Before Ram Chand Gupta, J.

NAIB SINGH AND OTHERS,—*Appellant*

versus

GURDEV KAUR—*Respondent*

R.S.A. No. 3174 of 1984

18th April, 2011

Code of Civil Procedure, 1908—S. 100—Second appeal maintainable only when substantial question of law is involved—WILL—plaintiff executed registered Will in favour of beneficiary who lived with widow-plaintiff and looked after her lands—By fraud and misrepresentation beneficiary also got General Power of Attorney executed taking advantage of her illiteracy. Subsequently, plaintiff cancelled her Will on account of fact that beneficiary was harassing her—Beneficiary on basis of alleged General Power of Attorney sold the entire land of plaintiff—Plaintiff filed a civil suit for declaration and joint possession challenging sale deed and mutation on ground of fraud and sold being a sham and illegal transaction—Suit dismissed by Trial Court—Appeal allowed holding General Power of Attorney is result of fraud—Regular second appeal dismissed upholding the judgement and decree of trial court.

Held, that fraud having been committed upon respondent-plaintiff by father of present appellant-defendants is apparent. There was no need of leading any other evidence by respondent-plaintiff in order to prove the same. Witnesses may speak lie but circumstances do not. It was for the appellant-defendants to prove absence of fraud misrepresentation or undue influence as their father was in a dominating position, viz-a-viz respondent-plaintiff, who was an illiterate lady. It was for appellants-defendants to prove that there was fair play in the transaction and that transaction is a real one, genuine and *bona fide*.

(Para 25)

Further held, that ordinarily, a person, who challenges validity of a transaction on the ground of fraud, undue influence etc. and charges his

opponent with bad faith and particularly when the transaction is *vide* registered document, the burden of proof is on him and however, when on account of existence of fiduciary relationship one of them is in a position to exert undue influence, or dominion over the other and takes any benefit from him, the burden of providing the good faith of transaction is thrown upon the dominant party.

(Para 26)

H.R. Bhardwaj, Advocate, *for the appellants.*

Ashok Singla, Advocate, *for the respondent.*

RAM CHAND GUPTA, J.

(1) Facts leading to the present Regular Second appeal are as under :—

(2) Sant Singh (deceased) was having one half share in the total land described in the heading of the plaint. He died about 35-36 years before filing of the suit leaving behind two widows, namely, Smt. Santi-plaintiff and Smt. Chotto. Originally the suit was filled by Smt. Santi, widow of deceased Sant Singh on 9th May, 1979 as an indigent person. After death of Smt. Santi, Gurdev Kaur was impleaded as her legal representative on the basis of Will dated 6th February, 1979, Ex. A-1, executed by Smt. Santi in favour of Gurdev Kaur. Gurdev Kaur was also permitted to sue as an indigent person. Smt. Santi was having 1/4th share in the total land measuring 192 kanals 3 marlas, as mentioned in the heading of the plaint. Smt. Parsin kaur is the sister of Smt. Chhoto, another widow of Sant Singh. Harcharan Singh is husband of Parsin Kaur. Appellants-defendants Naib Singh, Gurmel Singh and Jagdev Singh are sons of Harcharan Singh and Parsin Kaur. After death of Sant Singh, Harcharan Singh started living with Smt. Santi and Smt. Chhoto, both widows of Sant Singh and started looking after their land and won faith and confidence of both of them. On persuasion of Harcharan Singh, Smt. Santi and Smt. Chhoto accompanied him for executing a Will of their property in his favour to Mansa. Wazir Singh, father of Harcharan Singh and Darbara Singh, uncle of Harcharan Singh also accompanied them.

(3) As per case set up by Smt. Santi, though she and Smt. Chhoto wanted to execute the will of their property in favour of Harcharan Singh and in fact, they executed and got registered a will, dated 17th July, 1967

in favour of Harcharan Singh and, however, taking undue advantage of the fact that she was an illiterate lady and was under influence of Harcharan Singh, he got her thumb impression on another document without making clear the contents thereof to her, while she was sitting in a hotel, on the plea that her thumb impression was being taken for the prupose of execution of the Will. Hence, she put her thumb impression by taking the same as Will. However, one year prior to the filing of the present suit, Harcharan Singh started Harassing Smt. Santi and he also refused to give proper return of her land and hence, she visited the office of Sub-Registrar, Budhlada, on 6th February, 1979 and cancelled her Will dated 17th July 1967, executed in favour of Harcharan Singh and executed another Will in favour of Gurdev Kaur, the present plaintiff. However, on 20th March, 1979, Smt. Santi came to know from Patwari Halqa that Harcharan Singh got executed a mukhtarnama from her and Smt. Chhoto by committing fraud upon her. It is further pleaded that on the basis of said *mukhtarnama*, dated 17th July, 1967, Harcharan Singh executed sale deed of entire property of Smt. Santi in favour of his sons on 20th February, 1979, i.e., after few days of her cancelling the Will in his favour and executed another Will in favour of Gurdev Kaur, who is mother's mother's father's sister of Smt. Santi. The said sale-deed is fictitious one and without any consideration and the same is null and void and not binding upon the rigths of Smt. Santi. Mutation No. 865, which was sanctioned on the basis of said sale deed dated 20th February, 1979 has also been challenged. Plaintiff also claimed possession of the land in dispute on the basis of title, on the plea that mukhtarnama and consequential execution of sale deed by Harcharan Singh in favour of his sons is a result of fraud, illegal and void and a sham transaction.

