

1930

Present : Dalton S.P.J. and
Maartensz J.

UDALAGAMA v. TIKIRI BANDA.

453—D. C. Kegalla, 8,406.

Deed of gift—Action to set aside—Fraud and undue influence—Good faith of transaction—Burden of proof—Ordinance No. 14 of 1895, s. 111.

Plaintiff, an old man on his sick bed, signified to the defendant his desire to make over to the defendant and his sister (stepchildren of the plaintiff) certain properties which he had obtained from them. He entrusted the defendant with instructions to a notary to prepare deeds for the purpose. The defendant deliberately gave wrong instructions so that the deeds were drawn, conveying the properties to himself alone. Plaintiff, on discovering this, refused to sign the deed, whereupon he was induced by the defendant to do so on a verbal promise to carry out plaintiff's wishes.

Held (in an action brought by the plaintiff to set aside the deed), that the onus was on the defendant to prove the good faith of the transaction.

THIS was an action brought by the plaintiff to set aside two deeds executed by him in favour of the defendant on the ground of intimidation, fraud, and undue influence. The plaintiff died before trial and the action was continued by substituted plaintiff, his executor.

The action was tried on the following among other issues :—

(1) Did the defendant fraudulently or contrary to the instructions of the plaintiff instruct the notary to draw the deeds in his favour only, excluding his sister ?

(2) Did the defendant wrongfully and unlawfully by intimidation, undue influence, or fraud induce the plaintiff to sign the deed by promising to give a half share of the lands to his sister ?

(3) Is the deed of gift revocable ?

The learned District Judge found that the defendant had falsified the instructions which the plaintiff gave him to be conveyed

to the notary, but that the plaintiff had discovered the fraud before he signed the deeds. He then held that, as soon as the defendant promised to convey a half share to the sister, the plaintiff signed the deed voluntarily and dismissed the plaintiff's action.

Hayley, K.C. (with him *Samarawickreme*), for substituted plaintiff, appellant.

R. L. Pereira, K.C. (with him *Weerasooriya*), for defendant, respondent.

September 16, 1930. DALTON S.P.J.—

The appellant (substituted plaintiff) sought to have two deeds executed by the plaintiff, Tikiri Banda, in favour of the defendant set aside on the ground of fraud, undue influence, and intimidation. On plaintiff's death, a son of Tikiri Kumarihamy, executor of plaintiff, and sister of defendant, was substituted in his place, and is the present appellant.

When the case came originally in June last before this Court counsel on both sides expressed their willingness to see that the intentions of the plaintiff, now dead, in respect of the properties were fully carried out. Those intentions are set out in the order made by the Acting Chief Justice on that occasion, and the appeal stood down for the parties to come together and settle the case on that basis. No settlement has however been come to, and so the appeal must continue.

The facts are as follows :—The original owners of the lands, except one, dealt with in the two deeds were defendant and his sister Tikiri Kumarihamy. The other land they owned jointly with their mother Loku Kumarihamy. Loku Kumarihamy many years ago married plaintiff, and to give him some status in the village these lands were conveyed to him by Loku Kumarihamy and her two children, the defendant and Tikiri Kumarihamy. Loku Kumarihamy thereafter died without further issue, and plaintiff took a mistress named Selohamy, who lived with him for twenty or thirty years up to the time of his death, bearing five children by him

In October, 1927, plaintiff became ill and seems to have anticipated that his death was approaching. He thereupon conveyed various acquired properties to his mistress and illegitimate children. According to the evidence defendant visited plaintiff, his stepfather, during his illness on hearing of these conveyances, and plaintiff then stated that he wished to convey the properties he had received on his marriage to Loku Kumarihamy back to defendant and his sister. He thereupon entrusted the deeds to defendant with instructions to go to a notary and have the necessary deeds prepared for him to sign. The learned trial Judge finds as a fact, and there is strong evidence to support it, that defendant fraudulently and contrary to the wishes of plaintiff instructed the notary to draw the deeds in his favour only, excluding his sister Tikiri Kumarihamy. When the notary brought the deeds to be executed by plaintiff the latter was very ill and on his bed. The notary (who has also died since) stated that he read the deeds to plaintiff and the latter asked defendant whether his sister's name was not included. In reply to that defendant stated that there was a mortgage debt and when it was paid he would give his sister a half share in the properties. The plaintiff then refused to sign as Tikiri's name was not included and said it would be unjust to her. Then a discussion went on for some time between defendant and plaintiff, the latter refusing to sign and defendant urging to him to do so. The notary got up to come away, saying he had other work to do. Then defendant promised to give a half share to his sister if she paid half the mortgage debt. Then plaintiff, after questioning him again about this promise and receiving defendant's answer in the affirmative, executed the deed. This took place on October 28, 1927. He died in January, 1928. He however on December 7, 1927, commenced this action to set aside the deeds.

