



* IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 23rd May, 2023

Pronounced on: 5th September, 2023

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RFA (OS) 21/2021

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CM APPLs. 10474/2022, 19564/2022

KULWANT SINGH HAZOORIA SINCE DECEASED
THROUGH LRS AND ANR & ORS.Appellants

Through: Mr. Sandeep Sethi, Sr.
Advocate with Mr. Shaunak
Kashyap, Mr.
Balasubramanian, Mr. Dhruv
Goel, Mr. Kanav Agarwal,
Ms. Muskan Yadav, Ms.
Shreya Sethi, Mr. Vikram
Singh Dalal & Ms. Tanvi
Tewari, Advocates.

versus

HARCHARAN SINGH HAZOORIARespondent

Through: Mr. Vikas Dhawan, Sr.
Advocate with Mr. Sambit
Nanda & Ms. Samaya
Khanna, Advocates.

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T

NEENA BANSAL KRISHNA, J

1. The Regular First Appeal has been filed against the Preliminary Decree dated 29.10.2021 in a suit for Partition filed by the respondents



granting them half share by way of partition of the property bearing No.60, Ring Road, Lajpat Nagar-III, New Delhi (*hereinafter referred to as “suit property”*) in terms of Will dated 05.01.1996.

2. A suit for partition was filed by plaintiff Shri Harcharan Singh Hazooria (*respondent in the present appeal*) against the defendant No.1 Kulwant Hazooria, his brother (*appellant in the present appeal who is now represented by his legal heirs, appellant Nos. 1(a) to 1(f)*) and defendant No. 2, sister of the plaintiff and Smt. Nirmal Tej Kaur Bedi (*performa respondent herein*). Smt. Jaswant Kaur was the owner of the suit property comprising of ground floor, first floor, second floor, terrace above the second floor with lift room and barsati, vide Conveyance Deed dated 09.05.2000. She died on 15.08.2008 at the age of 98 years. The Respondent had claimed that because of her advance age and poor health, she was unable to manage her affairs or take any decision or form judgment of what was in her interest. On 05.01.1996 Smt. Jaswant Kaur executed her last and final Will bequeathing the suit property to Respondent Sh. Harcharan Singh Hazooria and appellant Sh. Kulwant Singh Hazooria in equal share. Defendant No.2, Smt. Nirmal Tej Kaur Bedi, the daughter was to receive a sum of Rs.10 lakhs from plaintiff and defendant No.1 in equal share. Smt. Jaswant Kaur also settled her movable assets.

3. The respondent Sh. Harcharan Singh went abroad in 1961 to pursue his higher studies. He got married in 1973 and remained in Germany. He finally retired in 2006 and came to India to reside with his mother.

4. In or around March, 2008, Sh. Harcharan Singh came to know that the appellant and his wife, appellant No.2, Smt. Manohar Bhasin acting on



behalf of their mother, had executed a Lease Deed in respect of the entire ground floor of the suit property for a rent of Rs.3.75 lakhs per month without Smt. Jaswant Kaur being aware of the said transaction. The respondent instituted a *suit CS (OS) 707/2008 for Declaration and Injunction*. However, since the compromise talks were going on between the parties, he did not get the summons of the suit served in order to avoid any unpleasantness. While the suit was pending, Smt. Jaswant Kaur expired on 15.08.2008.

5. It was claimed by respondent that apprehending mischief by the appellant, he searched the office of the Local Authorities and was shocked to find that the appellant Kulwant Singh in connivance with his wife appellant No.1(a) was trying to get the property mutated in their name by making false representations to the MCD. It also came to the knowledge of the respondent that appellant No.1 and his wife had got executed certain Gift Deeds from Smt. Jaswant Kaur in their favour.

6. The respondent has challenged the Two Gift Deeds on various grounds. The Gift Deed dated 23.05.2007 was allegedly executed in favour of Smt. Manohar appellant No.1(a) and the other Gift Deed dated 02.06.2008 was executed in favour of appellant No.1 Sh. Kulwant Hazooria. It is asserted that both the Gift Deeds are sham and bogus documents with no legal consequence. Smt. Jaswant Kaur was incapable of forming any independent judgment due to her illness and advanced age of about 98 years and lacked competence to execute the Gift Deeds. Moreover, she was not conversant with English language in which the alleged Gift Deeds dated 23.05.2007 and 02.06.2008 had been executed. Also, Gift Deeds bear only thumb impression which had been forcibly



impressed on them. Also, the Gift Deeds were not apparently executed in the office of Sub-Registrar but at her home on the ground of illness of Smt. Jaswant Kaur. Smt. Amrita Kataria and Danita Sawhney daughters of the appellant Nos.1 and 1(a) who were the beneficiary under the Deeds, were the attesting witnesses to the Gift Deeds. It was further asserted that in June, 2008 appellant No. 1 Sh. Kulwant Singh was living with Smt. Jaswant Kaur and was sharing the same bed room. No close relative or friends were present as the attesting witnesses and the Gift Deeds are void.

7. It was further claimed that appellant No.1 being the elder son and appellant No. 1(a) being the daughter-in-law, were in a fiduciary capacity with Smt. Jaswant Kaur and had a duty to protect her interest. In breach of this fiduciary relationship, they have taken undue advantage of the advanced age and lack of capacity of Late Smt. Jaswant Kaur. The respondent Shri Harcharan thus filed a suit for partition claiming half share in the suit property.

8. **Appellants Nos. 1 and 1(a)** (*who were defendant Nos. 1 & 3 in the Suit*) **in their Written Statement** took the preliminary objection that the suit was barred as the respondent/plaintiff had earlier filed a Civil Suit bearing No. *CS (OS) 707/2008* seeking Declaration that the appellants had no right to represent themselves as owners of the suit property. The respondent had knowledge of the Gift Deed dated 23.05.2007 even at that time, but no relief was sought with respect to them. The earlier Civil Suit had been withdrawn unconditionally vide Order dated 04.11.2008 without seeking any leave to file the fresh suit on the same cause of action. The present suit viz-a-vis the Gift Deed dated 23.05.2007 is therefore barred



and is liable to be dismissed.

9. It is further submitted that the two Gift Deeds were executed and registered in accordance with law raising a presumption as to the validity of the Gift Deeds and the respondent has failed to rebut the said presumption.

10. The appellants had further asserted that the occupation of the room on the second floor by respondent, is unauthorized and illegal. Furthermore, since the respondent has challenged the two Gift Deeds and has sought partition, he is bound to pay the Court Fee on the market value of the property.

11. It was asserted by appellant No.1 that he had an absolute bond with the parents. He was also constituted as an Attorney by his mother to look after and manage the suit property when the respondent left India in 1961 and settled in Germany and made only sporadic visits to India. He never made any efforts to take their mother to Germany in the last 25 years.

12. While admitting that the two Gift Deeds were registered by calling the Sub-Registrar to their residence, it was asserted that it was only as a matter of convenience and as per the normal practice in regard to senior citizens. It was claimed that the mother understood English as she used to watch English News as a daily routine, though she was unable to sign in English. The contents of the two Gift Deeds were explained to her which she understood before she signed the documents. She did not suffer from any mental infirmity and was completely alert and capable of forming her own judgment. Arthritis by no stretch of imagination can bring in mental infirmity. The members of the family were the witnesses to the Gift Deeds. The daughters were not disqualified under law from being the



witness. The stamp duty was duly paid by the mother after withdrawing the amount from her bank account. The existence of fiduciary relationship is denied and it was claimed that the suit was liable to be dismissed.

13. **The defendant/appellants in the counter-claim** sought a decree of Mandatory Injunction directing the plaintiff/ Respondent to remove himself and his belongings from the room with attached bathroom on the second floor of the suit property and had also claimed mesne profits.

14. **Defendant No.2/ performa respondent Smt. Nirmal Tej Kaur Bedi**, sister of the plaintiff **in her written statement** asserted that in 1986, Smt. Jaswant Kaur had executed a will whereby she had given the suit property in equal share to both sons and also directed that some amount of money be paid to her (the sister). Subsequently, in 1996, Smt. Jaswant Kaur had again executed a Will dated 05.01.1996 whereby she gave equal share in the suit property to both the sons, namely appellant No.1 and respondent and Rs.10 lakhs were directed to be paid to her by appellant No.1 and respondent. The execution of the earlier Wills of 1986 and 05.01.1996 were admitted by defendant No.2 as she has asserted that she was present at that time and the contents of the two Wills were duly explained to Smt. Jaswant Kaur.

15. It was asserted by defendant No.2 that she used to visit her mother at least once in a week and spend the entire day with her. For the last three years prior to her death, she noticed that her mother used to frequently forget things and at times she had difficulty in even recognizing her. Smt. Jaswant Kaur was not in disposing condition and was incapable of managing her affairs. It was further asserted that she



could neither read nor speak English and she was conversant only with Punjabi language/ Gurumukhi. She further stated that during the year 2007 and 2008 she frequently visited her mother who did not at any point of time express her intention to exclude respondent from the share in the suit property or indicate that she had any desire or had executed the alleged Gift Deeds in favour of the appellant Nos. 1 and 1(a).

16. Subsequently, Smt. Nirmal Tej Kaur Bedi/performa respondent/defendant No.2 in her affidavit dated 18.10.2010 changed her statement and said that though her mother was 98 years old, all her faculties were intact and she was capable of looking after her own interest. Defendant No.2 after about twenty days, filed another affidavit dated 08.11.2010, reaffirming the contents of the written Statement filed in March, 2009. She also stated that because of the close relationship with both the families, she was not interested in participating further in the legal proceedings.

17. **Issues were framed on 25.05.2012** as under: -

“(1) Whether the suit has not been valued property for the purposes of court fee and jurisdiction? OPD 1 & 3

(2) Whether the suit is barred under Order 2 Rule 2 CPC? OPD 1 & 3

(3) Whether Ms. Jaswant Kaur was conversant with English language? OPP

(4) Whether the gift deeds dated 23rd May, 2007 and 2nd June, 2008 were not executed by Ms. Jaswant Kaur? OPP

(5) Whether the gift deeds dated 23rd May, 2007 and 2nd June, 2008 are sham, bogus and have been obtained by playing fraud by the defendant Nos. 1 and 3 on the plaintiff and lat Ms. Jaswant Kaur? OPP



- (6) *Whether the gift deeds are unconscionable? OPP*
- (7) *Whether the gift deeds have been obtained by exercising dominance and undue influence by the defendant Nos. 1 and 3 on the plaintiff and Ms. Jaswant Kaur? OPP*
- (8) *Whether the gift deeds are hit by Section 16 of the Indian Contract Act, 1872? Onus to prove on both parties.*
- (9) *Whether Ms. Jaswant Kaur has validly executed the Will dated 5th January, 1996? OPP*
- (10) *Whether the plaintiff is entitled to a decree of partition as prayed for? OPP*
- (11) *Whether the plaintiff is entitled to a decree of rendition of accounts? OPP*
- (12) *Whether defendant Nos. 1 and 3 are entitled for a decree of mandatory injunction, as claimed in their counterclaim? OPD 1 & 3*
- (13) *Whether defendant Nos. 1 and 3 are entitled to mesne profits, if so, at what rate and for which period? OPD 1 & 3*
- (14) *Relief."*

18. **Issue Nos. 3, 4 and 7 were recast** vide Order dated 06.07.2012 which are as under: -

- "(3) Whether Mrs. Jaswant Kaur was conversant with English language? OPD 1 & 3*
- (4) Whether gift deeds dated 23.05.2007 and 02.06.2008 were executed by Mrs. Jaswant Kaur? OPD 1 & 3*
- (7) Whether gift deeds have been obtained by exercising dominance by the defendants No.1 & 3 on the plaintiff and Mrs. Jaswant Kaur? OPP"*

19. The appellant No.1/defendant No.1, Sh. Kulwant Singh Hazooria died on 05.03.2017 and his legal heirs i.e. the wife and five daughters were brought on record.