(4) Suit has been contested by appellants-defendants No. 1 to 3, *inter alia*, on the ground that *mukhtarnama* dated 17th July, 1979 was executed by Smt. Santi out of her free Will in favour of Harcharan Singh, their father, who was authorised to deal with the property, in any manner, by Smt. Santi and that they are *bona fide* purchasers for consideration of Rs. 36,000 from Harcharan Singh, general power of attorney of Smt. Santi and hence, it is pleaded that Smt. Santi or Gurdev Kaur is having no right to seek possession of the land in dispute from them. It is denied that power of attorney is a result of fraud and misrepresentation. It is also denied that the sale-deed in their favour by their father Harcharan Singh as attorney of Smt. Santi is a Sham transaction.

(5) From the pleadings of the parties, following issues were settled by learned trial Court for adjudication :—

"1. Whether the suit is not maintainable in the present form ? OPD.

2. Whether the plaintiff is estopped from challenging the *mukhtiar-nama* dated 17th July, 1967 ? OPD.

3. Whether the suit is bad for non-joinder of Harcharan Singh ? OPD.

4. Whether the suit is properly valued for the purposes of Court fee and jurisdiction ? OPP.

5. Whether the plaint is defective for want of the particulars of alleged fraud ? OPD.

6. Whether the defendants are *bona fide* purchaser for value without notice of anybody else rights in the suit land and the sale in their favour is protected ? OPD.

7. Whether *Mukhtiarnama* dated 17th July, 1967 purporting to have been executed by Smt. Santi in favour of Harcharan Singh is the result of fraud and mis-representation ? OPP.

8. Whether the sale-deed, dated 20th February, 1979 executed by *mukhtiar* of Smt. Santi in respect of 1/4th share in favour of defendant Nos. 1 to 3 who are sons of Harcharan Singh, is null, void and illegal land is the result of fraud and the same has got no effect on the rights of Smt. Santi in the suit land ? OPP.

9. Whether the suit is within time ? OPP.

10. Whether the plaintiff is entitled to possession of the suit land ? OPP.

11. Relief."

(6) Parties led oral as well as documentary evience in support of their respective contentions before learned trial Court. As Smt. Santi died before she could appear in the witness box, hence, her legal representative, Smt. Gurdev Kaur examined herself as PW1, whereas Naib Singh, one of the respondents-defendants, examined himself as DW1. DW2 is Gurcharan Singh Sodi, Deed Writer. DW3 is Mansa Singh, Lamberdar, DW4 is Darbara Singh and DW5 is Harcharan Singh, father of defendants.

Ex. P1 is copy of *jamabandi* for the year 1977-78. Ex. D1 is sale deed, dated 20th February, 1979. Ex. D2 is power of attorney, dated 17th July, 1967.

(7) Learned trial Court after considering oral and documentary evidence and after hearing both the parties decided issue Nos. 7, 8 and 10 against plaintiff and issue No. 9 in her favour, whereas issue Nos. 2, 4, 5 and 6 were decided in favour of defendants-repsondents and issue Nos. 1 and 3 against them. As as result of findings on various issues, suit filed by respondent-plaintiff was dismissed.

(8) Aggrieved against the said judgment, respondent-plaintiff filed appeal before learned Additional District Judge, Bathinda, who accepted the appeal filed by her, while reversing the finding on issue Nos. 5 to 8 and 10 and as a consequence thereof, respondent-plaintiff was held entitled to possession of the suit land, i.e. 1/4th share of land total measuring 192 kanals 3 marlas and, accordingly suit filed by Smt. Santi, now represented by Smt. Gurdev Kaur, respondent-plaintiff was decreed for joint possession of 1/4th share in the land total measuring 192 kanals 3 marlas, fully described in the headnote of the plaint, situated at Village Chak Ali Sher.

(9) Aggrieved against the said judgment and decree passed by learned Additional District Judge, Bhatinda, dated 19th October, 1984, the present Regular Second Appeal has been filed by appellants-defendants No. 1 to 3, which was admitted for hearing by this court on 11th March, 1985, without framing substantial questions of law.

