

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.7177 OF 2020

Rajiya Begum Mohammad Jakir,
Age : 57 years, Occ. Household,
r/o. Jomala, Tq. Bhokardan,
Dist. Jalna

..Petitioner

Vs.

Shaikh Mukttar Shaikh Hanif,
@ Hannu Patel,
Age : 40 years. Occ. Agri.,
r/o. Jomala, Tq. Bhokardan,
Dist. Jalna

..Respondent

Mr.V.P.Patil, Advocate for petitioner
Mr.A.P.Piratwad, Advocate for respondent-sole

**CORAM : R.G. AVACHAT, J.
DATE : MARCH 11, 2021**

PER COURT :-

The challenge in this Writ Petition is to the order dated 10.07.2020 passed by learned Joint Civil Judge, Junior Division, Bhokardan, Dist. Jalna, below application Exhibit-62 in Regular Civil Suit No.139 of 2010. By the impugned order, the application moved by the petitioner/defendant no.1 for recast of issue no.1 came to be rejected.

2. The respondent/plaintiff filed suit, being R.C.S. No.139 of 2010, for declaration that the sale deed dated 22.02.1994 is null and void, contending that the same has been executed by the petitioner/defendant no.1 and her husband by practicing fraud and taking advantage of illiteracy of respondent/plaintiff. It has also been averred that the respondent/plaintiff was minor when the sale deed was executed from him.

3. It has been averred in the plaint that the land admeasuring 77 R in gut no.104 situated at village Jomala, Tq. Bhokardan, Dist. Jalna, originally belonged to the father of the plaintiff and the defendant. On demise of the father in the year 1992, the husband of the petitioner/defendant took advantage of minority and illiteracy of the respondent/plaintiff and got executed the sale deed dated 22.02.1994.

4. The petitioner/defendant appeared in the suit and filed the written statement disputing the averments in the plaint. The trial Court, *inter alia*, framed issue no.1 as under :-

"01. Does the defendant prove that the sale deed bearing no.791/94 was not induced by undue influence, fraud and coercion ?"

5. The petitioner/defendant moved application Exhibit-62 for recast of issue no.1. She requested the trial Court to recast issue no.1 placing burden of proof on the respondent/plaintiff. The trial Court, relying on Section 16 of the Indian Contract Act and Section 111 of Evidence Act, rejected the application.

6. Learned counsel for the respondent/plaintiff would submit that the trial Court has rightly framed issue no.1. He took me through the relevant provisions of Indian Contract Act and Evidence Act.

7. Learned counsel for the petitioner/defendant no.1 would, on the other hand, rely on Sections 101 to 103 of the Evidence Act and the averments in the plaint.

8. Chapter VII of the Evidence Act, 1872, speaks of the burden of proof. Sections 101 to 103 of the Act of 1872 read as follows :-

101. Burden of proof.—

Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

102. On whom burden of proof lies.—

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

103. Burden of proof as to particular fact.—

The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Section 111 of the Evidence Act reads thus:-

111. Proof of good faith in transactions where one party is in relation of active confidence.—

Where there is a question as to the good faith of a transaction between parties, one

of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence.

Section 16 of Indian Contract Act reads as under:-

16. 'Undue influence' defined.—

(1) 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. 1[16. 'Undue influence' defined.—(1) 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."

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another—

(a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or

(b) where he makes a contract with a person whose mental

capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall be upon the person in a position to dominate the will of the other.

9. The burden of proof is static. It is the onus of proof that keeps shifting with trial of the suit. Reading of Sections 101 to 103 of the Evidence Act would indicate that it is for the person who desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, it is he, who is required to prove those facts. If no evidence is led by any of the parties to the suit, the burden of proof would lie on the person who would fail in such case.

10. In the case in hand, it is the respondent/plaintiff, who has come to the Court with a case that the husband of the petitioner/defendant, taking advantage of minority and

illiteracy of the respondent/plaintiff, got executed the sale deed in his favour. The burden of proof would, therefore, necessarily be on the respondent/plaintiff. True, by virtue of Section 16 of the Indian Contract Act, where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

11. Reading of aforesaid provision, undoubtedly, indicates that the respondent/plaintiff will first have to aver in his plaint the facts to show that the husband of the petitioner/defendant was in a position to dominate the will the respondent/plaintiff. He then will have to aver and prove that the sale deed, on the face of it, or on production of evidence, was unconscionable. Then only, the burden to prove that such contract was not induced by undue influence would be on the petitioner/defendant no.1. In the plaint, it has simply been averred that the the respondent/plaintiff was minor and

illiterate when the sale deed was executed. It is the respondent/plaintiff, who has filed the suit. If none of the parties to the suit would lead evidence, it is he, who would fail. The burden of proof would, therefore, necessarily lie on him.

12. So far as regards the principle of burden of proof under Section 16(3) of the Contract Act, it has to be stated that it is for the respondent/plaintiff to first make out a case in the pleadings and then in evidence that his case would fall under Section 16(3). If he would succeed to make out such a case, then necessarily the onus of proof would shift on the petitioner/defendant no.1 to prove that the transaction (sale deed) was not induced by undue influence. It is reiterated that the sale deed executed way back in 1994, has been sought to be declared to have been got executed by taking disadvantage of the respondent/plaintiff as he was minor at the relevant time and is an illiterate person.

13. In the aforesaid factual backdrop, the trial Court was not justified in placing the burden to prove issue no.1 on the

petitioner/defendant. The trial Court is, therefore, directed to recast issue no.1 and place the burden on the respondent/plaintiff to prove his assertion in the plaint.

14. The Writ Petition stands disposed of in the aforesaid terms.

[R.G. AVACHAT, J.]

KBP