20. **The respondent Sh. Harcharan Singh** examined himself as **PW1**



and deposed about his claim as stated in the plaint.

21. **PW2, Mrs. Jasbir Kaur**, sister of the deceased mother deposed on behalf of the Respondent/plaintiff and stated that both the Gift Deeds are deceitful and fraudulent.

22. **PW3, Manager of SBI Bank** produced the ledger statements of the joint bank accounts in the name of the appellants and the deceased in proof of the signatures of Smt. Jaswant Kaur.

23. **PW4 Mr. Vikas Gupta** AE Building, Central Zone brought a Regularization File dated 06.09.2007 and also a file of De-sealing of Property No. 60 GF, Ring Road, Lajpat Nagar III.

24. **PW5 Mr. Devender Prasad Singh**, LDC, SDMC produced the House Tax File No.BP-60, Lajpat Nagar III.

25. **PW6 Mr. Abnash Chander Sehgal, Advocate** and **PW7 Mr. Krishen K. Seth** were the attesting witnesses to the Will dated 05.01.1996.

26. **PW8 Mr. Mahesh Chand Mohani**, Director of M/s Sundari Apparels was the lessee who deposed about the letting out of the ground floor and first floor of the suit property by appellant No.1(a) Smt Manohar Bhasin vide Lease deed dated 12.10.2008 Ex. PW 8/A and the appellant, Shri Kulwant Hazooria, vide Lease deed dated 12.10.2008 Ex. PW 8/B, respectively .

27. **PW9, Ms. Neelam Wadhwa** from SBI Bank, Lajpat Nagar, was examined to prove the correctness of the documents produced by the respondent in IA No. 3401 of 2015 by comparing them with the original records maintained by the Bank.

28. **PW10 Mr. Jagdish Kumar Kaushik**, and **PW11 Mr. Gaurav**



Kaushik, were the Signature and Finger print/document examination Experts who proved their respective Reports. In the fingerprint report Ex PW 10/A it was stated that it is not possible to compare the questioned thumb impression marked as appearing on the Gift Deed dated 23.05.2007 with admitted thumbs impressions in documents advanced as the corresponding areas are not available for comparison.

29. The **appellant No.1(a) Smt. Manohar Bhasin Hazooria as DW3/1** deposed in support of the two Gift Deeds. She stated that Smt. Jaswant Kaur had travelled abroad and socialized with the overseas friends and understood English. She admitted during the cross-examination that her signatures on the document which was in German language, was also in Gurumukhi.

30. **D3W2 Mrs. Amrita Kataria**, daughter of appellant Nos.1 and 2 had similarly deposed that Smt. Jaswant Kaur had travelled to Europe and used to organize dinners for her husband, Trilochan Singh Hazooria's, foreigner friends and attend them as a perfect host. She was also fond of watching television including English news channel and she understood English. She also went to London though admittedly there was no document in this respect on record. Admittedly, all the documents were written in English, but she used to sign in Gurumukhi.

31. **D3W3 Smt. Veeran Wali Suri**, a close acquaintance of, deposed that she used to visit her frequently. She stated that Smt. Jaswant Kaur was a smart woman and could read English, Gurmukhi and Hindi. She also testified regarding the capacity of Jaswant Kaur to execute the two Gift Deeds by asserting that she would perform religious activities and was quite well before she died.



32. **Learned Single judge** on appreciation of evidence, disbelieved the testimony of D3W2 Smt. Amrita Kataria, and D3W1 Smt. Manohar Bhasin Hazooria and concluded that there was sufficient evidence on record to show that Smt. Jaswant Kaur did not understand English. The learned Single Judge further referred to the evidence of the parties to conclude that appellant Nos. 1 and 2 were wholly in charge of the affairs of Late Smt. Jaswant Kaur and the property was being entirely looked after by defendant No.1. The day to day needs of Late Smt. Jaswant Kaur were also being met by appellant Nos. 1 and 2 from the year 2004 or before when Smt. Jaswant Kaur's movement got restricted and she was confined to wheel chair. These facts clearly established the relationship of complete confidence existed between Jaswant Kaur and appellant Nos. 1 and 1(a) with regard to her general affairs, assets and daily requirements. The appellant No.1 was even the attorney holder on behalf of Late Smt. Jaswant Kaur. It was thus, concluded that there existed a fiduciary relationship between Smt. Jaswant Kaur and appellant Nos. 1 and 2. Learned Single Judge has observed that the onus was on appellant Nos. 1 and 2 to prove the validity of the Gift Deeds. The evidence of D3W1, Smt. Manohar Bhasin Hazooria and of D3W2, Smt. Amrita Kataria was considered and it was concluded that there was no evidence to show that the steps were taken by the officials from the office of Sub-Registrar to ascertain the intent of Smt. Jaswant Kaur to gift her property or that she had understood the contents of the Gift Deed before putting the thumb impression. It was concluded that being unaware of English language, she was unable to comprehend the contents and the nature of the documents. It was held that the appellant Nos. 1 and (a) failed to adduce any cogent



evidence that the contents of Gift Deeds were explained to Late Smt. Jaswant Kaur. It was further noted that no explanation was forth coming for the complete ouster from inheritance of property of other legal heirs of Smt. Jaswant Kaur. The plea of respondent that there were no independent witnesses to the two Gift deeds, was also accepted. It was also observed that the best evidence to establish that Smt. Jaswant Kaur was in sound deposing mind and understood the contents, were the officials from the office of Sub-Registrar who were present at the time of execution and registration of Gift Deeds, but they were not examined. Mr. Chhabra, Advocate who had drafted the Gift Deeds upon the instructions of Mrs. Jaswant Kaur, was also not examined. Further, there were two doctors, Dr. Prakash Jhuraneey and Dr. Rekhi who were taking care of Smt. Jaswant Kaur. Their names were included in the list of witnesses but they had not been examined. Appellant No.2 has placed on record a Certificate by Dr. Prakash Jhuraneey dated 17.05.2007 certifying that Smt. Jaswant Kaur was in sound mind in her senses and in normal state. She had suffered fracture of right leg because of which her movement got restricted. This document was apparently submitted in the office of Sub-Registrar along with the application for registration of Gift Deed requesting that the same may be executed at the residence. Dr. Prakash Jhuraneey was, however not examined. The best evidence to prove the execution and soundness of mind had not been examined, consequently it was held that the defendants/appellants failed to prove the contents of the two Gift Deeds dated 23.05.2007 and 02.06.2008, which were declared as null and void. A preliminary decree was consequently passed for division of the suit property in equal share between the



respondent and appellant No.1/ legal heirs in terms of the Will dated 05.11.1996.

33. Aggrieved by the said preliminary decree, the present appeal has been preferred.

34. **The main grounds of challenge** are that Smt. Jaswant Kaur died on 15.08.2008 at an advance age of 98 years and at that time of her life she had no right or title over the suit property as she had admittedly divested herself of all the right, title or interest in the suit property after she executed the two Gift Deeds dated 23.05.2007 and 02.06.2008 in favour of appellant No.1 and his wife Smt. Manohar Bhasin appellant No.1(a) because of love and affection and long association between the mother and appellants who along with their family was taking care of Smt. Jaswant Kaur during her life time. The property rights in the suit property therefore, vested in the appellant No.1 and 2 and after their death, in favour of their legal heirs.

35. The appellant had admittedly rented out the suit property after 23.05.2007 to M/s Sundari Apparels India Pvt. Ltd. The cheques of rent were received in the name of appellant No.1 and went into the joint account of Smt. Jaswant Kaur and appellant No.1. This money was utilized or withdrawn by Smt. Jaswant Kaur or as per her directions and wishes. Smt. Jaswant Kaur had spent money generously on the grandchildren including the children of Appellants and the Respondent. These facts were well within the knowledge of respondent who had never taken any objection about Smt. Jaswant Kaur being taken care of by appellants and their immediate family.

36. It is submitted that respondent started making false claim qua the



suit property and filed a Civil Suit bearing *CS (OS) No.707/2008* on 24.04.2008 seeking a declaration that appellants have no right to represent themselves as the owners of the property and also sought permanent injunction. The suit was dismissed as withdrawn unconditionally vide Order dated 04.11.2008 by the learned Single Judge of this Court. No leave was taken at the time of withdrawal to file a fresh suit on the same cause of action. The respondent filed the present suit against the appellants seeking similar claims i.e. of partition, possession and declaration of the Gift Deeds dated 23.05.2007 and 02.06.2008 as being null and void and for their cancellation. It is asserted that once the earlier suit had been withdrawn without seeking permission to file a fresh suit on the same cause of action, the second suit was not maintainable.

37. Ld. Senior Counsel on behalf of appellants argued that the learned Single Judge has wrongly concluded that the two Gift Deeds dated 23.05.2007 and 02.06.2008 were null and void as the onus to prove the validity of the Gift Deeds was wrongly put on the appellants which inverts all the known principles of law of onus of proof for registered documents. The registered document carries a presumption of genuineness and validity in terms of Section 60 of the Registration Act, 1908 and Section 114(e) of the Indian Evidence Act, 1872 and it was for the respondents to rebut the presumption with cogent evidence. This inversion of onus of proof of a registered document renders the judgment bad in law.

38. Ld. Senior Counsel on behalf of appellants further asserted that undue influence cannot be established merely by the fact that the parties were closely related. Reliance has been placed on *Raja Ram vs. Jai Prakash Singh & Ors.* (2019) 8 SCC 701, wherein the Apex court



observed that the onus would shift on the defendant under Section 16 of the Indian Contract Act 1872 read with Section 111 of the Indian Evidence Act 1872 only once the plaintiff has been able to establish a prima facie case. The close relationship between the parties would not lead to any presumption of undue influence particularly in a case involving siblings taking care of elderly parents.

39. Ld. Senior Counsel on behalf of appellants has asserted further that there can be no presumption of existence of a fiduciary relationship and the same cannot be held to have been established merely because the parties were residing together or were allegedly assisting Smt. Jaswant Kaur as it is natural that anyone would assist any elder member of the family. The onus to prove fiduciary position or a dominant position was on respondent which he had failed to discharge. The allegations of dominant position were baseless and the onus of proving the genuineness of the gift Deed could not have been shifted to the appellants.

40. Ld. Senior Counsel on behalf of appellants has further claimed that aside from vague and generic grounds that there was a *fiduciary and dominant relationship* which was misused by the appellants, no specific ground to substantiate these assertions by sufficient evidence was agitated by the respondent. The impugned judgment incorrectly equated the relationship of trust and confidence to a fiduciary relationship or dominant position without any basis and lost the distinction between the two. The appellants have relied on the case of Central Board of Secondary Education and Anr. vs. Aditya Bandopadhyay and Ors. (2011) 8 SCC 497 in support thereof.

41. Ld. Senior Counsel on behalf of appellants has explained that the



Power of Attorney had been executed in favour of appellants for sake of convenience as they were taking care of their mother. The respondent was admittedly residing in Germany for his entire life and merely visited Delhi in the interregnum and had neither contributed towards the upkeep of the property nor towards the care and medical expenses of their mother Late Smt. Jaswant Kaur.

