

**IN THE HIGH COURT AT CALCUTTA
(Civil Appellate Jurisdiction)
APPELLATE SIDE**

Present:

The Hon'ble Justice Supratim Bhattacharya

S.A. 6 of 2024

Debasish Das

Vs.

Smt. Urmila Mitra & Ors

For the Appellant : Mr. Ram Prakash Banerjee
Mr. Swapan Kumar Nandi
Mr. Debjyoti Ghosh

For the respondent: Mr. Debjyoti Basu
Nos. 1 & 2 Mr. Parashar Baidya

Heard On : 17.05.2024
Judgement Delivered On : 14.08.2024

Supratim Bhattacharya, J.:

1. This instant appeal has been preferred by the appellant/plaintiff being aggrieved by and dissatisfied with the judgment and decree passed by the Ld. Additional District Judge, 5th Court Burdwan on 13.11.2017 in Title Appeal being Title Appeal No. 16 of 2016 bearing an earlier no. 41 of 2010.
2. The aforementioned first appeal being Title Appeal no. 16 of 2016 was preferred by the instant appellant being aggrieved by the judgment

dated 24.06.2010 passed by the Ld. Civil Judge (Junior Division) 2nd Court Burdwan in Title suit No. 175 of 2005.

3. The appellant herein was the plaintiff before the trial court and the appellant before the first appellate court while the respondents herein were the defendants before the trial court and respondents before the first appellate court.

4. Facts of the instant lis

As has been depicted by the appellant/plaintiff in the plaint, a registered instrument being an alleged sale deed is said to have been executed by the appellant/plaintiff in favour of the respondent No. 1 that is the elder daughter of the appellant. It has also been stated that the appellant executed the impugned deed on the garb of being a power of attorney. Instead of being a power of attorney the alleged instrument has been registered as a sale deed which the appellant is claiming to have been made falsely by the respondent No. 2 with the help of the respondent No. 2 who is the elder son-in-law of the appellant. It has been stated by the appellant that the appellant had full faith and confidence reposed upon the respondents/defendants and being an illiterate person had signed on the alleged instrument as such fraud has been committed upon him. As such the appellant/plaintiff has sought for a decree rejecting the alleged instrument.

5. Facts before the Trial Court:

The appellant/plaintiff instituted the instant lis against the respondents/defendants stating that the appellant while residing at the in laws house of his elder daughter for the purpose of treatment was stated by the defendants that trouble has cropped up involving the suit property as such to sort out the said trouble power of attorney is required in favour of the respondents/defendants so that the respondents/defendants can take appropriate steps before the appropriate forum to sort out the said trouble. As such the appellant on 06.10.2005 had gone to Burdwan to execute this power of attorney. The appellant while being seated in the vehicle had signed on the alleged deed thinking the said instrument to be a power of attorney having good faith upon the respondents/defendants. It has further been stated that on 11.11.2005 the appellant /plaintiff came to know that the document which he had executed is a deed of sale in favour of the respondent No.1/defendant No. 1 in respect of the suit property in lieu of Rs. 4,00,000/- (Rs. Four Lakhs). Being aware of the said misdeed and fraud committed upon him the appellant instituted the lis.

The respondents/defendants entered appearance in the suit and filed their written statement denying all the contentions of the appellant/plaintiff.

The Trial Court after considering the oral and documentary evidences on record ultimately dismissed the suit on contest without any cost.

On the basis of the pleadings of the parties the following issues were framed.

ISSUES

- 1. Is the suit maintainable in its present form?*
- 2. Has the plaintiff any right, title, interest over the suit property?*
- 3. Is the deed fraudulent, collusive, mis-representation?*
- 4. Is the plaintiff entitled to get the decree as prayed for?*
- 5. Is the suit barred for want of ad valorem Court Fees?*
- 6. Is the plaintiff entitled to any other relief or reliefs as prayed for?*

The Ld. Trial Court after adjudication dismissed the title suit.

6. Facts before the First Appellate Court

Being aggrieved by and dissatisfied with the judgment passed by the Ld Civil Judge the appellant/plaintiff preferred an appeal.

