

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

WRIT PETITION NO.7169 OF 2020

Mohammad Taher Abdul Rauf,
Age : 52 years, Occ. Agri.,
r/o. Near Nurani Masjid,
New Bhokardan, Tq.Bhokardan,
Dist Jalna

..Petitioner

Vs.

Shaikh Ajim Shaikh Ajij,
Age ; 41 years, Occ. Agri.,
r/o. All Jomala, Tq. Bhokardan,
Dist. Jalna
and ors.

..Respondents

Mr.Vinod Patil, Advocate for petitioner
Mr.A.P.Piratwad, Advocate for respondent no.1

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

ORDER :-

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 Exh.67 in Regular Civil Suit No.159 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. Respondent no.1 herein is plaintiff in the suit, being suit No.159 of 2010. The suit is filed for declaration that the sale dated 24.03.1999 is not binding on respondent no.1/plaintiff and for possession of the agricultural land admeasuring 1 H 20 R in Gut No.99 situated at village Mouje Jomala, Tq. Bhokardan, Dist. Jalna. It is the case of respondent no.1/plaintiff that the suit land originally belonged to his father Sk. Ajij (deceased). Respondent nos.2 to 6 herein are defendant nos.2 to 6 in the said suit. They are siblings of respondent no.1/plaintiff. Their father Sk. Ajij died in January, 1998. The suit land came to be recorded in the name of their mother on the demise of the father. It is averred in the plaint that their mother was a simpleton, innocent and mentally retarded woman. The petitioner/defendant no.1 was on visiting terms with the family. Taking advantage of the innocence and mentally retardness of the mother of respondent no.1/plaintiff, the petitioner/defendant no.1 got executed the sale deed dated 24.03.1999 of the suit land. Within six months of execution of the sale deed, the mother passed away.

3. Respondent no.1/plaintiff filed the suit for declaration that the sale deed of the suit land has been got executed by the petitioner/defendant no.1 by practicing fraud, undue influence and coercion on the mother of respondent no.1/plaintiff. It has also been averred that the sale deed was without any consideration. The sale deed dated 24.03.1999 has, therefore, been sought to be set aside or declared to be illegal and not binding on respondent no.1/plaintiff, with a consequential prayer of possession of suit land.

4. The petitioner/defendant no.1 appeared in the suit and filed the written statement disputing the averments in the plaint.

5. The trial Court, *inter alia*, framed issue no.1 as under:-

01. Does defendant no.1 prove that the sale deed bearing no.1844/99 was not induced by undue influence, fraud and coercion ?

6. The petitioner/defendant no.1 had moved application below Exhibit-67 for recast of the aforesaid issue. He specifically urged for placing of burden on respondent no.1/plaintiff to prove his case. The trial Court, on hearing the parties, rejected the application. Hence, this Writ Petition.

7. Heard learned counsel for the parties.

8. Learned counsel for respondent no.1/plaintiff would submit that in view of Section 111 of the Indian Evidence Act, the trial Court has rightly framed the issue by placing burden on the petitioner/defendant no.1 to prove the same. Learned counsel also took me through Section 16 of the Indian Contract Act, in support of his contentions.

9. 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.

10. 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.

11 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.

12. In the case in hand, it is respondent no.1/plaintiff, who has come to the Court with a case that the petitioner/defendant no.1, by practicing fraud, undue influence

and coercion on respondent no.1/plaintiff's mother, got executed the sale deed in his favour. The burden of proof would, therefore, necessarily be on respondent no.1/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.

13. Reading of aforesaid provision, undoubtedly, indicates that respondent no.1/plaintiff will first have to aver in his plaint the facts to show that the petitioner/defendant no.1 was in a position to dominate the will of his mother. 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 mother of

respondent no.1/plaintiff was a simpleton, innocent and mentally retarded woman. The petitioner/defendant no.1, who used to visit her residence, taking advantage of her condition, got executed the sale deed in his favour. It is respondent no.1/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.

14. 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 respondent no.1/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 (here sale deed) was not induced by undue influence. It is reiterated that the sale deed executed by the mother of respondent no.1/plaintiff way back in 1999, has been sought to be declared to have been got executed by practicing fraud, undue influence and coercion in the suit filed in 2017.

15. In the aforesaid factual backdrop, the trial Court was not justified in placing the burden to prove issue no.1 on the petitioner/defendant no.1. The trial Court is, therefore, directed to recast issue no.1 and place the burden on respondent no.1/plaintiff to prove his assertions in the plaint.

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

[R.G. AVACHAT, J.]

KBP