fraudulently included in the gift deed plots 91 and 92 of Lingadahalli village without her knowledge. We are accordingly of the opinion that the transaction of gift was voidable and not void and the suit must be brought within the time prescribed under [Article 95](#) of the [Limitation Act](#)."

22. The proposition of law laid down by Their Lordships in [Ningawwa](#)

(supra) was followed with approval in the matter of [Dularia Devi v.](#)

[Janardan Singh and others](#)¹⁰ and the same proposition has been

¹⁰ 1990 (Supp) SCC 216

reiterated that where a document containing an agreement obtained by fraud and misrepresentation as to the character of the document itself, the contract is void and not voidable, and it was considered and held as under in paragraph 7 of the report: -

“7. From the facts narrated above, about which, as stated earlier, there is no dispute, it is clear that this is a case where the plaintiff-appellant was totally ignorant of the mischief played upon her. She honestly believed that the instrument which she executed and got registered was a gift deed in favour of her daughter. She believed that the thumb impressions taken from her were in respect of that single document. She did not know that she executed two documents, one of which alone was the gift deed, but the other was a sale of the property in favour of all the defendants. This was, therefore, a case of fraudulent misrepresentation as to the character of the document executed by her and not merely as to its contents or as to its legal effect. The plaintiff-appellant never intended to sign what she did sign. She never intended to enter into the contract to which she unknowingly became a party. Her mind did not accompany her thumb impressions. This is a case that falls within the principle enunciated in *Ningawwa v. Byrappa* (supra) and it was, therefore, a totally void transaction. Accordingly, as stated in *Gorakh Nath Dube v. Hari Narain Singh*¹¹, the suit is not maintainable by reason of the bar contained in the Act.”

23. Reverting to the facts of the present case in the light of the principles of law laid down in the above stated authorities of Their Lordships of the Supreme Court, it is quite vivid that in the present case, the executant of the sale deed Ex.D-1 – Chunnilal was seriously ill on the date of execution of the sale deed. Two persons namely Bharosh and Vansh Gopal took away Chunnilal from his house secretly to Surajpur without the leave of his brother – original plaintiff Sonsai on the pretext of free medical treatment as he was seriously ill and got the instrument executed in the office of the Registrar in favour of defendant No.1 and Chunnilal, the executant,

11 (1973) 2 SCC 535

bona fide believed that the thumb impression was being taken in order to get him treated and he did not sign the sale deed with the intention of executing the sale deed and alienating his share in the suit property in favour of defendant No.1 which he disclosed after coming back to his house, but, any how, steps could not be taken for cancellation of sale deed during his lifetime and ultimately, after his death, his brother original plaintiff Sonsai filed suit for declaring the sale deed null and void to which both the Courts have concurrently recorded a finding that Chunnilal had no legal necessity to alienate his share in the suit property and the instrument was got executed on 29-10-1975 fraudulently even without free consent of executant Chunnilal and without payment of consideration, but declined to set aside the sale deed on the premises that the sale deed so executed is voidable by virtue of the provisions contained in Section 19 of the Act of 1872. As such, both the Courts below have failed to notice inherent distinction between fraudulent misrepresentation of the character of the document and fraudulent misrepresentation as to the contents of the document as laid down in Ningawwa (supra) and reiterated in Dularia Devi (supra) in which their Lordships of Supreme Court have clearly held that in case of fraudulent misrepresentation as to the character of the document, the transaction is void and in case of fraudulent misrepresentation as to the contents of the document, the latter is voidable only. Present is a case concurrently recorded by the two Courts below that it is fraudulent misrepresentation as to the character of the document and sale deed was got executed by

defendant No.1 on the pretext of getting him medically treated as Chunnilal on that day was profusely ill and therefore it is transparently void and once the court has reached to the conclusion holding the document to be void, it is liable to be set aside, as, in the present case, Chunnilal was totally deceived as to the character of the document. Therefore, both the Courts below have concurrently erred in understanding the true nature and import of the document after having held that Chunnilal was deceived as to the character of the document by defendant No.1 while getting it executed, but wrongly held the document sale deed was only voidable and hit by Section 19 of the Act of 1872. However, the right of a party defrauded is not affected by the mere lapse of time so long as he remains in ignorance of the fraud (see Long v. Lloyd¹²). Lapse of time is not of itself a bar to setting aside a contract but may be material as evidence of acquiescence that is, of tacit election to affirm the contract (Armstrong v. Jackson¹³). Chunnilal was, as stated, seriously ill, therefore, he could not challenge despite noticed the fraud played with him, as such, same will not bar the plaintiff to question the said sale deed after death of Chunnilal being successor-in-interest. As such, judgments & decrees of both the Courts below to the extent of issue No.3(b) holding that the sale deed dated 29-10-1975 (Ex.D-1) is only voidable, is set aside and the sale deed executed is held to be void and the sale deed Ex.D-1 being void is accordingly set aside. Judgments and decrees of both the Courts below to that extent are

12 (1958) 2 All ER 402

13 1916-17 All ER Rep 1117

set aside and it is decreed that the sale deed dated 29-10-1975 (Ex.D-1) is set aside as it has been obtained by playing fraud and misrepresentation and it does not effect the interest of original plaintiff Sonsai, now his legal representatives. The substantial question of law is answered accordingly.

24. The second appeal is allowed to the extent indicated herein-above leaving the parties to bear their own cost(s).

25. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge

Soma