(10) A Full Bench of this Court in the case of **Ghanpat** *versus* **Ram Devi, (1)** had taken a view that in view of Section 41 of the Punjab Courts Act, the amended provisions of Section 100 of the Code of Civil Procedure, as amended in 1976, were not applicable to the second appeals filed in this Court and accordingly, no substantial question of law was framed, nor the aforesaid regular second appeals were admitted on any such substantial question of law. However, the Hon'ble Apex Court in the case of **Kulwant Kaur** *versus* **Gurdial Singh Mann (dead) by LRs, (2)** has held that after amendment of Code of Civil Procedure in the year 1976, thereby amending Section 100, Section 41 of the Punjab Courts Act had

(1) AIR 1978 (PB. & Hy.) 137 (FB)
(2) JT 2001 (4) SC 158 = AIR 2001 SC 1273

become redundant and repugnant to the Central Act, i.e., Code of Civil Procedure and therefore was to be ignored and therefore, the second appeal shall only lie to this court under Section 100 of the amended Code of Civil Procedure on a substantial question of law.

(11) It may be mentioned here that though question of law was not framed at the time of admission of present appeals, and however, it has been observed by full Bench of this Court in **Dayal Sarup** *versus* **Om Parkash (since deceased) through L. Rs and others (3),** that this Court can formulate question of law as contemplated under Section 100 of the Code of Civil Procedure at any point of time before hearing of the appeal, even without amending the grounds of appeal. It has also been held that it is the duty of the Court to formulate substantial question of law while hearing the appeal under Sections 100 (4) and 100 (5) of the Code and question of law can be permitted to be raised at any stage of proceedings.

(12) Hence, in view of this legal proposition, learned counsel for the appellants was asked to file substantial questions of law, stated to be arising in this appeal.

(13) Learned counsel for the appellants has filed the following substantial questions of law, stated to be arising in this appeal :—

> "a. Whether a sale made by a person duly authorized can be set aside only because it is in favour of a near relative of the attorney/ vendor ?
>
> b. Whether liability for any act unauthorised *inter-se* between the principal and the attorney would not be limited for action against the attorney himself and sale would not be affected when the power of attorney expressly gives him power of alienation ?"

(14) I have heard learned counsel for the parties and have gone through the whole record carefully.

(15) It has been contended by learned counsel for the appellants that they are *bona fide* purchasers for consideration and that merely on the ground that they are sons of Harcharan Singh, who executed the sale deed in their favour, it cannot be said that the sale deed is a sham transaction. It has further been contended that Harcharan Singh was having duly executed

(3) 2010 (4) PLR 1

general power of attorney in his favour by Smt. Santi deceased and that power of attorney was a registered on and the same was not withdrawn by Smt. Santi till the date of execution of the sale deed in favour of appellants-defendants by Harcharan Singh. It is further contended that as power of attorney is registered one and hence, statutory endorsement of Sub-Registrar on the power of attorney establishes that the same was read over to her and that she affixed her thumb impression after duly understanding the same before the Sub-Registrar. Hence, it is contended that learned first appellate Court has committed illegality in coming to the conclusion that the document was got thumb marked from her without apprising her of its contents. It is further contended that if Smt. Santi was having any dispute with her attorney, i.e, Harcharan Singh, she could proceed against him and that on that basis sale deed executed in favour of appellants-defendants by Harcharan Singh cannot be said to be a sham transaction. It is further contended that plea of fraud, like any other charge of criminal offence, whether made in civil or criminal proceedings, has to be established beyond reasonable doubts and that finding as to fraud cannot be based on suspicions and conjectures. It is further contended that Smt. Santi died without appearing in the witness box and hence, it is contended that there is no evidence as to under what circumstances, she executed power of attorney in favour of Harcharan Singh and hence, it is contended that learned first appellate Court has committed illegality in reversing the judgment passed by learned trial Court.

(16) He has vehemently contended that if a document is a registered document, registration certificate shall be presumed to be genuine unless an unimpeachable evidence is produced to the contrary and that registered document cannot be ignored on conjectures and surmises. On the point he has placed reliance upon number of judgments rendered in **Sant Ram** *versus* **Brij Mohan Kaura and another (4), Chanan Singh and others** *versus* **Mit Singh and others (5), Ram Chandra Das** *versus* **Farszand Ali Khan and others (6), Ishwar Dass Jain (Dead) through LRs** *versus* **Sohan Lal (dead) through LRs (7), Voleti Venkata Rama Rao** *versus* **Kasapragada Bhas Kararao and others (8),**

(4) 2006 (2) RCR (Civil) 769
(5) 2010 (2) HLR 320
(6) 1912 ILR 253
(7) 2000 (1) RCR (Civil) 168
(8) AIR 1962 AP 29

Subhash Chander Kumar *versus* **Prabhu Dayal and another (9), Smt. Rami** *versus* **Sohan Singh (deceased) and others (10), Shivdas Loknathsing and others** *versus* **Gayabai Shankar Surwase (11), Irudayam Ammal and others** *versus* **Salayath Mary (12),** and **Raj kumar and others** *versus* **Hardwari and others (13).**