42. Ld. Senior Counsel on behalf of appellants has vociferously argued that the conclusion that they had withheld the best evidence, is without any basis in law or fact. Since the appellants were tracing their title by relying on registered Gift Deeds to which there is a presumption of genuineness, there was no requirement for them to lead evidence. Consequently, the adverse inference drawn against the appellant on this account is entirely erroneous. The impugned judgment suffers from serious legal errors which is not sustainable in law. The appellants have relied on the case of *Krishna Mohan Kul vs. Pratima Maity and Others* (2004) 9 SCC 468, *M. Rangasamy vs. Rengammal and Ors.* (2003) 7 SCC 683 and *Dharman and Six Ors. vs. Marimuthu*, 1996 SCC OnLine 375 in this regard.

43. Ld. Senior Counsel on behalf of appellants has claimed that the findings in the impugned judgment that Gift Deeds which were in English, had been executed by Late Smt. Jaswant Kaur without understanding the contents of the documents, is incorrect. The learned Single Judge had failed to consider that various other documents especially the Will dated 05.11.996, which was the primary document relied upon in the judgment, were also in English. Certain other documents relied upon by the respondent were also in English and had the signatures of Smt. Jaswant



Kaur in Gurumukhi such as the Lease Deed dated 24.06.1979, Original Receipt dated 20.08.1983 in favour of M/s Moti Lal Pesticides India Pvt. Ltd., Certificate dated 13.04.2007 issued by Smt. Jaswant Kaur, the original GPA dated 30.06.1997 executed by Smt. Jaswant Kaur in favour of the appellant No.1. The respondent had himself deposed about these documents which were also in English, having been executed by Smt. Jaswant Kaur. The learned Single Judge has chosen to ignore that if Smt. Jaswant Kaur could sign the Certificate, her ability and capacity to execute and register Gift Deed around the same time cannot be doubted. When all other documents admittedly executed by Smt. Jaswant Kaur were in English and were presumed to be understood by her, it is not understandable as to why the contents of the two Gift Deeds could not have been understood by her before signing in Gurumukhi. The conclusion of learned Single Judge that *“if she understood English, there is no plausible explanation as to why she did not sign the English document in English”* is on the face of it, incorrect. The automatic assumption that would follow from the observation of the learned Single Judge in the impugned judgment is that Late Smt. Jaswant Kaur did not understand the contents of any of the document signed by her in Gurumukhi, but this interpretation cannot be held to be correct.

44. The Id. Advocate has further argued that the evidence of D3W3 Smt. Veeran Wali Suri had not been appreciated in the correct perspective. Smt. Veeran Wali Suri had a long standing relationship with the deceased from the time of partition and used to frequently visit her. She had proved the mental capacity of Smt. Jaswant Kaur in her testimony. The learned Single Judge failed to consider her cross-



examination, wherein she had categorically deposed that Smt. Jaswant Kaur whom she had met at a religious function, was well till the time of her death. The evidence of D3W3 Smt. Veeran Wali Suri who was a 98 year old person, was a clinching piece of evidence to prove valid execution of the Gift Deeds but it has been ignored. Advance age or diminishing physical strength by itself is not a ground to assume lack of mental capacity. Moreover, no pleading or evidence has been led to prove that Smt. Jaswant Kaur was mentally infirm. The Medical Certificates dated 19.09.2005 and 27.03.2008 certifying her sound mental condition, have also not been challenged by the respondent.

45. Ld. Senior Counsel on behalf of appellants has contended that the evidence of D3W2, *Smt. Amrita Kataria*, one of the attesting witnesses who was extensively cross-examined by the respondent, had proved the mental capacity of Smt. Jaswant Kaur at the time of execution of the Gift Deeds. She had deposed that she was present at the residence at the time of registration of Gift Deeds by her grandmother in the presence of the officials of the Sub-Registrar Office, who visited them at home. She identified the thumb impression of the executor as well as of the other attesting witness. The testimony of the attesting witness also proved the execution of the Gift Deed. The appellants have relied on the case of Lakshmi Amma and Another vs. Telanganarayana Bhatta and Another 1970 (3) SCC 159, wherein a similar factual scenario existed where the old testator had executed the Deed at a Nursing Home as he was not in a fit condition to go to the Sub-Registrar's Office.

46. Lastly, learned Senior Counsel on behalf of appellants has submitted that the learned Single Judge has wrongly concluded that the



two Gift Deeds were not executed by Smt. Jaswant Kaur in sound mind and has invalidated them. The appellants by virtue of the two Gift Deeds were entitled to entire property and not to 50% of the property as has been held in the impugned order dated 29.10.2021. It is therefore, submitted that the impugned preliminary decree be set aside.

47. The **respondent in the written submissions** has submitted that the learned Single Judge has correctly pondered upon the suspicious circumstances surrounding the Gift Deed. Smt. Jaswant Kaur was a bed ridden 98 years old lady. She had two sons, one daughter and 24 grand/ great grand children. At the age of 97/98 years, there was no reason for her to disinherit all her children from the inheritance. No reasons have been mentioned in the Gift Deeds for this unnatural behaviour. The rights in the suit properties worth over Rs.50 crores, were her only source of income which by virtue of impugned Gift Deeds stood transferred leaving no provision for her to continue to live in the suit property or provide her subsistence from the rental income which was being generated from the property.

48. Furthermore, D3W2 Smt. Amrita Kataria, the granddaughter of Smt. Jaswant Kaur took active part in making of the Gift Deeds and was the attesting witness in both the Gift Deeds. She had contacted Mr. Chhabra, Advocate who is alleged to have scribed the Gift Deeds, but he remained a ghost and his name does not even appear on the Gift Deeds as a scribe. He was also not examined as a witness. Furthermore, the mutation papers were signed in May, 2007 immediately after the registration of the Gift Deeds, but were not submitted with the concerned Authority. The Lease Deed was executed in January, 2008 for Ground



Floor but the Gift Deeds were not recited. Fresh Lease Deed was prepared in December, 2008 after the demise of Smt. Jaswant Kaur when for the first time the recital regarding the Gift Deeds was introduced. Further, no independent witness was called to witness the execution of the Gift Deeds.

49. While Smt. Amrita Kataria, the attesting witness testified that the Gift Deed dated 02.06.2008 was executed in the presence of the officials from the office of Sub-Registrar in the Drawing Room of the suit property and the thumb impressions and finger prints were put as per the advice of the Officers, but the Sub-Registrar maintained that he was not aware of the location where the Gift Deeds were executed. The photographs on the Gift Deed dated 23.05.2007 shows her sitting on the bed in the bed room while Smt. Amrita Kataria the attesting witness had deposed that the photograph was taken in the Drawing Room. In view of the contradictions in the testimony of the witnesses it was clearly established that these two Gift Deeds were surrounded with mysteriously suspicious circumstances and have been rightly declared as null and void.

50. The Doctors namely Dr. Prakash Jhuraney and Dr. Rekhi, who took care of Smt. Jaswant Kaur, though listed as witnesses, were never examined to prove the medical condition of Smt. Jaswant Kaur. Thus, the presentation and execution of the Gift Deed dated 02.06.2008 is surrounded by mystery.

51. The Ld. Senior Counsel on behalf of the respondent has further asserted that relationship between parents and children qualifies as a fiduciary relationship. Smt. Manohar Bhasin Hazooria has admitted that she and appellant No.1 Shri Kulwant Singh Hazooria had bank accounts



jointly and whenever she needed advice on any matter, she would consult the two appellants. When the Leases were executed by Smt. Jaswant Kaur, then too appellant No.1 Kulwant Singh Hazooria took part in the negotiations. It is evident that there existed a fiduciary relationship between the appellants and the mother Smt. Jaswant Kaur and they were in a position to dominate the will of the deceased. Reliance has been placed on the case of Dharman and Six Ors., (supra), Lakshmi Amma and Another (supra) and Krishna Mohan Kul (supra) to contend that where a fiduciary relationship exists between the parties, the onus is on the beneficiary under the document who was in a position to dominate the will of the other, to remove all suspicion regarding the unfairness of transaction.

52. The Ld. Senior Counsel on behalf of respondent has asserted that *Section 16 of the Indian Contract Act, 1872* has to be satisfied. The presumption of undue influence which was evident in the present case, had to be rebutted by the appellants which they have failed to do. The Gift Deeds are sham and bogus and were obtained by the appellants by plain fraud. Smt. Jaswant Kaur had no knowledge of English which was the language in which the Gift Deeds were written and this fact was deposed by Smt. Jasbir, sister of Smt. Jaswant Kaur. Reliance has been placed on the case of B.R. Koteshwara Rao vs G. Rameshwari Bai 2003 SCC OnLine AP 444, to contend that mere fact of signature in a document would not prove its due execution when the language is not known to the signatory and it is not proved that the contents of the document were explained to the testator.

53. Ld. Senior Counsel has further pointed out that the best evidence by



examining the Doctors to prove the mental state of Smt. Jaswant Kaur and the best evidence to prove the execution and registration of the Gift Deeds by examining the officials of Sub-Registrar has been withheld. Likewise, Mr. Chhabra Advocate who was the Scribe was the best person to prove the execution and registration of the Gift Deeds but he again has not been included in the list of witnesses, which raises suspicion. The best evidence to prove the thumb impression and finger prints of Smt. Jaswant Kaur on the Gift Deeds was by examining the Forensic Expert, which has also not been led. The appellants have thus failed to prove the two Gift Deeds by any cogent evidence. Further, mere endorsement is not enough to conclusively prove execution of the document. It is claimed that the registration of the two Gift Deeds had been done in a perfunctory manner and the endorsements had been made contrary to rules, Manual as well as the provisions of the Registration Act. Reliance has been placed on the case of Ramakrishna Ganpat Futane vs Mohammad Kasam Mohammd Maki, 1972 SCC OnLine Bom 137 and Jagannath vs M. Dhiraja 1918 SCC OnLine Oudh 4.

54. Lastly, Ld. Counsel for the respondent has submitted that the learned Single Judge has rightly held the Gift Deeds to be void and the present appeal is liable to be dismissed.

55. **Submissions heard.** This Court's issue-wise findings are as under:

Issue No. 2: -

“Whether the suit is barred under Order 2 Rule 2 CPC? OPD 1 & 3”

56. At the outset, a legal objection has been taken on behalf of the appellants about maintainability of the suit on account of filing of a



similar prior suit bearing CS (OS) No.707/2008 on 24.04.2008 seeking *declaration and injunction* against the appellants herein.

57. The question is whether the present suit is maintainable in view of the earlier suit filed involving the same suit property as in the present case. This aspect came up for consideration in Ram Mal vs. Upendra Datt and Anr. 1928 SCC OnLine Lah. 196, where a suit was filed for injunction on 12.10.1926 directing the defendant to close the door that had been opened in the house of the plaintiff. This was followed by another Suit filed on 19.10.2026, wherein the plaintiff claimed Permanent Injunction to restrain the defendant from obstructing his right of way to his property. The first suit was dismissed as withdrawn on 20.12.1926. The issue arose whether the dismissal of the first suit by withdrawal would bar the filing of the subsequent suit under Order XXIII Rule 1 CPC and whether the contentions raised in the first suit even though withdrawn, would operate as constructive res-judicata in the second suit. Reference was made to the case of P. Surja Beddi vs. Subba Beddi (1916) 39 Mad. 937, and it was observed that the consequence of withdrawal or abandonment of a claim is that the plaintiff is debarred from instituting a fresh suit with respect to the same subject matter except where it had been withdrawn with the permission of the Court under Order XXIII Rule 1 CPC. However, this Rule would not be applicable when the plaintiff had already filed the subsequent suit at the time when the first suit is withdrawn. This is so as *Order XXIII Rule 1 CPC* requires the filing of subsequent suit **after** the withdrawal of the first suit.