The Ld. First Appellate Court considered the submissions of the Ld. Counsels representing the appellant/plaintiff as well as the respondents/defendants and had framed the points for consideration which are as follows:

1. *Whether the Judgment dated 24.6.2010 and decree dated 22.7.2010 so assailed suffers from any illegality or irregularity?*
2. *Whether the same is sustainable in law?*

The Ld. First Appellate Court has dismissed the first appeal and affirmed the judgment of the trial court by relying on the fact that the appellant/plaintiff though claiming himself to be an illiterate person has not adduced any evidence to establish his claim of being an illiterate person having stated that it is settled principle of law that he who claims to take benefit of a particular disability must prove that he suffers from the said disability which has not been proved by the appellant/plaintiff.

The Ld. First Appellate Court has also relied upon the discussion of the Ld. Trial Court wherein the Ld. Trial Court has stated that during the cross-examination the plaintiff has admitted that he has earlier gifted properties to his grand children voluntarily and the defendant has exhibited a deed of gift being number 618 of 2005 executed by the plaintiff in favour of his grand daughter namely Sudipta Mitra daughter of the defendant, and in the said deed of gift it has not been mentioned that the contents of the said deed has been read over and explained to the donor/ plaintiff on the other hand it has been mentioned in the said deed of gift that Gouranga Das i.e. the

plaintiff has executed the said deed by signing on it after understanding the contents thereof. Which goes in favour of the respondent/defendant as regards to the issue that in transactions with an illiterate person the burden of proof is on the person who relies on any document executed by the illiterate person to show that such illiterate person not only executed the document by putting his/her thumb impression/signature but that the contents of the said documents was explained to the illiterate person and that person understood it. As such the First Appellate Court has dismissed the appeal preferred by the appellant/plaintiff

7. Being aggrieved by and dissatisfied with the judgement and decree passed by the Ld. First Appellate Court the appellant/plaintiff has filed the instant second appeal.

The instant appeal has been admitted and two substantial questions of law have been framed which are as follows:

1. *Whether both the Courts below have wrongly shifted the onus on the plaintiff /appellant to prove the transaction between him and the respondent No. 1 despite the fact that the respondent No. 1 had been reposed with confidence by the father ?*
2. *Whether both the courts below substantially erred in dismissing the suit ignoring the categorical stand of the plaintiff /appellant being a father that he never intended to transfer and /or alienate the 'Ka' schedule property, which he retained after*

settling the other properties in favour of the son and the grand-daughters, more particularly, when he denied to receive any consideration allegedly shown in the purported deed, which indicates that the consideration of Rs. 4,00,000/- was paid in cash and not through any banking transaction ?

8. Ld. Counsel Mr. Ram Prakash Banerjee being assisted by Mr. Swapan Kumar Nandi and Mr. Debjyoti Ghosh appearing for the appellant has submitted exhaustively which are epitomized as follows:

- i) The appellant is an illiterate person and is presently retired from service and is receiving pension.
- ii) The appellant gifted his other properties apart from the suit property to his son and grand daughters by separate deeds of gift and has kept the suit property under his own possession.
- iii) The appellant had been to Burdwan on 06.10.2005 for the purpose of execution of a power of attorney on the advice of the respondents.
- iv) The appellant had signed on certain papers while being seated in the car and the signatures were obtained by the respondents.
- v) The appellant relying upon the respondents had signed on those papers under the impression that he is executing a power of attorney in favour of the respondent No. 1. The appellant

receives pension which is more than enough for his living and the appellant had no intention to sell the suit property.

vi) The appellant did not receive any further information as has been mentioned in the impugned deed.

vii) The impugned sale deed has been manufactured by the respondents and is void and inoperative.

viii) The Ld. Trial Court has been pleased to dismiss the suit holding that in the instant case the plaintiff has not been able to successfully rebut the presumption either by oral or documentary evidence except alleging that a registered deed of sale was falsely manufactured by the defendants taking advantage of his illiteracy.

ix) The First Appellate Court has been pleased to dismiss the first appeal and to affirm the judgment of the trial court holding that it is settled principle of law that who claims to take benefit of a particular disability must prove that he suffers from the said disability and has held that the trial court has rightly held that in transaction with an illiterate person the burden of proof is on the person who relies on any document executed by the illiterate person to show that such illiterate person not only executed the documents by putting his/her thumb impression /signature but the contents of the said document was explained to the illiterate person and he understood it and the appellant

has not been able to establish his claim and he has signed on the impugned deed under the misconception of the fact that it was the power of attorney.