(17) He has further contended that it was for the plaintiff to specifically plead and prove the alleged fraud in execution of general power of attorney and the sale deed by the attorney in favour of present appellants-defendants and, however, respondent-plaintiff has failed to prove the same. On the point, he as placed reliance upon **ALN Narayanan Chettyar and another** *versus* **Official Assignee High Court, Rangoon and another (14)** and **Bishundeo Narain and another** *versus* **Seogeni Rak and others (15).**

(18) On the other hand, it has been contended by learned counsel for the respondent-plaintiff that in the present case fraud is proved from the admitted circumstances of the case. It has been contended that respondent-plaintiff was an illiterate lady and that Harcharan Singh, father of present appellants-defendants, was having influence upon her as admittedly he used to look after her land after death of her husband and that after winning her confidence, he alongwith her father and uncle brought her to Mansa on the plea that a Will was to be executed by her in favour of him and that taking undue advantage of the same, he got executed a power of attorney, which is surrounded by suspicious circumstances. Further contended that when Smt. Santi lost faith in him and cancelled her Will, a few days thereafter, he got executed sale deed in favour of his sons, two of whom were also minors, without any consideration and that consideration mentioned in the sale deed is also a fictious one, as none of sons of Harchanan Singh, i.e, present appellants were having any income. It is also contended that nothing was paid to Smt. Santi by Harcharan Singh and hence, it is contended that

(9) 1994 PLJ 443
(10) 1991 PLJ 587
(11) 1994 (1 ivil Court Cases 597 (Bom.)
(12) AIR 1973 Mad. 421
(13) 2007 (2) RCR (Civil) 123
(14) AIR 1941 PC 93
(15) AIR 1951 SC 280

as there was fiduciary relationship between Smt. Santi and Harcharan Singh, the burden of proving the absence of fraud and misrepresentation is upon the present appellants-defendants and their father as their father was in a dominating position.

(19) Learned first appellate Court has given cogent reasons in reversing finding of learned trial Court on issues No. 5 to 8 and 10 by observing as under :—

> "9. Patent facts are that Smt. Santi got one-fourth share in 192 kanals 3 marlas of disputed land on the death of her husband Sant Singh, which took place 35/36 years prior to filing of the suit. Smt. Chhoto was another widow of Sant Singh and her brother-in-law Harcharan Singh started living with these co-widows after the death of Sant Singh. For 35/36 years prior to filing of the suit, Harcharan Singh was looking after the land of his sister-in-law and Smt. Santi and he was the only male, who looked after their interest. It was natural for Smt. Santi and Smt. Chhoto to pin all their faith in Harcharan Singh and to take whatever he said, to be true. They could not think that Harcharan Singh could betray their confidence and commit any fraud on them. Darbara Singh (DW4) stated in cross-examination that Smt. Santi used to rely on Harcharan Singh in those days and that Smt. Santi used to act according to the advise and wishes of Harcharan Singh. Harcharan Singh stated that Smt. Santi was an illiterate lady. The plea of Smt. Santi in her plaint was that she and Smt. Chhoto were persuaded by Harcharan Singh to make will of their property to him, and for this purpose she was taken to Mansa by Harcharan Singh alongwith Zora Singh and Mansha Singh and there she was made to sit in a Hotel and her thumb-impressions were obtained on a document which was not read over to her and by representing that she was making will of her property to him. Smt. Santi died before she could aver these facts from the witness-box. It is undisputed that on 17th July, 1967, Smt. Santi made will of her property to Harcharan Singh, and, similarly, Will in his favour was executed by Smt. Chhoto. Even before these Wills were executed, statement of Gurcharan Singh

scribed proves that Harcharan Singh got separate Mukhtiarnama from Smt. Chhoto and Smt. Santi for single purpose of getting mutation of her property sanctioned. It is true that Harcharan Singh being man of confidence of Smt. Santi, she could give Mukhtiarnama to him. The fact, however, remains that for 30/35 years, Harcharan Singh had been looking after the land of Smt. Santi without a written Mukhtiarnama in his favour and even after the alleged execution of Ex. D2, he is not proved to have done any act, as Mukhtiar of Smt. Santi by way of transfer of her land in any manner, except when he executed sale-deed Ex. D1 on 20th February, 1979 in favour of his sons, i.e. after 18 days of cancellation of her Will by Sant Kaur.—*vide* Ex. A-1, dated 6th February, 1979. If all that was to be done by Harcharan Singh was to manage the land by giving it on batai or chakota and mostly to himself, something which he has been doing for 30/35 years, there was no necessity to execute a formal Mukhtiarnama in his favour. Relevant entry in scribe's register regarding disputed Mukhtiarnama was entered by Gurhearan Singh (DW2) at serial No. 672. This mukhtiarnama purports to have been executed together by Smt. Chhoto and Smt. Santi. Being real sister of Harcharan Singh, Smt. Chhoto was expected to accept this Mukhtiarnama. Column meant for thumb impression/thumb impressions of executant against entry No. 672 of the scribe, bears only one thumb impression and that is the statement of Gurcharn Singh Sodhi. Sole thumb impression against entry No 672 aforesaid isnot described to be of Smt. Santi or of Smt. Chhoto Gurcharan Singh (DW2) stated that it is not mentioned in entry No. 672 as to whom this thumb impression belongs. No effort was made by defendants-respondents to get the thumb impression of entry No. 672 compared with the thumb impression of Smt. Santi on Will Ex.A-1, dated 6th February, 1979 or the will which Smt. Santi had admittedly executed in favour of Harcharan Singh on 17th July, 1967. Entry No. 670 in scribe's register pertaining to will executed by Smt. Chhoto on 17th July, 1967 in favour of Harcharan Singh, but against that entry also the thumb impression of Smt. Santi was obtained by the scribe and then it