58. Likewise, in the case of Mangi Lal and Anr. Vs. Radha Mohan and Anr. 1930 SCC OnLine Lah. 69, a suit was filed before the Munsif Court



and the second suit on the same cause of action was filed before the Subordinate Judge 2nd Class. It was observed that Order XXIII Rule 1 CPC cannot be read to be applicable and bar a suit which has already been instituted before the first suit is abandoned or dismissed. It was explained that if two suits are pending, then withdrawal of one would not be covered by the prohibition contained under Order XXIII Rule 1 CPC.

59. The two judgments above discussed were relied upon by Punjab & Haryana High Court in Shri Girdhari Lal Bansal vs. The Chairman, Bhakra Beas Management Board, Chandigarh and Ors. AIR 1985 P&H 219, wherein the similar question of withdrawal of previous suit when a subsequent suit on the same cause of action was pending came up for consideration. It was concluded that where the second suit is already pending at the time of withdrawal of first suit, Order XXIII Rule 1 CPC would not be attracted.

60. Now coming to the facts of the case in hand, admittedly the previous suit was filed by the respondent but he has explained that on account of certain compromise talks, he had not got the summons served on the defendants (*who are the appellants herein*) in order to avoid unpleasantness. During the pendency of that Suit, Smt. Jaswant Kaur died on 15.08.2008. Apprehending mischief at the hands of the appellants, he made search in the office of local Authorities and came to know that appellant No 1 & 1(a) had got certain registered Gift Deeds executed in their favour from Smt. Jaswant Kaur. Thus, respondent filed the present civil suit bearing CS (OS) No. 2244/2008 seeking *partition, possession of the share of Respondent and decree of declaration challenging the Gift Deeds relied upon by the appellants.* Subsequent to the filing of the



present suit, the earlier suit bearing CS (OS) No.707/2008 was withdrawn on 07.11.2008. The present suit was already pending when the first suit was withdrawn and in the light of the judgements discussed above, the present suit cannot be held to be barred under Order II Rule 2 CPC.

61. Even on facts, the bar is not attracted as the relief claimed was distinct in the two suits. The respondent has filed the present Suit seeking *Partition* of the suit property and possession of his one-half share. He has also sought a *Declaration* that the Gift Deeds dated 23.05.2007 and 02.06.2008 allegedly executed by Smt. Jaswant Kaur as null and void and consequent *Cancellation* of the said Gift Deeds along with other connected reliefs. The earlier suit No.707/2008 was merely confined to a Declaration of ownership of respondent in respect of one-half share in the suit property and consequent Injunction and there was no mention of the Gift Deeds. Respondent had claimed that it was only after the demise of the mother that he on enquiry, came to know about the existence of the Gift Deeds and consequently he filed the second suit for cancellation of the two Gift Deeds and Partition. Respondent could not have sought relief in respect of the Gift Deeds which were not even in his knowledge at the time of filing of first Suit. The relief sought in the two suits though in respect of same property, were absolutely distinct. The seeking of Declaration of ownership does not entail that the partition also has to be sought necessarily. Further, the right of partition is a continuous right and a fresh cause of action accrues every day. The suit for partition therefore cannot be deemed to be barred by the earlier suit. The scope of the second suit was not only wider but was premised on different facts. The reliefs sought were based on distinct causes of action and the bar of Order II Rule



2 CPC is definitely not attracted in the given facts.

62. The present suit is therefore, not barred merely because an earlier suit was filed, which was withdrawn unconditionally.

63. We find that the observations of Ld. Single judge though premised on different reasoning, came to the right conclusion about the suit not being barred under O. II Rule 2 CPC.

Issue No. 3: -

“Whether Ms. Jaswant Kaur was conversant with English language? OPP”

Issue No. 4: -

“Whether the gift deeds dated 23rd May, 2007 and 2nd June, 2008 were executed by Ms. Jaswant Kaur? OPD 1 & 3”

Issue No. 5: -

“Whether the gift deeds dated 23rd May, 2007 and 2nd June, 2008 are sham, bogus and have been obtained by playing fraud by the defendant Nos. 1 and 3 on the plaintiff and late Ms. Jaswant Kaur? OPP”

Issue No. 6: -

“Whether the gift deeds are unconscionable? OPP”

Issue No. 7: -

“Whether gift deeds have been obtained by exercising dominance by the defendant Nos. 1 and 3 on the plaintiff and Mrs. Jaswant Kaur? OPP”

&

Issue No. 8: -

“Whether the gift deeds are hit by Section 16 of the Indian Contract Act, 1872? Onus to prove on both parties.”



64. Learned Single Judge held in the impugned judgment that the Gift Deeds having been executed under undue influence as defined under Section 16 of the Indian Contract Act, 1872 and were therefore, invalid. Consequently, the Will dated 05.01.1996 Ex. PW1/1 was held to be valid as the last testamentary document and on the basis of the Will, the decree of partition dividing the property equally between Appellant No.1 and the Respondent was passed.

65. “**Undue Influence**” is provided under Section 16 of the Indian Contract Act which reads as follows: -

"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 lie upon the person in a position to dominate the will of the other.

Nothing in this sub-section shall affect the provisions of section 111 of the Indian Evidence Act, 1872 (1 of 1872)



Illustrations

(a) A having advanced money to his son, B, during his minority, upon Bs coming of age obtains, by misuse of parental influence, a bond from B for a greater amount than the sum due in respect of the advance. A employs undue influence.

(b) A, a man enfeebled by disease or age, is induced, by Bs influence over him as his medical attendant, to agree to pay B an unreasonable sum for his professional services, B employs undue influence.

(c) A, being in debt to B, the money-lender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on B to prove that the contract was not induced by undue influence.

(d) A applies to a banker for a loan at a time when there is stringency in the money market. The banker declines to make the loan except at an unusually high rate of interest. A accepts the loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence.”

66. The appellants herein have challenged the correctness of the findings that the two registered Gift Deeds Ex. P-2 & P-3 claimed to be executed by Late Smt. Jaswant Kaur were under the shroud of suspicion or were executed by Late Smt. Jaswant Kaur under undue influence thereby making them null and void.

67. It is not in dispute that Smt. Jaswant Kaur, mother of the parties, was the owner of the suit property by a Conveyance Deed dated 09.05.2000. It is also not in dispute that she during her lifetime had executed a Will dated 05.01.1996 Ex. PW1/1 whereby she bequeathed the suit property to the respondent and Appellant No. 1 in equal shares. The sister, Smt. Nirmal Tej Kaur Bedi, performa respondent/ defendant No.2



was to receive a sum of Rs.10 Lakhs from the respondent and appellant No.1 (since deceased and represented through LR.) in equal shares. Smt. Jaswant Kaur also settled her other movable assets. This Will dated 05.01.1996 was claimed by the Respondent to be last testament of late Smt. Jaswant Kaur, which was executed by her in a sound and disposing state of mind.

68. The appellants on the other hand, resisted the claim of respondent to a share in the suit property by claiming to have become absolute owners of the suit property by virtue of the Gift Deeds dated 23.05.2007 and 02.06.2008 that were executed in their favour respectively by their mother Late Smt. Jaswant Kaur.

69. Ld. Senior Counsel had vehemently argued on behalf of the Appellants that the two Gift Deeds under challenge were the registered documents to which the presumption of genuineness is attached as observed in the case of Jamila Begum v. Shami Mohd., AIR 2019 SC 72. During the trial the onus was wrongly placed on them to prove the genuineness of the two Gift Deeds.

70. Though the two Gift Deeds are indisputably registered documents, however, in Rani Purnima Debi & Anr. vs. Kumar Khagendra Narayan Deb & Anr., AIR 1962 SC 567, it was observed that mere registration of a Will cannot dispel all suspicious circumstances surrounding it. A registered document shall be considered the true testament of a testator only when the evidence establishes that the contents of the documents were understood by the testator before it was signed.

71. In Pratap Singh & Ors. vs. The State & Anr. 173 (2010) DLT 132



(DB), it was observed that when there is no evidence that the Will was prepared on the direction of the testator and the contents of the Will were read over and explained to him in the language known, then the onus on the appellant to prove the mentally fit disposition of the testator would not stand discharged and it cannot be said that the Will is free from suspicion. The principle as propounded in this case though is the case of Will, applies squarely to the two Gift Deeds under challenge in the present appeal.

72. Similarly, in Belasia Bai Siya and Ors. vs. Pradeep Kumar and Ors. in Second Appeal No. 236 of 1996, decided on 16.03.2009, the High Court of Chhattisgarh observed that the mere fact that the Will is registered is not by itself sufficient to dispel all suspicion regarding it. If the evidence as to the registration shows that it was done in a perfunctory manner and that the Officer registering it did not read its contents to the testator and did not satisfy himself in some way that the testator knew that it was a Will that was being executed, the mere registration would not be of much value. The registration may take place without the executant really knowing the nature of the document being registered.

73. Though the aforesaid judgements are in the context of Wills but the fundamental principles for interpretation of documents are applicable pari materia to the registered Gift Deeds. In the present case as well, though the two Gift Deeds are registered documents but they do not become beyond challenge. The evidence is still admissible to ascertain whether the document was prepared at the instance of the executor and whether the same was signed after understanding its true contents. The mere fact of registration is not by itself enough to dispel all suspicion that may attach



to the execution and attestation of the document, though the fact that it has been registered would be an important circumstance in favour of the document being genuine if the evidence as to registration establishes that the testator had executed the document after knowing and understanding its nature.

74. However, at the outset it must be seen who must lead the evidence in this regard when undue influence is alleged.

75. In Sher Singh and others Vs. Pirthi Singh Others AIR 1975 Allahabad 259, similar facts came up for consideration before the Allahabad High Court wherein cancellation of a Gift Deed was sought which was executed by an illiterate, rustic villager aged about 80-90 years who was physically infirm and mentally in distress with none to look after him after the death of his wife and the marriage of his two daughters except his nearest relatives who took care of his daily needs and managed his cultivation, in whose favour the Gift Deed was made thereby depriving him of all his transferable properties during his lifetime. After analysing his situation in the context of the principle it was held as under:

*“6. Section 16 of the Indian Contract Act incorporates the principles relating to undue influence. As pointed out by the Supreme Court in Ladli Prasad Jaiswal v. The Kamal Distillery Co. Ltd., AIR 1963 SC 1279 the doctrine of undue influence under the common law was evolved by the Court 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 Contract Act is founded substantially on the rules of English common law. Sub-Section (1) of S. 16 of the Contract Act lays down the principle in general terms. By sub-section (2) a person is 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 subsection is that 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."

76. This judgement was referred in the case of Dharman and Six Ors. (supra), and it was concluded that if on the face of the document and the nature of the transaction covered by the document, it appears to be either *unconscionable or unnatural*, the burden of proving that the transaction was not induced by undue influence rests with the beneficiary under the document.