Defendant in his answer denies any fraud on his stepfather or sister. The

debt of which he speaks being a mortgage debt, it would in any event attach to any half share that might have been conveyed to his sister and it is difficult to understand how in any case it could affect the question.

Although the trial Judge has found that defendant falsified the instructions that plaintiff gave him to convey to the notary, there is no doubt that plaintiff discovered that fraud before he signed the deeds. The learned Judge then came to the conclusion that as soon as defendant gave the promise to convey a half share to his sister, plaintiff signed the deed voluntarily, and without any fraud, undue influence, or intimidation by the defendant. He therefore answered this issue in favour of the defendant and dismissed the action.

It has been urged for the appellant that defendant was in a position of active confidence so far as the plaintiff was concerned, and therefore the onus was on the defendant to prove the good faith of the transaction. In my opinion that argument is correct. Plaintiff was an old man on a sick bed. Defendant, his stepson, was seeking to obtain certain of his properties which had come to his stepfather from himself and his sister on the marriage of his mother. He had heard of the disposal of the other properties to the illegitimate children. Plaintiff clearly signified his desire to make over to defendant and his sister the properties in question. He entrusted defendant with instructions to the notary to prepare deeds to carry out those intentions. He clearly relied upon the defendant to do what he wished. Defendant deliberately gave wrong instructions to the notary, so that deeds were prepared conveying the properties to himself alone. This was discovered by plaintiff when the notary read the deeds to him. Then followed much discussion between the stepfather and defendant, the former being then persuaded by the latter to sign the deeds as they stood on a verbal promise by defendant to carry out plaintiff's wish. The verbal promise was of no legal value and could not be enforced, but having

regard to plaintiff's condition it is probable he did not direct his mind to this aspect of the case. He relied upon the promise and was doubtless anxious to end the wrangle with his stepson. The latter clearly took advantage of the age and helpless position in which plaintiff was to induce him to sign the deeds. Under the circumstances plaintiff should have been told the promise was of no value, as he was doubtless advised later when this action was started. He was entitled in such a case to independent advice, if defendant did not fully and frankly put everything before him. Throughout the transaction the facts proved show that plaintiff relied upon him, and he was in a position of active confidence towards his stepfather. He took an unfair advantage of the situation, thereby getting plaintiff's signature to the deeds. His answer and his action on the attempt of this Court to obtain a settlement as suggested by counsel on both sides show his determination to hold to that advantage. I do not think it necessary to examine here the various authorities cited on behalf of appellant at the hearing, for I was fully satisfied at the time that they supported appellant's contention and I heard nothing from the other side to the contrary.

Defendant was in a position of active confidence towards plaintiff and the onus was on him to prove the good faith of the transaction. He has failed to discharge that onus. He called no evidence at all, although it is not surprising to me that he did not go into the witness box himself. The plaintiff was entitled to have this issue answered in his favour.

It has now to be decided what effect this conclusion has upon the deeds. The appellant has assisted the Court here and is not pressing that the deeds be set aside altogether. He wishes to effect what plaintiff desired. The deeds will therefore be set aside in respect of a half share in the properties dealt with, to which Tikiri Kumarihamy's son is entitled now under plaintiff's will. The decree entered by the trial Judge must be set

aside and a fresh decree entered in conformity with this judgment. The appellant is entitled to costs in both Courts.

MAARTENSZ J.—

This was an action by the grantor of two conveyances of land to have them cancelled and declared null and void on the ground that he was induced by the defendant to execute them while in a weak state of health by intimidation and undue influence.

The plaintiff died before the trial and the action was continued by the substituted plaintiff, his executor, who appeals from the decree ordering a dismissal of the action.

The defendant filed answer denying the averments in the plaint, but did not give evidence.

The action was tried on the following issues :—

(1) Did defendant fraudulently or contrary to the wishes of the plaintiff instruct Notary Abeyesekera to draw the deeds in his favour only—excluding his sister Tikiri Kumarihamy ?

(2) Did the defendant wrongfully and unlawfully by intimidation, undue influence, or fraud induce the plaintiff to sign the said deeds by promising to give a half share of the lands to defendant's sister ?

(3) Damages—agreed at Rs. 10 up to date and Rs. 10 per annum hereafter.

(4) Is the deed of gift revocable ?

(5) Has any cause of action accrued to the original plaintiff (deceased) or to his executor to have the deeds in defendant's favour declared null and void ?

The facts which in view of the defendant not giving evidence are not in dispute are as follows :—

The plaintiff was married to defendant's mother.—She had by her previous marriage two children, the defendant and his sister Mrs. Udalagama.