was scored out. Even prior to the execution of the Wills by the two widows and the execution of the disputed Mukhtiarnama Harcharan Singh got Mukhtiarnama from Smt. Santi and Chhoto for the sole purpose of getting mutation of her property sanctined and entry regarding that Mukhtiarnama was made by Gurcharan Singh Sodhi in his register at serial No. 669. Unless the Will and the Mukhtiarnama and been executed, it is not understandable as to how there could have been any Mukthiarnama for sanctioning of mutation on behalf of the executant. It is thus, clear that Smt. Santi is not proved to have thumb marked entry No. 672 in the register of the scribe, whereas, her thumb impressions were indiscriminatory obtained by Gurcharan Singh against entry which pertain to the Will of Smt. Chhoto, entry No 668 and entry No. 669 ass well. A look at Mukthiarnama Ex. D2 shows to the naked eye that thumb impressions of the executant below certification by Sub-Registrar are with the same black in pad with which their thumb impressions purported to have been obtained by the scribe, and the scribe is not expected to have gone before the Sub-Registrar and he has not stated this fact in his examination. Though citation of the names of the executant and the attesting witnesses on their thumb impressions below the certificate of the Sub-Registrar apper to have been written with fast hand, yet on visual comparison of this citation with the citation of their names by the scribe, I am led to believe that the names of the executant and the attesting witnesses have been cited by the scribe with the same black ink and pen. Relevant fact is also this that certificate purported to have been signed by the Sub-Registrar is in different handwriting, presumably by the Registration Clerk, in light black ink, while the signatures of the Sub-Registrar are in light blue ink. Ink used for citing the names of the executant and the witnesses below the certificate of the Sub-Registrar is much thicker than the one used for writing the certificate and tallies with the ink used in the body writing of Mukthiarnama Ex. D2. Most probable fact, therefore, is that thumb impressions of executant and witnesses on Mukthiarnama Ex. D2 as well as those below the certificate of Sub-Registrar,

were obtained by the scribe before the document was put before the Sub-Registrar, and that Sub-Registrar only put his signatures above the stamp, otherwise proceedings of registration were not conducted by him and the whole process of registration was of perfunctory nature. This circumstance naturally gives colour to the version of the plaintiff-appellant that Smt. Santi never executed Mukthiarnama Ex. D2 as she was not conversant with its contents nor she participated in the registration process. This observation, I think finds support from two circumstances, and they are that after getting the thumb impressions of Smt. Santi on Ex. D2, which was not read over to her, Harcharan Singh never performed any act as Mukhtiar by effecting any transfer of her land either by way of sale or mortgage or lease, and despite the fact that definite estrangement and parting of ways had taken place between Harcharan Singh and Smt. Santi, she made no reference or disputed Mukthiarnama in her Will dated 6th February, 1979. When Smt. Santi voluntarily cancelled her Will dated 17th July, 1967 for the reason tht Harcharan Singh had forfeited her confidence, she must have cancelled the disputed Mukthiarnama if she had known that any such Mukthiarnama had been executed by her, consciously and voluntarily. It is true that fraud has to be established beyond doubt and finding thereto cannot be based on suspicions and conjectures, but there are circumstances which speak louder than men and expose the truth beyond doubt. In the present case, Wazir Singh attesting witness of Ex. D2 was no other man than the father of Harcharan Singh, while Darbara Singh admitted that he is uncle of Harcharan Singh. When his father and uncle were with him and all that Smt. Santi wanted to execute was a will, it was not difficult for Harcharan Singh to get thumb impresions of an illiterate lady, like Smt. santi on Mukthiarnama Ex. D2 without having read to her, in connivance with the scribe and them getting it registered by an officer whose proceedings appear to have been taken, without his knowledge by his Clerk, a person standing in a fiduciary relation has a duty to protect the interest given to his care and the Court watches all such transactions between such persons