- x) The Ld. Trial Court and First appellate court have placed the onus of proof upon the appellant/ plaintiff and have come to a conclusion that the appellant plaintiff has failed to prove his case that he is an illiterate person.
- xi) The general presumption of a registered deed is that the deed is validly executed and one who has challenged the registered deed, the onus of proof lies upon him to prove that the deed has not been validly executed according to the provisions of Section 101 of the Evidence Act but when fiduciary relationship exists between the parties to the deed and question of reliance has arisen then the onus of proof shifts upon the person who is claiming the deed to have been validly executed according to the provisions of Section 111 of the Evidence Act.
- xii) In this instant case since the father and his elder daughter are the parties in the impugned deed so fiduciary relationship exists between the parties and the appellant/plaintiff relying upon his daughter signed on some papers thinking that he is executing a power of attorney in favour of his daughter as such in this instant case the onus of proof has shifted upon the

daughter which both the trial court and the first appellate court have not considered.

- xiii) Both the trial court and the first appellate court have failed to consider that fiduciary relationship exists between the parties and question of reliance had been raised which means that the question of literacy or illiteracy has no value as because an illiterate father can rely upon his daughter same as that of a literate father can also rely upon his daughter.
- xiv) Apart from the respondent/defendant No. 1 and her husband i.e. the respondent /defendant No.2 no other person has deposed to prove that the impugned deed was executed by the appellant /plaintiff having knowledge.
- xv) For the purpose of corroboration of oral evidence of the defendant No. 1 oral evidence of the defendant No. 2 cannot be considered as the defendant No. 2 is an interested witness. As such the defendants have failed to discharge the onus of proof. Section 54 of the Transfer of Property Act refers to sale wherein the parties must intend to transfer the ownership of the property on the agreement to pay the price either in present or in future and the intention is to be gathered from the recitals of the sale deed , the conduct of the parties and the evidence on record and where intention of the parties to transfer of the properties is

disputed therein price constitutes an essential ingredient as regards to the transaction sale.

xvi) In this instant case the intention of the parties to transfer ownership is disputed and the defendants have not produced any documentary evidence to prove the payment of the consideration amount. By oral evidence payment of consideration of money cannot be proved and the evidence of DW2 cannot be considered as corroboration of the oral evidence of DW1 as because DW2 is an interested witness.

xvii) The appellants/plaintiffs case is that relying upon the respondents /defendants he had signed some papers sitting in the car and the document has been registered. In this context the Ld. Counsel has relied upon Section 32(2) of the Registration Act wherein it has been laid down that a representative made present the document for registration and the term representative means a personal representative that is a person who manages the affairs of another because of incapability.

xviii) Presumption under Section 114E of the Registration Act has to be made depending upon the particular circumstances of each case.

xix) The Ld. Counsel has relied upon the following authorities:

1. AIR 1982 ALL 376
2. AIR 2006 SC 1971

3. AIR 2003 SC 4351

Relying upon the aforesaid submission the Ld. Counsel has prayed for allowing the instant appeal and setting aside the judgements of the trial court and the first appellate court.

9. The Ld. Counsel Mr. Debjyoti Basu being assisted by Mr. Parashar Baidya representing the respondents No. 1 and 2 per contra has submitted elaborately which are as follows:

- i) The title suit filed by the erstwhile plaintiff namely Gouranga Das since deceased praying for a decree ascertaining his rights over the suit property by holding that the so called deed of sale is false ineffective, collusive and fake.
- ii) The plaintiff has mentioned in the plaint that he was wrongly induced to execute a deed of sale in favour of his elder daughter taking advantage of his faith and trust is false.
- iii) The plaintiff has also stated that in the pretext of executing a power of attorney in favour of his elder daughter he was taken to the office of the registrar and made to sign certain papers while sitting in the car without knowing exactly the contents of the documents is not at all correct.
- iv) The plaintiff has denied to have executed any sale deed in favour of his elder daughter or to have received consideration

amount of Rs. 4,00,000/- (Rs. Four Lakhs only) or any part thereof which is also not correct.