The lands in dispute had been gifted to the plaintiff by defendant and his sister.

After his wife's death plaintiff kept the witness Selohamy as his mistress and acquired a large number of lands which he transferred to Selohamy and her children by him shortly before his death. He declined to convey the lands in dispute to his children because he wanted to give them to defendant and his sister.

The plaintiff fell ill two months after he executed the deeds in favour of his children. The defendant used to visit plaintiff after he came to hear of the execution of the conveyances in favour of the children.

The plaintiff at one of those visits told defendant "The lands you two (meaning defendant and his sister) have given me you had better take back".

The defendant took away the deeds and returned with the notary four or five days later.

The notary brought with him draft deeds drawn on defendant's instructions by which the lands were transferred to him only.

The plaintiff, when the draft deeds were read out to him, discovered that defendant's sister was not a transferee and inquired "whether (why?) his sister's name was not included in the deed. The defendant explained "that there was a debt and that when it was paid he would give a half share to his sister".

The plaintiff at first refused to sign the deeds saying it was wrong to deprive her (the sister).

The plaintiff and defendant discussed the matter for some time, plaintiff refusing to sign, the other urging plaintiff to sign.

The notary eventually got up to go away, saying he had work in Kegalla. Then the defendant promised to give a half share to his sister if she paid half the debt, and the plaintiff executed the deeds in question.

Mrs. Udalagama, when she heard that the plaintiff had executed the deeds in favour of the defendant, took steps to have them set aside.

The deeds were executed on October 28, the grantor filed this action on December 7. He died in January, 1928, leaving a last will by which he made the substituted plaintiff, Mrs. Udalagama's son, his sole heir.

The learned District Judge held on the first issue that the defendant fraudulently or contrary to the wishes of the plaintiff instructed the notary to draw the deeds in his favour only excluding his sister Tikiri Kumarihamy.

On the second issue he held that the notary's evidence showed that there was no fraud and that there was no evidence of intimidation or undue influence and answered it in the negative.

The second is in my opinion the crucial issue in the case. If this issue is answered in the affirmative the fifth issue must be answered in favour of the plaintiff.

It was contended in appeal that the defendant stood in a position of active confidence to the plaintiff and that the plaintiff must succeed unless it appears that the plaintiff had independent advice. It was also contended that as the defendant had not given evidence he had not discharged the burden of proof placed on him by section 111 of the Evidence Ordinance, No. 14 of 1895.

This section enacts :—

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.

An alternative argument was that even if the defendant did not stand in a position of active confidence to the plaintiff the deeds should be cancelled, as the evidence established that they were executed by the plaintiff under pressure when he was

old and ill and against his will in consideration of a promise made by the defendant, which he was not aware was of no value as it had not been embodied in a notarial instrument.

I prefer to rest my decision in this case on the alternative argument on which the appellant relied. This argument was founded on the rule laid down in the case of *Cook v. Lamotte*,¹ where it was held that (I read the head-note), "Whenever a person obtains, by voluntary donation, a benefit from another, he is bound, if the transaction be questioned, to prove that the transaction was righteous, and that the donor voluntarily and deliberately did the act, knowing its nature and effect. The above rule is not confined to the cases of attorney and client, parent and child, &c., but is general. A nephew who was provided for by his aunt's will obtained a *post obit* bond from her. It was set aside, he not having proved that she knew that the effect of the bond was to make her will irrevocable."

In an earlier case, *Willan v. Willan*,² an agreement between the defendant and his uncle was set aside on the ground that the agreement was entered into a few days before the uncle's death when he was confined to bed by the illness of which he died and was in a state of mental imbecility. Lord Redesdale, one of the Judges, doubted whether if there had been no evidence of imbecility such an agreement made under such circumstances would not be set aside on the ground of misapprehension.

The authorities cited by the respondent do not affect the rule laid down in the cases referred to. Plaintiff in this case was, as were the donors in those cases, old and ill. It is true he had his senses and discovered that the deeds were not drawn in accordance with his instructions. The evidence however established that his will was overborne by considerable persuasion by the fact that the notary wished to go away and by the defendant's promise to convey a half share to his sister. This

¹ (1851) 15 *Bev. Rep.* 234. ² 2 *Dow's Rep.* 274.

promise was apparently a very strong factor in the result. There is, in my opinion, good reason for coming to the conclusion that the donor would not have executed the deeds if he was aware that the promise made by the defendant was not legally enforceable. This is therefore essentially a case in which the donor should have had independent legal advice. There are here even stronger grounds for setting aside the deed than in the English cases, for here the donor was persuaded to execute a deed which he did not wish to execute to the extent of half the properties in question.

I am therefore of opinion that the appeal should be allowed and that a decree should be entered as proposed by my brother Dalton.

Appeal allowed.