jealously so that protector may not use his influence or his confidence against and to the disadvantage of the person against whom he is in a dominating postition. When such a relation is shown, law presumes everything against the transcaction and onus is cast upon the person holding the position of confidence or trust to show that the transaction is perfectly fair and reasonable and that the other person was conscious agent of the document purporting to have been executed by him. **Guljan Bibi** *versus* **Nazir-ud-din Mia,** AIR 1975 Gauhati 30, and **Ram Kalap Pande** *versus* **Bansidhar and another,** AIR 1947 Oudh, 89 can be referred with advantage on this proposition. On the facts and circumstances enumerated in this discussion, I am convinced that without the statement of Smt. Santi, who was defrauded, she was defrauded by Harcharan Singh into getting her thumb impressions on a document, which turned out to be her Mukthiarnama. Particulars of this fraud as contained in the plaint were sufficient enough as in natural life, Smt. Santi was not expected to know more than what she pleaded and what her legal representative has reiterated in the plaint. Finding of the learned trial Judge on issues No. 5 and 7 are reversed, and these issues are decided against the defendants-respondents and in favour of the plaintiff-appellant."

(20) It has further been observed by learned first appellate court in para No. 12 of the judgment as under :—

"12. In their three written statements filed on 12th December, 1979, 7th November, 1981 and 12th December, 1981, the three contesting respondents pleaded in unambiguous terms that sale consideration of Rs. 36,000 was paid by them to Harcharan Singh Mukhtarnama of Smt. Santi. They never pleaded that that they had paid the sale consideration, or any part therof, to Smt. Santi. It was also not their plea that Naib Singh had made agreement for purchase of disputed land with Smt. Santi five days prior to the execution of the sale-deed or that Harcharan Singh had executed the sale deed in their favour under instructions of Smt. Santi. Nor they pleased in their written statements that Naib Singh paid Rs. 36,000 to Smt. Santi at

her house at the time of any such sale agreement. All that was pleaded by them is that under Mukhtarnama dated 17th July, 67, Harcharan Singh had the authority to effect the sale deed and that they are *bona fide* purchasers from him and the entire sale price was paid by them to Harcharan Singh Mukhtar-i-am. Evidence tendered by Naib Singh (DW1), Mansha Singh (DW3) and Harcharan Singh (DW5) to the effect that five days prior to the execution of the sale deed, Naib Singh had transacted the sale agreement with Smt. Santi and had, at that time, paid cash consideration of Rs. 36,000 to her, at her house, and that Harcharan Singh had executed the sale deed under instructions from Smt. Santi has to be ruled out of consideration for want of plea in their written statements. Smt. Santi was an illiterate widow for 40/50 years and Harcharan Singh had been getting documents executed from her, but it is strange that he never asked nor his sons required Smt. Santi to execute any sale-agreement regarding the suit land nor they demanded receipt for payment of Rs. 36,000 to her. Mansha Singh and Zora Singh attesting witness of Exh. D-1, are cousions of Harcharan Singh and they can be expected to depose anything to favour him. Harcharan Singh and his sons have not stuck to their version of having received and paid the sale consideration for fear of possible suit by Smt. Santi for recovery of sale consideration from him and what they have tried to state in the court is something, which they have never pleaded. No part of sale consideration was paid before the Sub-Registrar. It thus follows clearly that Harcharan Singh has transferred possession of disputed land to his sons without there being actually any consideration for execution of sale-deed Exh. D-1. It is to be noted in this context that Naib Singh was about twenty years of age on 20th September, 1979, while his two brothers are still minors. They had absolutely no land or any other property from which sale consideration of Rs. 36,000 could be paid by them. Naib Singh tried to state that his mother had some land, but this fact is not proved on record. Mother of Naib singh had not come to state that she had Rs. 36,000 to be given to her sons. Harcharan Singh tried to state that his wife and sons lived

separately from him, but this statement is belied by Mansha Singh, who deposed that wife of Harcharan Singh used to live with him. It cannot be believed that Naib singh and his minor brother, who have absolutely no land or property, are living separately from their parents. In fact, they had absolutely no source from which the price stated in Exh. D-1 cold have been paid by them. They took false plea regarding payment of sale consideration to Harcharan Singh, which they tried to change into one of payment to Smt. Santi. Also what appears to his that sale consideration of Rs. 36,000 has been fixed without relevance to facts. Santi's share in 192 kanals 3 marlas is one fourth and this comes to about 48 kanals, half of which is of Nehri quality and half is of Barani quality. May be that Gurdev Kaur had not transacted or witnessed any sale, but there is no basis to agree with the evidence of the respondents that Rs. 36,000 was market value. In these days three kilas of Nehri land and three kilas of Barani land cannot be purchased for Rs. 36,000 except when the sale is domestic affair, like Exh. D-1, dated 20th March, 1979. Sale-deed Exh. D1 being without consideration is void and is the result of connivance between Harcharan Singh and his sons to deprive an illiterate old widow of something on which she depended for her breath and bread.