- v) It is false to say that the impugned sale deed is null and void on the ground of breach of confidence faith and trust which the appellant/plaintiff had allegedly reposed upon his elder daughter.
- vi) The respondents/defendants had not misbehaved with the appellant. It is also denied that because of misbehaviour by the respondents the appellant had left the matrimonial house of the respondent No. 1.
- vii) It has further been submitted that the appellant was in possession of the suit property and he ultimately expired in the suit property. On the expiry of the original appellant namely Gouranga Das during the pendency of the first appeal the original appellant was substituted by his son Debasish Das.
- viii) It has also been submitted that the plaintiff had attempted to prove that he was not learned enough to understand the intent and purport of the alleged sale deed and that his elder daughter in connivance with her husband committed breach of fiduciary duty against the plaintiff and it has also been tried to prove that the plaintiff was financially strong enough to maintain himself out of his pension which he was

receiving after retiring from the post of Group-D in the Damodar Valley Corporation which has not been believed.

- ix) The respondent No.1 that is the elder daughter had made arrangement of the part of the consideration amount by selling her own jewellery and the remaining amount of Rs. 4,00,000/- was provided by her husband.
- x) As the entire amount of transaction was paid in cash so the respondents/defendants could not adduce any documentary evidence to corroborate the payment of Rs. 4,00,000/- to the appellants. It has been submitted that the Ld. Trial Court had taken into consideration that certain fingerprints of the plaintiffs also appears in the alleged sale deed and there is no whisper as regards to putting such fingerprints on the document.
- xi) The Ld. Trial Court has noted that the plaintiff had not denied his fingerprints and signatures placed in the original deed and the document has been marked as an exhibit.
- xii) There is no denial on behalf of the appellant/plaintiff as regards to the execution or attestation of the impugned deed.
- xiii) It has been contended that in case of the registered document it is presumed that the same is validly executed and the plaintiff has failed to discharge his onus of proof.

- xiv) It has also been stated that the plaintiff has not been able to successfully rebut the said presumption either by oral or by documentary evidence except alleging that the registered deed of sale was illegally manufactured by the defendants taking advantage of his illiteracy.
- xv) The ld. Trial Court had gone through the gift deeds and has come to the conclusion that nowhere in the said gift deeds it is mentioned that the contents of the said gift deed/deeds were read out and explained to the plaintiff and after understanding the contents the plaintiff had signed on the said deeds, on this ground the ld. Trial Court had found that the submission of illiteracy is unbelievable.
- xvi) The instant case is not required to be remanded back to the Trial Court on the ground that issue as regards to Section 111 of the Evidence Act has not been framed.
- xvii) The instant case is not required to be sent back to the Trial Court on the ground that an issue as regards to Section 34 of the Specific Relief Act has not been framed.
- xviii) It has further been submitted that Ashok Chakraborty PW2 is not a trustworthy witness on the contrary he is a witness set up by the appellant and he is a tutored one.
- xix) The ld. Counsel has further submitted that ld. First Appellate Court proceeded on the fact that the sale deed was

properly registered as the plaintiff had signed on all the pages of the sale deed in English and two attesting witnesses have also signed. The fingerprints have also not been denied by the appellant as such the First Appellate Court has held the impugned sale deed to be properly registered. In this context Section 114 (e) of the Indian Evidence Act has been taken into consideration.

- xx) The Ld. Counsel has submitted that the authority published in AIR 1982 ALL 366 which has been cited on behalf of the appellant is not at all helpful to the appellant as because in this instant case the appellant/plaintiff though being the father of the respondent No. 1/defendant No. 1 was financially capable.
- xxi) It has also been submitted that the element of active confidence or fiduciary relationship which is the main contention of Section 111 of the Evidence Act has to be understood in the context of the intention of the legislature and there is no scope of expanding the meaning of the term.
- xxii) It has further been submitted that there is nothing to suggest that the relationship between the respondent No. 1 and the appellant lies within the exclusive category of fiduciary relationship having active confidence. On this

context the case of Krishna Mohan Kul reported in AIR 2003 SC 435 is not applicable.