77. The Apex Court in Raj Kumari v. Surinder Pal Sharma 2019 SCC Online SC 1747 made a reference to Jaswant Kaur v. Amrit Kaur (1977) 1 SCC 369 and observed as under:

*"(5) It is in connection with wills, the execution of which is surrounded by suspicious circumstances that the **test of satisfaction of the judicial conscience has been evolved.** That test emphasises that in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator.*

*(6) **If a caveator alleges fraud, undue influence, coercion, etc. in regard to the execution of the will, such pleas have to be proved by him,** but even in the absence of such pleas, the very circumstances surrounding the execution of the will may raise a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter. "*



78. In Surendra Pal and Ors Vs. Saraswati Arora and Anr 1974 2 SCC 600, Hon'ble Supreme Court observed that the nature and quality of the evidence must be commensurate with such essentiality so as to remove any suspicion which a reasonable or a prudent man may in the prevailing circumstances entertain.

79. **Thus, the aforesaid judgements expound on the principle that generally the onus is on the party alleging fraud or undue influence to prove the same.** It is only when such onus stands discharged, the onus shifts on the other party to dispel the allegations of undue influence and explain such circumstances alleged. **However, this principle changes where there exists a fiduciary relationship.**

80. Section 111 of the Indian Evidence Act, provides that: -

“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.

Illustrations

(a) The good faith of a sale by a client to an attorney is in question in a suit brought by the client. The burden of proving the good faith of the transaction is on the attorney.

(b) The good faith of a sale by a son just come of age to a father is in question in a suit brought by the son. The burden of proving the good faith of the transaction is on the father.”

81. Thus, in transactions of good faith the burden of proof is on the party who is in a position of active confidence.

82. This aspect has further been explained by the Apex Court in the



case of Krishna Mohan Kul (supra), where similar facts in respect of registered documents arose and it was observed that when false misrepresentation or undue influence is alleged by a party to a suit, normally, the burden is on him to prove such fraud, undue influence or misrepresentation. *However, 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 the person in the dominating position and he has to prove that there was fair play in the transaction and that the transaction was genuine and bona fide. In such a case, the burden of proving that the transaction was in good faith is thrown upon the dominant party, that is to say, the party who is in a position of active confidence.* A person standing in a fiduciary relation to another has a duty to protect the interest given to his care and the court watches zealously all transactions between such persons so that the protector may not use his influence or the confidence to his advantage.

83. In the case of M. Rangasamy (supra), similar proposition was reiterated that where it was alleged that the defendant exercising or dominating influence over his grandmother in a fiduciary relationship, got the two settlement deeds executed from her by exploiting her old age, dim eye-sight and mental condition. It would normally be the rule that a person who pleads undue influence has to lead evidence to establish that fact. But in view of the fiduciary relationship of the defendant, the proof that the gift deeds were the result of the free exercise of independent will by the executant was to be supplied by the defendant.

84. In Krishna Mohan Kul (Supra), it was further explained that Section



111 of the Indian Evidence Act, 1872 engrains the rule that where the party complaining shows a fiduciary relationship or dominant position, the law presumes everything against the transaction and the onus is passed on the person who is holding the position of confidence of trust to show that the transaction was fair and reasonable and he had taken no advantage of his position. This principle that he who bargains in a matter of advantage with a person, who places confidence in him is bound to show that a proper and reasonable use has been made of that confidence. Such transaction does not necessarily become void ipso facto nor is it necessary for those who impeach it to establish that there was a fraud or imposition, but the burden of establishing its perfect fairness, adequacy and equity is caused upon the person in whom the confidence has been reposed.

85. In Subhas Chandra Das Mushib Vs. Ganga Prasad Das Mushib and Ors (1967) 1 SCR 331, the apex court observed that while making out a case of undue influence, two things have to be considered: (1) *whether the relationship between the donor and the donee is such that the donee is in a position to dominate the will of the donor, and (2) whether the donee used that position to obtain an unfair advantage over the donor.* On determination of these two issues, the third point emerges that is of 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 person who is in a position to dominate the will of the other. Thus, the first aspect that is to be examined in such a case, is the relationship of the parties. But it may be further qualified that merely because the parties were nearly related to each other or merely because the donor was old and weak character, no presumption of undue influence can be raised. The



presumption of undue influence solely on the basis of close relationship is not warranted by law. However, Section 16(2) of the Contract Act shows that a presumption of undue influence can arise wherever the donee stands in a fiduciary relationship to the donor or holds a real or apparent authority over him. *Before, however, a court is called upon to examine whether undue influence was exercised or not, it must scrutinise the pleadings to find out that such a case has been made out and that full particulars of undue influence have been given as in the case of fraud.*

86. To ascertain in the facts of this case, whether the appellants were having a fiduciary relationship with the deceased and were in a dominant position, it would be pertinent to understand the concept of “**Fiduciary relationship**”.

87. The **Advanced Law Lexicon, 3rd Edition, 2005**, defines *fiduciary relationship* as

“a relationship in which one person is under a duty to act for the benefit of the other on the matters within the scope of the fiduciary relationship.”

88. In the case of Central Board of Secondary Education and Anr. (supra) it was explained that : -

“Fiduciary relationship usually arise in one of the four situations (1) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first, (2) when one person assumes control and responsibility over another, (3) when one person has a duty to act or give advice to another on matters falling within the scope of the relationship, or (4) when there is specific relationship that has traditionally be recognized as involving fiduciary duties, as with a lawyer and a client, or a stockbroker and a customer.”



89. The scope of the fiduciary relationship consists of the following rules: -

*“(i) **No Conflict rule**- A fiduciary must not place himself in a position where his own interests conflicts with that of his customer or the beneficiary. There must be “real sensible possibility of conflict.*

*(ii) **No profit rule**- a fiduciary must not profit from his position at the expense of his customer, the beneficiary;*

*(iii) **Undivided loyalty rule**- a fiduciary owes undivided loyalty to the beneficiary, not to place himself in a position where his duty towards one person conflicts with a duty that he owes to another customer. A consequence of this duty is that a fiduciary must make available to a customer all the information that is relevant to the customer’s affairs*

*(iv) **Duty of confidentiality**- a fiduciary must only use information obtained in confidence and must not use it for his own advantage, or for the benefit of another person.”*

90. The term “*fiduciary relationship*” has been discussed by this Court in the case of Central Board of Secondary Education and Anr. (supra). After referring to various authorities to ascertain the meaning of the term fiduciary relationship, it was observed that generally, the term ‘*fiduciary*’ applies to any person who occupies a position of peculiar confidence towards another. It refers to *integrity and fidelity*. It contemplates *fair dealing and good faith* rather than a legal obligation as the basis of the transaction. The term includes those informal relations which exist whenever one party trusts and relies upon another, as well as technical fiduciary relations.

91. In Bristol and West Building Society vs. Mothew [1998 Ch. 1] the term *fiduciary* was defined as: -



“A fiduciary is someone who has undertaken to act for and on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty..... A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal.”

92. In Wolf vs. Superior Court [2003 (107) California Appeals, 4th 25] the California Court of Appeals defined *fiduciary relationship* thus:

“any relationship existing between the parties to the transaction where one of the parties is duty bound to act with utmost good faith for the benefit of the other party. Such a relationship ordinarily arises where confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interests of the other party without the latter’s knowledge and consent.”

93. In the case of Central Board of Secondary Education and Anr. (supra) it was further explained that: -

“21. The term ‘fiduciary’ refers to a person having a duty to act for the benefit of another, showing good faith and candour, where such other person reposes trust and special confidence in the person owing or discharging the duty. It is used to describe a situation or transaction where one person (beneficiary) places complete confidence in another person (fiduciary) in regard to his affairs, business or transaction/s. The term also refers to a person who holds a thing in trust for another (beneficiary). The fiduciary is expected to act in confidence and for the benefit and advantage of the beneficiary, and use good faith and fairness in dealing with the beneficiary or the things



belonging to the beneficiary. If the beneficiary has entrusted anything to the fiduciary, to hold the thing in trust or to execute certain acts in regard to or with reference to the entrusted thing, the fiduciary has to act in confidence and is expected not to disclose the thing or information to any third party.

There are certain relationships where both the parties have to act in a fiduciary capacity treating the other as the beneficiary. Examples of these are: a partner vis-à-vis another partner and an employer vis-à-vis employee. An employee who comes into possession of business or trade secrets or confidential information relating to the employer in the course of his employment, is expected to act as a fiduciary and cannot disclose it to others. Similarly, if on the request of the employer or official superior or the head of a department, an employee furnishes his personal details and information, to be retained in confidence, the employer, the official superior or departmental head is expected to hold such personal information in confidence as a fiduciary, to be made use of or disclosed only if the employee's conduct or acts are found to be prejudicial to the employer."

94. The afore discussed judgements explaining the concept of fiduciary relationship, were reiterated in the case of RBI vs. Jayantilal N. Mistry (supra) and also in CBSE and others vs. Aditya Bandopadhyay (supra), Marcel Martins vs. M. Printer & Ors. (2012) 5 SCC 342 and Pawan Kumar vs. Babulal since deceased through LRs and Ors. (2019) 4 SCC 367.

95. It may be thus concluded in the words of learned Single Judge who observed that a fiduciary relationship arises:

- “(i) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first;*
- (ii) when one person assumes control and responsibility over*



another;

(iii) when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship; and

(iv) when there is a specific relationship that has traditionally been recognised as involving fiduciary duties, as between a lawyer and a client or a stockbroker and a customer.”

96. Applying these principles, the evidence as led in this case may be considered. The appellants in their written statement have admitted that they always stayed with Smt. Jaswant Kaur since the suit property was acquired by her and they had taken care of her emotional, psychological, financial and other requirements. It was also stated that the bondage was complete and absolute between Smt. Jaswant Kaur and the appellants. The respondent had left India in 1961 to pursue higher studies and had thereafter settled in Germany and only sporadic visits were made by him to India.

97. D3W1 Smt. Ms. Manohar Bhasin, Appellant No.1(a), has also admitted that since her marriage in 1955, she has been living with her mother-in-law Smt. Jaswant Kaur and father-in-law and had taken care of them. She further deposed that Late Smt. Jaswant Kaur had executed a registered Power of Attorney dated 30.06.1997 in favour of the appellant No.1, Kulwant Hazooria to look after and manage the suit property. The creation of the General Power of Attorney by Late Jaswant Kaur in favour of the appellant creates a “*fiduciary relationship*” between the two.

98. Appellant No.1(a) had also deposed that Smt. Jaswant Kaur used to treat her as her own daughter and she also took care of Smt. Jaswant Kaur with full affection and devotion. In the cross examination, appellant



No.1(a) explained in response to a specific question that appellant No.1 was the in charge of all the things in the house thereby implying that appellant No.1 was responsible for taking care of Smt. Jaswant Kaur. She further clarified in her cross examination that whenever late Jaswant Kaur needed any advice in any matter, she consulted the appellants, so much so, that appellant No.1 even negotiated with the prospective tenants and also looked after the interest of Smt. Jaswant Kaur. Also Smt. Jaswant Kaur had a joint account with Sh. Kulwant Hazooria in which the rental income was deposited and which account was managed by the latter even if on her instructions.

99. The testimony of the appellants proves that they both were absolutely in charge of the affairs of Smt. Jaswant Kaur and the suit property was also being managed and taken care of by appellant No.1/ Kulwant Hazooria (since deceased). The day to day needs and requirements of Jaswant Kaur was also taken care of by the appellants.

100. It has also emerged from the testimony of D3W2 Smt. Amrita Kataria, daughter of Smt. Jaswant Kaur, that Smt. Jaswant Kaur had developed weakness in her legs and her mobility was restricted to the extent that she was confined to the wheelchair even though she was blessed with a long age of about 98 years. She even attended the wedding of great grand children in October, 2004 and March, 2006 while being confined to the wheel chair.