Plaintiff-appellant is not bound by such a sale. Findings of the learned trial judge on issues No. 6 and 8 are also reversed, and while issue No. 6 is decided against the defendants-respondents, issue No. 8 is decided in favour of the Plaintiff-appellant."

(21) So, far as argument of learned counsel for the appellants that a party alleging fraud misrepresentation or undue influence has to specifically plead and prove the same and so far as legal proposition held in the aforementioned authorities, on which reliance has been placed by learned counsel for the appellants-defendants is concerned, there is no dispute. However, law is well settled that when a person is in fiduciary relationship with another and later is in a position of confidence, 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 the transaction is a genuine and *bone fide* one. For this

view reliance is placed upon **Guljan Bibi** *versus* **Nazir-uddin Mia, (16)** relevant paragraph of which reads as under :—

> "14. When fraud, misrepresentation or undue influence is alleged by a party in a suit, normally, the burden is on him to prove such fraud, undue influence or misrepresentation. But, 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; he has to prove that there was fair play in the transaction and that the apparent is the real; in other words, that the transaction is genine and *bone fide*. The law presumes *prima facie* in favour of deeds duly executed. So, ordinarily a person who challenges the validity of a transaction on the ground of fraud, undue influence, etc. and charges his opponent with bad faith, has the burden of proof on him. But, where on account of the existence of fiduciary relationship one of them is in a position to exert undue influence or dominion over the other and takes any benefit from him, the burden of proving the good faith of the transaction 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 with jealousy all transactions between seuh persons so that the protector may not use his influence or the confidence to his advantage. When the party complaining shows such relation, the law presumes everthing against the transaction and the onus is cast upon the person holding the position of confidence or trust to show that the transaction is perfectly fair and reasonable, that no advantage has been taken of his position. This principle has been engrained in Section 111 of the Evidence Act and in may opinion the learned Courts below were right in holding that this section does apply to the facts of the instant case.

(16) AIR 1975 Gauhati) 30

(22) On this point reliance can also be placed upon **Ram Kalap Pande** *versus* **Basidhar and another, (17),** relevant paragraphs of which read as under :—

"7. When the parties to a transaction do not stand upon an equal footing, the law raises in a suitable case a presumption of fraud. In order to bind persons who, by their acts or contracts, have divested themselves of bulk of their property, there must be a free and full consent, and in transactions in which one of the parties is not a free and voluntary agent and is unable to appreciate the import of what he does, the main elements which render the act his own are wanting. Accordingly when a person, who from his state of mind, age, weakness or other peculiar circumstances is incapable of exercisng a free discretaion, is induced by another to do that which may tend to injure him, that other is not allowed to derive any benefit from his improper conduct. When in addition one of the two parties in fiduciary relationship to the other, confidence is naturally reposed by one and the influence which grows out of that confidence is possessed by the other. If this confidence is abused, and the influence is exercised to obtain an advantage at the expense of the confiding party the obtaining of property or any benefit through the unconscious abuse of influence constitutes fraud of the gravest character,—*vide* Kerr on Fraud, Edn. 6, pp 153 to 160. As Lord Kingsdown observed in (1859) 7 H.L.C. 750 at p. 779:

'The principle applies to every case where influence is acquired and abused, where confidence is reposed and betrayed.'

In (1888) 36 Ch. D. 145 Lindley L.J., explained the principle thus:

'The principle must be examined. What then is the principle? Is it that it is right and expedient to save persons from the consequences of their own folly ? Or is it that it is right and expedient to save them from being victimised by other people ? In my opinion the doctrine on undue influence is founded upon the second of these principles. Courts of

(17) AIR 1947 Oudh 89

Equity have never set aside gifts on the ground of the folly, imprudence, or want of foresight on the part of donors. The Courts have always repudiated any such jurisdiction (1807) 14 Ves. 273 is itself a clear authority to this effect. It would obviously be to encourage folly, recklessness, extravagance and vice if persons could get back property which they foolishly made away with..... On the other hand to protect people from being forced, tricked or misled in any way by others into parting with their property in one of the most legitimate objects of all laws.' Cotton L.J. in the same case said :

In the second class of cases the Court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused.' Lord Halsbury summarising the English law on the point says:

There are two class of cases in which gifts are set aside by Courts of Equity on the ground of undue influence: first where the court has been satisfied that the gift is the result of influence expressly used by the donee for the purpose: secondly where the relations between the donor and the donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor. In such a case the court sets aside the gift unless it is proved that it was in fact the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justify the Court in holding that the gift was the result of the free exercise of the donor's will.....

In cases where such a relationship is shown to exist, the party seeking relief has not to prove that actual fraud or coercion or even direct persuasion was employed: he has but to prove the existence of the confidential relation, and then the onus falls upon the party seeking to uphold the conveyance of proving that the power conferred by the relation was not abused.' (See Vol. 15 Halsbury's Laws of England, para 491).