- xxiii) It is also submitted that the Hon'ble Apex court has mentioned the exact category of persons who falls within the scope and ambit of such exclusive relationship which are agents /trustee / executors /administrators/ auctioneers and others have been held to fall within the rule and under no stretch of imagination such relationship be held to exist.
- xxiv) The judgment passed in the case of Anil Rishi reported in AIR 2006 SC 1971 is not applicable in this instant case as fiduciary relationship and active confidence does not exist between the appellant and respondent No. 1.
- xxv) The Hon'ble Apex Court has held that the possession of the sale deed by the defendant could not change the legal position with respect to the element of proving forgery or fabrication in a document and in the instant case although the plaintiff has placed a case of alleged power of attorney but no step has been taken by him to produce the documents.
- xxvi) It has further been stated that the appellant/plaintiff had the capacity to read and write and understand the purport and/or import of registered instruments as he had executed three deed of gifts earlier.

xxvii) The appellant was physically firm and mentally alert on the day of execution and registration of the impugned sale deed.

xxviii) The Ld. Counsel has relied upon the case between Dahiben Vs. Arvinbhai Kalayanji Bhanusali (Gajra)(D) through LRS and Ors. Civil Appeal No. 9519 of 2019, wherein the Hon'ble Apex Court has held that once the title in property has already passed even if the balance sale consideration is not paid the sale could not be invalidated on this ground and non-payment of the entire sale consideration could not be a ground for the cancellation of the sale deed, the plaintiff may have other remedies in law for recovery of the balance consideration amount but cannot be granted the relief of cancellation of the registered sale deed.

Banking upon the aforesaid facts and circumstances the Ld. Counsel has prayed for dismissal of the instant appeal.

Discussion with reason:

10. From the contention of the parties it transpires that the fact of the lis is that as to whether the sale deed had been executed and registered in good faith by the father in favour of his elder daughter. At the time of execution of the impugned deed the father is said to have been residing at the matrimonial house of the purchaser that is his elder daughter. The said father was aged more than 75 years at that relevant point of time and had fallen ill while he was residing in

his house alone as such he had gone to the matrimonial house of his elder daughter wherein he had once again fallen ill. During the stay of the father in the matrimonial house of his elder daughter the impugned deed is said to have been executed and registered in lieu of a transaction amount of Rs. 4,00,000/- (Rs. Four Lakhs only) which is alleged to have been paid by the daughter purchaser in cash.

Out of the total consideration of Rs. 4,00,000/- (Rs. Four Lakhs only) some portion of the said amount is said to have been arranged by the purchaser by selling her ornaments while the remaining portion was said to have been provided by the husband of the purchaser.

The father that is the alleged seller has instituted the instant lis praying for a declaration that the impugned deed is invalid and inoperative and has also prayed for permanent injunction on the ground that he did not intend to sale the remaining portion of his property which he had in his possession after gifting the major portion of his entire property through three (3) deed of gifts in favour of his son and to the two grand-daughters one being the daughter of the elder daughter while other being the daughter of the younger daughter.

The father has alleged that his elder daughter and son-in-law had said to him that some problem has arose in respect of the property which he is possessing and to keep the said property safe one has to

take steps before some authorities for which power of attorney is to be executed in favour of somebody who can take steps on his behalf. The father has alleged that on the presumption that he was executing a power of attorney he had signed on the document.

On the contrary it is the contention of the elder daughter and her husband that the father of the elder daughter had intended to sale the remaining portion of his property which was in his possession and had intended to pay the money obtained from the sale proceeds to the organization where he intended to reside in future that is an old age home, as such he had made an offer to sale the property which was in his possession at a consideration amount of Rs. 4,00,000/- (Rs. Four Lakhs only) which was accepted by the elder daughter.

- 11.** The moot point in the instant lis is as regards to burden of proof, whether the procedure laid down under Section 101 of the Evidence Act is to be adopted or as to whether Section 111 of the said Act is to be adopted.
- 12.** The party is relieved upon the principle called *quia timet*, that is, for fear that such agreements, securities, deeds or other instruments may be vexatiously or injuriously used against him, when the evidence to impeach them may be lost, or that they may throw a cloud or suspicion over his title or interest.
- 13.** Let both the aforementioned sections be laid. Section 101 of the Evidence Act, 1872 states as follows:

“101. Burden of proof. — Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.”

While Section 111 of the said Act lays down as follows:

“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.”

14. Thus from the aforementioned two sections it transpires that Section 101 of the said act lays down the burden of proof as per the general rule while Section 111 of the Evidence Act lays down that in case of special circumstance that is in case where there is the fact of active confidence prevailing between the parties then in such a case to prove that the transaction has taken place in good faith, Section 111 comes into play.