101. The *relationship of trust and confidence* is clearly proved between the appellants and Smt. Jaswant Kaur who had reposed complete confidence for the general affairs, assets, business and her daily requirements in the appellants. The Ld. Single Judge has rightly held that



there was a fiduciary relationship between Late Smt. Jaswant Kaur and the Appellant No. 1 and 1(a) by observing as follows: -

*“It follows from the evidence clearly that defendant Nos. 1 and 3 were wholly incharge of the affairs of Late Smt. Jaswant Kaur. The property in question was being entirely looked after by defendant No. 1, the day to day needs of Late Smt. Jaswant Kaur were also being met by defendants Nos. 1 and 3. From 2004 or perhaps even prior to that, Late Smt. Jaswant Kaur's movement got restricted as she used to move around on a wheel chair only. Smt. Jaswant Kaur was blessed with long age and was above 95 years old. These facts clearly show that there existed a relationship of trust and confidence. Late Smt. Jaswant Kaur had placed complete confidence in defendants Nos. 1 and 3 with regard to her general affairs, her assets, her business and her daily requirements. They had stayed together for almost the last 40 years. Late Smt. Jaswant Kaur had reposed complete confidence in defendants No. 1 and 3 regarding all her affairs including affairs of the immovable property. In fact, defendant No.1 was the attorney holder on behalf of Late Smt. Jaswant Kaur. Clearly, **a fiduciary relationship existed between the said Smt. Jaswant Kaur and defendants No. 1 and 3**”*

102. Therefore, applying the principles discussed above, the onus to prove the validity of the Gift Deeds was rightly placed upon on the appellants.

103. Pertinently it may be mentioned that 'burden of proof' is a rule of evidence provided under Section 101 of the Indian Evidence Act, 1872 which reads as under-

*“**Section 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. Illustrations

(a) *A desires a Court to give judgment that B shall be punished for a crime which A says B has committed. A must prove that B has committed the crime.*

(b) *A desires a Court to give judgment that he is entitled to certain land in the possession of B, by reason of facts which he asserts, and which B denies, to be true. A must prove the existence of those facts."*

104. The meaning of the term '*burden of proof*' was analysed in the case of Bhoora Singh vs State of Uttar Pradesh 1992 Cr LJ 2294. It was observed that the term envisages a situation where whoever desires a Court to give a judgment as to any legal right or liability by placing reliance on existence of certain facts, proves those facts as per his assertions. The Section is based on a Maxim '*El Incumbit Probation Qul Dicit Non Quit Negat*' which means that the burden of proof rests on the party who asserts the affirmative of the issue and not on the party who denies it, as the negative is incapable of proof.

105. The concept of burden of proof has two meanings; '*burden of proof*' and '*onus of proof*'.

106. In Narayan Bhagwantrao vs. Gopal Vinayak, 1960 SCR (1) 773 the Supreme Court explained that the two meanings of expression "*burden of proof*" envisage that when a party makes an allegation, they are required to prove the same for a judgement to be passed in their favour. If the said allegation is contested by the other party, then it becomes a contested issue for which they have to introduce evidence.

107. The meaning of onus of proof was explained in the case of Anil Rishi vs Gurbaksh Singh (2006) 5 SCC 558. It was observed that the right



to begin the evidence follows the principle of *onus probandi* and it assumes importance in the early stage of a case. The question of onus of proof assumes importance where the question is which party is to begin. While the concept of burden of proof in Section 101 is always inflexible, the '*onus of proof*' as under Section 102 shifts when the initial burden stands discharged by the plaintiff.

108. Further, in the case of Narayan Bhagwantrao (supra) it was observed that where the parties have joined issue and have led their respective evidence, the abstract question of burden of proof becomes academic. The conflicting evidence can be weighed to determine which way the issue can be decided, and that the burden of proof is of importance only where by reason of not discharging the burden which was put upon it, a party must eventually fail.

109. Thus, the question of burden of proof essentially becomes irrelevant once parties have joined issue and the evidence has also been led. It is then a matter of appraisal of the evidence to determine in whose favour the issue is to be decided.

110. In the present case as well, since both the parties have led their respective evidence, the issue of onus/burden of proof has been rendered academic since now the respective evidence of the parties needs to be assessed to determine which facts stand proved.

111. Now, it must be examined whether the Gift deeds were executed by taking advantage of the trust and confidence of Smt Jaswant Kaur in light of the various suspicious grounds surrounding the execution of the said Gift Deeds that had been agitated by respondent, which are as under: -

(i) *Smt. Jaswant Kaur was about 98 years old at the time of*



execution of the two Gift Deeds and was suffering from various ailments and was not in sound state of mind.

- (ii) Smt. Jaswant Kaur did not know English language and was not aware of the contents of the two Gift Deeds.*
- (iii) The unexplained ouster of Respondent.*
- (iv) The Appellant Nos.1 & 1(a) have exercised undue influence on Smt. Jaswant Kaur.*
- (v) the propounders/attesting witnesses were the beneficiary under the two Gift Deeds and had actively participated in their registration.*

112. These grounds may now be considered separately.

(i) Medical condition of deceased Jaswant Kaur: -

113. It is not in dispute that the two registered Gift Deeds dated 23.05.2007 and 02.06.2008 Ex.P-2 and P-3 respectively were executed in favour of the two appellants, namely Kulwant Hazooria and his Wife/appellant No.1(a) Smt. Manohar Bhasin Hazooria. It is also not denied that Smt. Jaswant Kaur had died on 15.08.2008 at the age of 98 years, which is soon after the execution of the second Gift Deed. When the demise of the testator takes place soon after the execution of the impugned documents, it necessarily creates a circumstance where the medical condition of the deceased donor, calls for a closer scrutiny.

114. It is no doubt that merely because a person is of 98 years of age, there can be no presumption of unsoundness of mind of a person on the ground that she is old and ailing. The difference between physical and mental health is self evident. A person may become physically indisposed



or bed ridden and that in itself cannot lead to drawing of any inference of the person not being mentally fit to understand the nature of transaction.

115. In the case of Benedicta Monterio and others Vs. Thomas Monteiro and Others 2015 SCC OnLine Kar 9451, a similar situation came for the consideration of the court where the testator who was 90 years of age was hospitalised on account of paralysis when the Will in question was prepared. ***The court pointed out that the capacity to make a Will which is a mental exercise, is quite different from physical state of health.*** It was observed that the mental incapacity is required to be proved by positive evidence. A person who is producing a document not only has the onus to adduce the evidence which is satisfactory and sufficient to prove the sound and disposing mind of the executor of the document and has his/her signatures as required by law but also at the same time it is also necessary for him to remove suspicious circumstances surrounding the execution of the document for which no hard and fast or inflexible rules of evidence can be laid down. These observations were made by the Apex Court in the case of H. Venkatachala Iyengar Vs. B.N. Thimmajamma AIR 1959 SC 443 in the context of proving the Will but the same principle equally applies to the present case wherein the registered Gift Deeds have been placed under challenge.

116. Therefore, no conclusion of mental incapacity of Smt. Jaswant Kaur can be drawn on account of her age and it is pertinent to examine the evidence regarding the mental health of the donor.

117. In her affidavit by way of evidence, Ex. PW2/A PW-2 Smt Jasbir Kaur, sister of Smt. Jaswant Kaur has stated that she used to occasionally visit Smt. Jaswant Kaur and that she had not mentioned the execution of



any gift deeds. She has also stated that from 2006 onwards, the health of her sister had started deteriorating and that *'she used to be in a state of confusion and would frequently forget things in the present'*.

118. It is also pertinent to refer to the Written Statement filed by performa respondent/defendant No.2, sister of the respondent and appellant No.1 who has stated that she used to visit her mother, Smt. Jaswant Kaur at least once a week and that she had noticed for the last three years before her mother's death that she would frequently forget things and at times, she had difficulty recognising even her own daughter. Hence, according to the performa respondent/ defendant No.2 her mother was clearly not capable of executing the two Gift Deeds.

119. However, the performa respondent/ defendant No.2 retracted her statement on 18.10.2010 by filing an affidavit stating that though her mother was 98 years old, all her faculties were intact and she was capable of looking after her own interest. Performa respondent/ defendant No.2 after about twenty days, filed another affidavit dated 08.11.2010, and reaffirmed the contents of the written Statement filed in March, 2009. She then stated that because of the close relationship with both the families, she was not interested in participating further in the legal proceedings. Thus, the evidence led by the performa respondent/ defendant No.2 cannot be relied on by this court.

120. The appellants have claimed that even though she was 98 years old, she was in full senses and had good mental faculty. It is not denied that Smt. Jaswant Kaur during her life time, was being treated by Dr. Jhuraney and Dr. Rekhi. Though these two doctors have been cited as witnesses and the medical treatment record of Smt. Jaswant Kaur was also placed on



record but for the reasons best known to the appellants, neither were the two doctors examined nor were the medical prescriptions of Smt. Jaswant Kaur proved. The appellants therefore, failed to adduce best evidence to prove that Smt. Jaswant Kaur was in a fit mental condition at the time of execution of the Gift Deeds. **Thus, there was no certification on the Deeds.**

121. Ld. Single Judge has rightly observed that,

“68. Clearly, the three best witnesses, namely, the concerned officials from the office of the Sub-Registrar, the advocate-Mr.Chhabra and Dr.Prakash Jhuraney who would have been independent witnesses, have not been summoned to give their testimony that Late Smt.Jaswant Kaur was of sound deposing mind and understood her acts and that she voluntarily knowing fully well about the contents of the two gift deeds executed the same.”

122. It is observed that the onus was on the appellants to have established that she was in fit condition and sound state of mind. Significantly, the appellants have not examined any witness to prove the state of mind of Jaswant Kaur, which was a pre-requisite to determine the genuineness of an executed documents and hence, the observations of the Ld. Single Judge in this regard do not warrant any interference.

(ii) Smt. Jaswant Kaur did not know English language and was not aware of the contents of the two Gift Deeds: -

123. The **other aspect** which needs consideration of this court is whether two Gift Deeds Ex. P-2 and P-3 had been executed by Smt. Jaswant Kaur after understanding the contents of the two documents before they were signed by her.

124. Respondent, to assert that the Gift Deeds were not the embodiment



of informed decision of Smt. Jaswant Kaur had argued that since she was not cognizant of English language and therefore she was not aware of the contents of the two Gift Deeds. Admittedly, the two Gift Deeds Ex. P-2 and P-3 are written in English and bear the thumb impressions of Late Smt. Jaswant Kaur. It has emerged in the testimony of D3W1 Smt. Manohar Bhasin Hazooria and is corroborated by the testimony of D3W2 Smt. Amrita Kataria that Late Smt. Jaswant Kaur used to sign all the documents in Gurumukhi. It is also not disputed that all the documents including Lease Deed dated 24.06.1979 Ex.PW1/D10, Rent Receipt dated 20.08.1993 Ex.PW1/1 and document in German all bear the signatures of Late Smt. Jaswant Kaur in Gurumukhi. Even the two Wills of 1986 and 1996 have the signatures of Late Smt. Jaswant Kaur in Gurumukhi. It is not disputed or contested that Smt. Jaswant Kaur always signed the documents which required her signatures, in Gurumukhi.

125. Interestingly, the two impugned Gift Deeds dated 23.05.2007 and 02.06.2008 do not bear the signatures whether in English or Gurumukhi, but have thumb impressions. No explanation whatsoever has been given as to why Late Smt. Jaswant Kaur's thumb impressions appear in the two Gift Deeds instead of her signatures. The only inference in the absence of any other evidence that can be drawn is that her thumb impression on the Deeds were obtained manipulatively without her being aware of the contents of the documents. This is indeed a suspicious circumstance which creates a doubt about the two documents having been executed by the donor out of her own free will.