The word “Good faith” has been defined in Section 3(22) of the General Clauses Act, 1897 which is as follows:

“3 (22) a thing shall be deemed to be done in “good faith” where it is in fact done honestly, whether it is done negligently or not;”

In the judgment passed by the Hon'ble Apex Court published in (2006) 5 SCC 558 the Hon'ble Apex Court has laid down the meaning of the word "active confidence" in Paragraph No. 15 which states as follows:

"15. The words "active confidence" indicate that the relationship between the parties must be such that one is bound to protect the interests of the other."

In the instant lis the parties are related to each other being father, daughter and son-in-law. The father was a person aged more than 75 years at the relevant point of time that is at the time of execution of the impugned document and was a retired Group-D employee of the Damodar Valley Corporation and was having a son with whom he did not have good relation and two daughters out of whom this defendant No. 1 was the elder daughter. He did not have his wife alive at that point of time. The said father was financially capable as he was a retired employee of the Damodar Valley Corporation.

It is fact that a person aged more than 75 years not having his spouse alive though being financially independent depends upon his next generation and in this instant case he did not have good relation with his son so it is obvious that the father relied upon his elder daughter. For that reason he had gone to the matrimonial house of his elder daughter as he had good faith and confidence upon her. So it is apparent that in the instant lis the burden of proof shifts upon

the defendants being the elder daughter and son –in-law as per section 111 of the Evidence Act.

So the burden of proof shifts upon the defendant.

In this regard this Court relies upon Paragraph 11 of the judgment passed by the Hon'ble Apex court in the case between Anil Rishi Vs. Gurbaksh Singh published in (2006) 5 SCC 558, which states as follows:

“11. The fact that the defendant was in a dominant position must, thus, be proved by the plaintiff at the first instance.”

From the facts of the case the said dominant position of the defendant has been proved.

This being an exception to the general principle of burden of proof.

In the 19th Edition of the book “Law of Evidence” by Woodroffe and Amair Ali the principle as regards to Section 111 of the said Act has been stated as follows:

‘The reason why the burden of proving good faith is, by way of an exception to the general rule, cast upon the defendant that, if it were not so, the transaction could rarely be satisfactorily enquired into. The plaintiff, having been entirely in the hands of the defendant would be destitute of the means of proving affirmatively the mala fides of the transaction; whilst the defendant, in such a transaction, may fairly be subjected to the duty not only of dealing honestly but of preserving clear evidence that he had done so.’

- 15.** In this regard Section 16 of the Indian Contract Act, 1872 is referred to which states 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).”

- 16.** In case of a human being who is an aged person monetary independence is not the sole criteria of being independent. As like a child who fully trusts his parents not having the capacity to think otherwise, an aged person specially a person whose spouse is not

alive relies fully upon his sons and daughters and where the term of the father and the son is not good the aged father fully relies upon his daughter and in this instant case the defendant being the elder daughter the plaintiff father wholly relied upon her. This instant lis is between a father who was fully relying upon his elder daughter. Thus, in this instant lis the principle of burden of proof will be in accordance with Section 111 of the Indian Evidence Act, 1872 and not in accordance with the general principle of burden of proof which has been laid down under Section 101 of the said act. So the burden of proof is upon the respondents/defendants herein that is the daughter and the son-in-law.

- 17.** The instant lis revolves around a deed which is a deed of sale. Section 54 of the Transfer of Property Act, 1882 defines the word 'Sale' which states as follows:

“Sale” defined.—“Sale” is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.”

So from the aforementioned definition it is apparent that sale is a transfer of ownership in lieu of consideration.

- 18.** From the facts of the instant lis it evolves that an amount of Rs. 4,00,000/- (Rs. Four Lakhs only) is involved. The defendants had to prove that they had paid Rs. 4,00,000/- (Rs. Four Lakhs only) to the seller that is the father.

The defendants have alleged that their father that is the seller had expressed his intention on 20.07.2005 to sale the property, which he had kept in his possession after gifting the major portion of his property through three deed of gifts, in the presence of his son and daughters and in their presence he had also expressed to sale the property at a consideration of Rs 4,00,000/-. The defendants have also alleged that the entire consideration amount was paid to the seller in the registry office and that too in the presence of her brother and younger sister. Neither the brother nor the younger sister has come up before the court to adduce evidence as witness neither on behalf of their father nor on behalf of their elder sister.

- 19.** The purchaser has stated that part of the consideration amount was arranged by selling her gold ornaments and the remaining part was provided by her husband and the entire amount has been paid in cash.