126. This aspect assumes importance in light of the fact that Smt. Jaswant Kaur had died on 15.08.2008 which is soon after the execution of



the two Gift Deeds. She was about 98 years old at the relevant time and the fitness of her medical condition has also not been proved on record by the appellants. ***The two Gift Deeds have been executed shortly before her death and having no signatures but only thumb impressions definitely raises a doubt about the two Deeds having been executed by Smt. Jaswant Kaur after understanding the contents thereof.***

127. The other aspect is that the two Gift Deeds were executed in English and it has emerged in the testimony of PW2 Smt. Jasbir Kaur, sister of Smt. Jaswant Kaur that the donor had studied only for about five years in a village under a Gurudwara Priest who used to teach Gurumukhi language. She could neither read and write nor understand English language and was familiar only with Punjabi/Gurumukhi language. D3W1 Smt. Manohar Bhasin Hazooria, appellant No.1(a) as well as her daughter, D3W2 Smt. Amrita Kataria had tried to assert that Smt. Jaswant Kaur had travelled abroad and also used to watch English programmes on television and attended dinners with foreigner friends organized by her husband and thus, could understand English. ***Even if it is accepted that Smt. Jaswant Kaur had some comprehension of English language this cannot be considered sufficient for her to understand the contents of the two Gift Deeds on her own.***

128. The other circumstance which needs to be considered is that the Sub-Registrar had to be called at home for the registration of Gift Deed as Smt. Jaswant Kaur was not in a position to go to the office of Sub-Registrar. Her inability to even go to the office of Sub-Registrar, the circumstance of her affixing her thumb impression instead of putting her signature in Gurumukhi along with the attesting witnesses being the



daughters of the appellants and being the beneficiaries in the Gift Deed creates suspicion of the Gift Deeds being a result of free will of Smt. Jaswant Kaur and of being free from undue influence of the appellants, who as already discussed above, were in a dominant position vis-a-vis Smt. Jaswant Kaur.

129. Similar facts at hand came up for the consideration of the Allahabad High Court in the case of Sher Singh and Others (Supra), wherein it was observed as under: -

“It appears doubtful if the document was read over and explained to the plaintiff before registration. Sher Singh admitted in his cross-examination that the document was read over only once when the scribe took it from the registration office after it had been registered. The defendants did not examine Budh Singh and Tika Singh, the two attesting witnesses, who had been cited as witnesses and were even present in court when the plaintiffs Sher Singh examined himself. Tika Singh was present in court even on the next day. The failure to examine these witnesses, who according to Sher Singh were present when the document was scribed and had accompanied Pirthi Singh to the registration Office where the document was registered, creates serious doubts about the bona fide of the transaction. Their examination may not have been necessary to prove due attestation of the document but it was certainly necessary to rebut the presumption and explain the circumstances in which the gift deed came into existence. The statement of Sher Singh is not sufficient to discharge the burden which lay on the defendants. His testimony to the effect that the idea of executing a gift deed in favour of the defendants was initiated by the plaintiff himself and it was outcome of his own free will has been rightly rejected as he does not appear to be a truthful witness. In his anxiety to show that he was a totally disinterested and innocent person he went



to the extent of stating that he was not even aware that the daughters were the legal heirs of the plaintiff and that he did understand what was meant by 'Washiyatnama' and 'Hibbanama'.”

130. It thus becomes pertinent to consider whether the contents of the two Gift Deeds were explained to her by any person considering her limited knowledge of English. The Supreme Court in the case of Gurdial Kaur vs. Kartar Kaur (1998) 4 SCC 384 had observed that the conscience of the Court must be satisfied that the document was not only executed and attested in the manner required under the Indian Succession Act, 1925, but it should be found that the said Will was the product of the free volition of the executor, executed after knowing and understanding its contents.

131. Admittedly, Mr. Chhabra, Advocate was engaged to prepare the Gift Deeds; he would have been the best witness to depose if the Gift Deed was prepared on her instructions and whether the contents were explained to Smt. Jaswant Kaur. However, he has not been examined.

132. The other material witness who could have been deposed about the contents having been explained to Smt. Jaswant Kaur were the officials from the office of Sub-Registrar who were present at the time of the execution of the two deeds. The suspicion surrounding a registered document can be minimized if the Sub-Registrar who registers the document, certifies that the same was read over to the executor and doing so had admitted its contents as observed by the Apex Court in the case of Rabindra Nath Mukherjee vs. Panchanan Banerjee (Dead) Lrs (1995) 4 SCC 459. However, they have also not been examined on behalf of the appellants.



133. Thus, it cannot be said that the donor was aware of or knew the contents of the documents that she was signing as there is no evidence regarding the contents being explained to her.

134. Thus, the Ld. Single Judge has rightly held that Smt. Jawant Kaur was not aware of the contents of the two Gift Deeds while observing as follows: -

“I have already held above that Late Smt. Jaswant Kaur did not understand English. Both the gift deeds dated 23.05.2007 and 02.06.2000 are written in English. Neither of the two witnesses of the defendants, namely, D3W1 or D3W2-the attesting witness has testified that somebody had explained to Smt. Jaswant Kaur the contents of the gift deeds and she understood its contents and thereafter, she affixed her thumb impressions on the said deeds. The entire evidence is completely silent on this aspect. There is no evidence led to show that steps were taken by the officials from the Sub-Registrar to ascertain the intention of Smt. Jaswant Kaur and to ascertain that Smt. Jaswant Kaur understood what she was executing. From the evidence, it is manifest that Smt. Jaswant Kaur was an old and partly ailing person, even as per the defendants. Being unaware of English language, she did not comprehend the contents of the documents or the nature of the documents. It was for defendants No. 1 and 3/the beneficiaries of the gift deeds to bring on record the fact that somebody had explained the contents of the gift deeds to Late Smt. Jaswant Kaur.”

(iii) No reasons for ouster of the respondent: -

135. The other relevant factor is the complete disinheritance of her other son, the respondent, Harcharan Singh Hazooria. The first Gift Deed dated 23.05.2007 was executed in favour of appellant No.1(a), who is the daughter-in-law while the second Gift Deed dated 02.06.2008 was executed in favour of the appellant No.1 (since deceased), who is the son.



Admittedly, a Will dated 05.01.1996 had been executed earlier, whereby the right in the suit property was bequeathed equally to the two brothers. The execution of the Gift Deeds have had an effect of complete disinheritance of the respondent, her other son. However, there is no circumstance which has been brought on record from where it could be inferred that Smt. Jaswant Kaur had developed over a period of time, any animosity or ill will towards the respondent, to have completely excluded him from his right in the suit property and gifted it to the two appellants.

136. Further, there is no reason why the entire immovable property was gifted only to the appellant No.1 and 1(a) when there also existed a daughter i.e. performa respondent/ defendant No.2, who was in constant touch with the donor, her mother.

137. Similar observations have been made by the Ld. Single judge as under:

“Further, it is noteworthy that under the transaction in question that plaintiff was deprived of all rights in the only immovable property that Smt. Jaswant Kaur owned. There is no explanation as to why the other legal heirs of Late Smt. Jaswant Kaur, namely, the plaintiff and defendant No. 2 were completely ousted from inheritance of the property by Late Smt. Jaswant Kaur. It is nobody's case that defendant No.2, the daughter of Late Smt. Jaswant Kaur was not constantly in touch with Late Smt. Jaswant Kaur.”

138. It is also observed that a suit numbered CS (OS) 707/2008 for declaration and injunction was instituted by the respondent against the appellant No.1 and 1(a) and the Late Jaswant Kaur; however, no animosity between the mother and the respondent was evident. Even thereafter, it has not emerged from the testimony that Late Smt. Jaswant



had any animosity or ill will against her other son, the Respondent herein. Hence, there was no reason for her to exclude Respondent from her estate and the observations of the Ld. Single Judge do not warrant any interference.

139. Thus, such unexplained ouster of the other children/heirs of the donor from her only immovable property raises doubt regarding the genuineness of the two Gift Deeds.

(iv) The appellant Nos.1 & 1(a) have exercised undue influence on Smt. Jaswant Kaur: -

140. Now, it must be seen if the two Gift Deeds under which the appellants have been given a substantial benefit were executed by Smt Jaswant Kaur from her own free will or she was influenced by the dominant position of the appellants in this regard.

141. The concept of 'undue influence' was explained in the case of Sher Singh and Others (Supra) and it was also observed that under the impugned deed where a legal heir was deprived of his right to the property, and there was no reason to disinherit the heir, such unexplained ouster of legal heirs makes the transaction in question unconscionable on the face of it and casts a suspicion on the genuineness on the document. It was observed that:

“In the present case, as observed earlier, the plaintiff was an illiterate, rustic villager aged about 80/90 years, physically infirm and mentally in distress. He had none to look after him after the death of his wife and the marriage of his two daughters. The defendants were his nearest relations who at one time formed a joint family. They looked after his daily needs and managed his cultivation. They were obviously in a position to dominate his will. It was, therefore, for the



defendants to establish to the satisfaction of the court that the gift deed had been obtained without exercising undue influence. The law did not require the plaintiff to establish positively that in fact the deed had been obtained by exercising undue influence and in that view of the matter the plaintiff could not be expected to set out in detail the elements undue influence in the plaint. It was enough to point out that the defendants were in a position to dominate his will and that they obtained an unfair advantage by using that position. The plaintiff has led undisputed and unassailable evidence to establish the aforesaid facts and the same position emerges from the stand taken by the defendants. The transaction in question is unconscionable on the face of it. Under the impugned deed the plaintiff was deprived of all his transferable properties during his lifetime. Moreover, there appears to be no apparent reason to impel the plaintiff to deprive his daughters and their sons the right to inherit the properties after his death. In such a situation the burden lay on the defendants to rebut the presumption and to establish by cogent evidence that the confidence was not abused and the transaction was not induced by undue influence and the gift deed was executed under circumstances which enabled the donor to exercise an independent will."

142. The facts of the above case are squarely applicable to the present case where respondent has been disinherited from the property of the donor, without any reason, which makes the transaction unconscionable on the face of it as it divests a legal heir from a property and bestows it completely on another son especially when it has already been proved that Smt. Jaswant Kaur did not know and understand the contents of the two Gift Deeds.

143. It need not be reiterated that where there is a fiduciary relationship between the parties, the onus is on the person in a position of active confidence, i.e. appellant Nos. 1 and 1(a) to establish that the Gift Deeds were a product of Smt. Jaswant Kaur's free will. However appellant Nos.1



and 1(a) have not led any evidence in support of their case. Thus, there is a suspicion that the Gift Deeds were executed by exercise of undue influence on Smt. Jaswant Kaur.

144. Significantly, the First Gift Deed Ex. P-2 is dated 23.05.2007 and the second Gift Deed Ex.P-3 is dated 2.06.2008 but, the appellants did not get the property mutated in their respective names during the lifetime of Smt. Jaswant Kaur. The mutation papers were signed in May, 2007 immediately after the registration of the Gift Deeds, but were not submitted with the concerned Authority. No explanation is forthcoming as to why the gift deeds were only disclosed and acted upon after the demise of Smt. Jaswant Kaur and not during her lifetime.

145. Thus, the Ld. Single Judge has rightly held that the gift deeds were unconscionable and are hit by Section 16 of the Indian Contract Act.