From the documents placed before the Court as regards to the sale proceeds of the gold ornaments most of the receipts are of the year 2003 that is much prior to the alleged proposal of sale made by the father that is in the year 2005. Most of the receipts are dated prior to the date of proposal of the sale that is 20.07.2005. So those receipts cannot be taken into consideration. As regards to the other few receipts those which are dated after the date of proposal of sale the person who is said to have purchased the gold ornaments has not

tendered himself before the Court to adduce evidence, in addition those few receipts are not sufficient to prove.

As regards to the remaining amount the defendant no.1 has said that it has been provided by her husband who is having income tax return file but the husband has deposed that he has a bank account only but he does not have an income tax return file. So that part is also hard to believe.

- 20.** The father has denied the entire fact of making an offer or having an intention to sale his last bit of property which was in his possession.

It is not believable that a person who has gifted his major portion of the property to his son and two grand-daughters recently and will suddenly change his mind and intend to sale the remaining last bit of his property which he was possessing and that too to pay the organization that is an old age home where it has been alleged that he intends to reside without depending upon others.

One of the three deed of gifts that is the deed of gift in favour of the daughter of the elder daughter is of the month of January, 2005. It is hard to believe that a person after gifting the major portion of his property who intends to live independently without taking any help from his son and daughters will gift the major portion of his property to his son and daughters and afterwards change his mind and

intend to sale the last bit of his property which he was possessing worth Rs. 4,00,000/- only.

- 21.** The impugned deed has two signatories as witness out of whom one is the elder son-in-law who is an interested party while the other who is not an interested party and being a neutral person has not come before the court and tendered himself to adduce evidence.
- 22.** Thus, from no corner it can be believed that the elder daughter has been able to prove the impugned deed. The source of money has not been proved by the purchaser, secondly the second witness that is the independent witness has not adduced evidence in this case proving the impugned deed, thirdly the scribe has not adduced evidence keeping apart neither the brother nor the younger sister (with whom the defendants have claimed to have good relation) has adduced evidence proving the transaction or the execution and registration of the impugned deed. Thus the defendants have not been able to prove the transaction and thus the impugned deed that is the sale deed.
- 23.** From the aforementioned discussion it is apparent that there casts cloud as regard to the impugned deed. On the contrary this Court is of the view that fraud has been committed by the daughter upon the father.
- 24.** The element of valid consideration could not be proved. A valid consideration is an essential element of a contract, and without it the contract is void and unenforceable. Where there is fraud, the

instrument has to be declared as void. As such the impugned deed of sale is declared void.

- 25.** Though the scope for interference with concurrent findings of fact while exercising jurisdiction under Section 100 CPC is very limited but it can be exercised where the trial court and/or the first appellate court misdirected themselves in appreciating the question of law and placed the onus on the wrong party, there is scope for interference which has been laid down in Paragraph 9 of the Judgment passed by the Hon'ble Apex court in the case between Krishna Mohan Kul alias Nani Charan Kul and Another Vs. Pratima Maity and Others reported in (2004) 9 SCC 468 which states as follows:

“9. Though, as rightly contended by the learned counsel for the appellants, the scope for interference with concurrent findings of fact while exercising jurisdiction under Section 100 CPC is very limited, where the trial court and/or the first appellate court misdirected themselves in appreciating the question of law and placed the onus on the wrong party, certainly there is a scope for interference under Section 100 CPC after formulating a substantial question of law.”

- 26.** Thus, from the above discussion it transpires that the impugned judgment is required to be interfered with. The instant appeal being **S.A. 6 of 2024** is **allowed** by setting aside the impugned judgment.

- 27.** Thus, the **Sale Deed** under consideration recorded in Book No. 1 Volume No. III Pages 147 to 154 **being No. 2787** for the year **2006** registered in the office of the Additional District Sub-Registrar,

Burdwan is adjudged void and the respondent No.1 namely Smt. Urmila Mitra is ordered to deliver up the said deed and is declared as cancelled.

- 28.** Let a copy of the decree be sent to the Additional District Sub-Registrar, Burdwan, where the said instrument has been registered, to note on the copy of the instrument contained in his books the fact of its cancellation.
- 29.** Parties shall be entitled to act on the basis of the server copy of the judgment and order placed on the official website of the Court.
- 30.** Urgent certified photo copies of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Supratim Bhattacharya, J.)