(v) the propounders/attesting witnesses were the beneficiary under the two Gift Deeds and had actively participated in their registration: -

146. Another significant aspect that emerges from the testimony of appellant No.1(a) D3W1, Smt. Manohar Bhasin Hazooria is that Smt. Jaswant Kaur had desired to execute a Gift Deed in respect of the Ground Floor and Second Floor of the property in question in her favour and she informed her husband and daughter to get the Gift Deed prepared accordingly. Her daughter and husband got the Gift Deed drafted from Mr. Chhabra, Advocate who also facilitated the registration process. Also, the attesting witnesses to the first Gift Deed were Smt. Amrita Kataria and Smt. Danita Sawhney, both daughters of beneficiary Manohar Bhasin Hazooria.



147. In the second Gift Deed the attesting witnesses were appellant No.1(a), Smt. Manohar Basin, wife of Sh. Kulwant Singh Hazooria, the beneficiary and their daughter Amrita Kataria.

148. It is therefore, evident that Smt. Manohar Bhasin along with her husband and daughter, was actively involved in the preparation and registration of the two Gift Deeds dated 23.05.2007 and 02.06.2008.

149. Such active participation of the beneficiaries raises a suspicion regarding the genuineness of the document as observed in the case of Sher Singh and Others (Supra) as under:

“The defendants took a prominent part in the execution of the gift deed. They collected all the material details of the Bhumidhari plots, purchased the stamps and appear to have got the document scribed under their instruction. The plaintiff due to his physical and mental infirmities remained unaware and ignorant of the consequences of the act which he was induced or misled to perform. Being a simple illiterate villager, he was left with no will or mind of his own due to extreme old age and serious physical ailments which made him totally dependent on others and the defendants took advantage of his helplessness and got the gift deed executed in their favour.”

150. In the present case, the attesting witnesses i.e. the daughters are also the beneficiaries under the Gift Deeds 23.05.2007 and 02.06.2008. It is specifically provided in the Gift Deeds that the property shall be inherited by the legal heirs of the donees who are also indirect beneficiary under the Gift Deeds.

151. In the case of Kumar Harish Chander Singh Deo and Anr. vs. Bansidhar Mohanti & Ors. (1966) 1 SCR 153, the definition of ‘attested’ in Section 3 of Transfer of Property Act was considered and it was observed by the Apex Court that ‘**a party to the transaction was debarred**



from being the attesting witness to the document in question'. The object of attestation is to protect the executants from being required to execute a document by the other party thereto by force, fraud or undue influence. Reliance was placed on the observations of Lord Selborne, LC in Seal vs. Claridge LR 7 QBD 516 to arrive at the conclusion that attestation implies the presence of some person who is not a party to the transaction.

152. Thus, a party to the transaction is barred from being an attesting witness. The very fact that it is the daughters, who are the attesting witnesses, are also the ultimate beneficiaries under the Gift Deeds, again raises a suspicion about the two Gift Deeds being a result of the free volition of Smt. Jaswant Kaur and their testimony regarding the execution of the Gift Deeds is placed under a cloud of doubt.

153. In fact, D3W1 Smt. Manohar Bhasin Hazooria as well as D3W2 Smt. Amrita Kataria have not been able to prove about the contents of the documents having been explained or understood by Smt. Jaswant Kaur before putting her thumb impressions on them. Thus, it can be said that Smt. Jawant Kaur could have been induced or misled to execute the Gift Deeds.

154. Further, there is no independent witness who has been produced by the appellants could verify the genuineness of the transaction. Thus, it is observed that documents were not a product of free volition of the donor.

155. In the light of the various suspicious circumstances namely; medical condition of deceased Jaswant Kaur, lack of awareness of the contents of the two Gift Deeds; unexplained ouster of respondent and doubt regarding the credibility of the propounders/attesting witnesses who were the beneficiary under the two Gift Deeds, it is evident that the



Appellant No.1 and 1(a) had used their relationship of trust and confidence to obtain an unfair advantage over the donor.

156. We, therefore, conclude that the learned Single Judge has rightly arrived at the decision that the two Gift Deeds dated 23.05.2007 and 02.06.2008 as null and void.

Issue No. 9: -

“Whether Ms. Jaswant Kaur has validly executed the Will dated 5th January, 1996? OPP”

157. In light of the Gift Deeds dated 23.05.2007 and 02.06.2008 being declared null and void, it must be analysed whether the Will dated 05.01.1996 Ex. -PW1/1 was the last valid document executed by Smt. Jaswant Kaur.

158. Section 63(c) of the Indian Succession Act, 1925 provides the mode for execution of Will which reads as follows:

“63. Execution of unprivileged wills - Every testator, not being a soldier employed in an expedition or engaged in actual warfare, 1 [or an airman so employed or engaged,] or a mariner at sea, shall execute his will according to the following rules:—

*(a) - (b)****

*(c) **The will shall be attested by two or more witnesses**, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”*



159. The conditions for execution of a Will, as per the mandate of Clause (c) of Section 63, is that it must be attested by two or more witnesses, each of whom should have seen the testator sign or put his mark on the Will. The Will must be signed by the witnesses in the presence of the testator, but it is not necessary that more than one witness should be present at the same time.

160. The Will dated 05.01.1996 has been placed on record by respondent and he has further alleged that the same was the last Will and testament executed by Smt. Jaswant Kaur. The appellants on the other hand, have not admitted that the Will was executed but have said that the same is irrelevant in light of the execution of the two Gift Deeds dated 23.05.2007 & 02.06.2008 Ex. P2 and Ex.P-3, respectively regarding the said suit property. Further, appellants No. 1 & 1(a) at the time of admission/denial of documents had denied the execution of the Will dated 05.01.1996.

161. In light of the denial of execution of the Will dated 05.01.1996 the execution of the Will in accordance with Section 63 of Indian Succession Act, 1925 may appear to be true, but the bigger challenge arises with respect to proving the same once it is challenged by any party in the court of law. **Sections 68 and 71 of the Indian Evidence Act, 1872** outline the guidelines for the evidence required to be led in proof of the Will which is *a document required by law to be attested.*

***“Section 68- Proof of execution of document required by law to be attested.—If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:
[Provided that it shall not be necessary to call an attesting***



witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.]

Section 71- Proof when attesting witness denies the execution.—*If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.”*

162. In Jagdish Chandra Sharma vs Narain Singh Saini (Dead) Through LRs and Others (1995) 4 SCC 459 the Apex Court while referring to Sections 68 and 71 of the Evidence Act, observed that for a Will to be proved so as to make it admissible in evidence, being a document required by law to be attested by two witnesses, it would necessarily need proof of its execution through at least one of the attesting witnesses, if alive and capable of giving evidence.

163. The underlying principles were explained by the Apex Court in the decision of Jaswant Kaur (supra) as referred to in Raj Kumari (supra), wherein it was observed thus:

“(1) Stated generally, a Will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent mind in such matters. As in the case of proof of other documents, so in the case of proof of Wills, one cannot insist on proof with mathematical certainty.

(2) Since Section 63 of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by Section 68 of the Evidence Act, one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence.”



164. The issue was resolved beyond controversy in Janki Narayan Bhoir vs. Narayan Namdeo Kadam (2003) 2 SCC 91 where it has been held that clause (c) of Section 63 of the Indian Succession Act requires and mandates attestation of a Will by two or more persons as witnesses, albeit Section 68 of the Evidence Act gives concession to those who want to prove and establish a Will in the court of law by examining at least one attesting witness who could prove the execution of the Will viz., attestation by the two witnesses and its execution in the manner contemplated by clause (c) to Section 63 of the Indian Succession Act, 1925. However, where one attesting witness examined fails to prove due execution of the Will, then the other attesting witness must be called to supplement his evidence to make it complete in all respects to comply with the requirement of proof as mandated by Section 68 of the Indian Evidence Act, 1872.

165. Thus, in order to prove a will, at least one attesting person must be called as a witness and must prove its execution as provided under the law. If the attesting witness fails to prove execution of the will, then the second witness must be called to supplement the evidence and show that the requirement of proof as mandated by Section 68 of the Indian Evidence Act was duly complied with.

166. In the present case, a perusal of the Will shows that the same is signed by two witnesses, Mr A.C. Sehgal and Mr. Krishen K Seth who appeared as PW-6 and PW-7, respectively.

167. Mr A.C. Sehgal PW-6 stated in his evidence that he was a lawyer and knew appellant No.1 and his entire family as they were family friends. He asserted that Smt. Jaswant Kaur had signed the Will which is



Ex.PW1/1 in his presence and that he had also signed the same at Point 'A' in the presence of the testatrix. Further, he stated that another witness had signed the Will as well. In his cross-examination he confirmed that he was called by the testatrix to sign the Will and that she was in a sound and deposing mind at the time of the execution of the Will.

168. The other attesting witness was Mr. Krishen K Seth, PW-7, who states that he was a neighbour to the Hazooria family. Similarly PW-6, also stated that Smt. Jaswant Kaur had signed the Will which is Ex.PW1/1 in his presence and that he had also signed the same in the presence of the testatrix.

169. Thus, substantial evidence has been led by respondent to prove the validity of the Will dated 05.01.1996.

170. The execution of the Will is further corroborated by the testimony of Smt. Jasbir Kaur PW-2, who has stated that in 2007-08, it was stated by Smt. Jaswant Kaur that the property would devolve upon both her sons. The same is in consonance with the contents of the Will and thus, it is re-affirmed that it is a reflection of the wishes and desires of Smt. Jaswant Kaur and was drafted as per her instructions.

171. Ld. Single Judge has rightly held in the impugned judgment, that the Will dated 05.01.1996 Ex. PW1/1 was the last testamentary document of Smt. Jaswant Kaur.

Issue No. 10: -

“Whether the plaintiff is entitled to a decree of partition as prayed for? OPP”

Issue No. 11: -



“Whether the plaintiff is entitled to a decree of rendition of accounts? OPP”

Issue No. 12: -

“Whether defendant Nos. 1 and 3 are entitled for a decree of mandatory injunction, as claimed in their counterclaim? OPD 1 & 3”

&

Issue No. 13: -

“Whether defendant Nos. 1 and 3 are entitled to mesne profits, if so, at what rate and for which period? OPD 1 & 3”

172. The Ld Single Judge has observed that as the Will dated 05.01.1996 stands duly proved, the property shall devolve upon the two sons of Smt. Jaswant Kaur, the appellant No.1 and the respondent in equal shares. Accordingly, respondent was held to be entitled to rendition of accounts of 50% of the profit earned from rent from the suit property from the date of demise of Smt. Jaswant Kaur. Further, it was held that the appellant no. 1 and 1(a) shall not be entitled to a decree of mandatory injunctions as well.

173. *As the Will dated 05.01.1996 Ex. PW1/1 has been held to be the last testamentary document of Smt. Jaswant Kaur, we find no reason to interfere with the observations of the Ld. Single Judge on the above issues.*

174. We conclude from the aforesaid discussion and settled law that the preliminary decree has been rightly passed on the basis of the Will dated 05.01.1996 Ex.PW1/1 in the suit for partition and the judgment dated 29.10.2021 is hereby upheld.

175. The appeal is dismissed.



176. Consequently, pending applications are also dismissed.

177. Parties to appear before the Roster Bench for further adjudication of Final Decree on 18th September 2023.

(NEENA BANSAL KRISHNA)
JUDGE

(SURESH KUMAR KAIT)
JUDGE

SEPTEMBER 5, 2023

VA/NK