8. In India S. 111, Evidence Act, lays down the rule that where there is a question as to the good faith of a transaction between parties, one of whom stands to 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."

(23) On the similar facts this Court in **Baj Singh and another** *versus* **Smt. Gajo and another, (18)** observed as under :—

"4. Both the respondents Smt. Gejo and Smt. Mejo are illiterate, village women. No evidence was led to show that they had consciously got entered in the Mukhtiarnama the clause authorising Bagicha Singh to alienate their property. That apart, the trial Court relied on the judgment of Bhide, J., in **Mt. Jan** *versus* **Mt. Fajjan and another**, AIR 1939 Lahore 351, where a similar clause under similar circumstances in a power of attorney came up for interpretation and it was held that attorney was not intended to be authorised to alienate the property. No decision to the contrary was cited by the learned counsel for the appellants. Accordingly, the finding of the power of alienation has to be affirmed."

(24) In another judgment of this Court in **Chalti Devi and others** *versus* **Rajinder Kumar and another (19),** while relying on Guljan Bibi's case *(supra)*, it was observed as under :—

"15. I am in respectful agreement with the view expressed by the Gauhati High Court. In the present case, plaintiff Smt. Chalti Devi is an illiterate woman. Dina Nath, who is pivot in the whole case, is father of the defendants. He is none else but brother of deceased husband of plaintiff Smt. Chalti Devi. He stands in a fiduciary capacity to dominate upon plaintiff No. 1 Smt. Chalti Devi. It is apparent that soon after the death of her husband, a family settlement is purported to have been signed by her. The said settlement has not been given effect to by the parties. Therefore, another family settlement is relied upon by the defendants which is six months prior to the filing of this suit. It shows that the defendants were out to grab the property of plaintiff No. 1."

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(18) 1988 (2) PLR 42
(19) 2004 (1) LJR 235 = 2003(3) PLR 463 = 2003 (4) RCR (Civil) 527

(25) In the present case fraud having been committed upon respondent-plaintiff by father of present appellants-defendants is apparent. There was no need of leading any other evidence by respondent-plaintiff in order to prove the same. Witnesses may speak lie but circumstances do not. In this case, it was for appellants-defendants to prove absence of fraud misrepresentation or undue influence as their father was in a dominating position, viz-a-viz respondent-plaintiff, who was an illiterate lady. It was for appellants-defendants to prove that there was fair play in the transaction and that transaction is a real one, genuine and *bona fide*.

(26) So, far as argument of learned counsel for the appellants-defendants that as power of attorney is a registered one, law presumes *prima facie* in favour of deed, duly executed. There is no dispute regarding legal proposition held in the aforementioned authorities on the point, on which reliance has been placed upon by learned counsel for the appellants-defendants. Ordinarily, a person, who challenges validity of a transaction on the ground of fraud, undue influence etc. and charges his opponent with bad faith and particularly when the transaction is vide registered document, the burden of proof is on him and however, when on account of existence of fiduciary relationship one of then is in a position to exert undue influence, or dominion over the other and takes any benefit from him, the burden of proving the good faith of transaction is thrown upon the dominant party.

(27) In the present case, respondent-plaintiff is a widow. Her husband had died 35-36 years before filing the suit. Property left by her husband was inherited by her as well as by Smt. Chhoto, another widow of her husband. Respondent-plaintiff and Smt. Chhoto were the only two widows in the house, after the death of their husband. There was nobody to manage and look after the holding of land left by their husband, Sant Singh. Hence, they required the assistance of some male member to look after the land. Harcharan Singh, is husband of Parsin Kaur, sister of Smt. Chhoto, another widow of Sant Singh. Hence, Harcharan Singh started living with both widows of Sant Singh, i.e. Smt Santi and Smt. Chhoto and won their confidence. He used to look after their land. Both of them agreed to execute a registered will of the land in favour of Harcharan Singh. Hence, Harcharan Singh persuaded them to accompany him to Mansa for that purpose. Harcharan Singh was accompanied by his father, who was Numberdar of the village and his uncle. A will was actually executed and

registered by Smt. Santi and Smt. Chhoto in favour of Harcharan Singh on that day and, however, at the same time, Harcharan Singh got thumb impression of Smt. Santi on a power of attorney and got the same as wells registered alongwith the will. As intention of Harcharan Singh since the very beginning was *mala fide*, he kept the said power of attorney a secret for son many years. However, later on when he lost confidence of Smt. Santi and when Smt. Santi cancelled the Will executed in his favour and rather executed another will in favour of her other relative, namely, Smt. Gurdev Kaur, within few days of the same, he got sale deed of entire property of Smt. Santi executed in favour of his three sons, including two minor sons, who were having no income by registering a sale deed in their favour. Hence, on these facts, it was for present appellants-defendants and their father Harcharan Singh to prove that execution and registration of power of attorney in favour of Harcharan Singh by Smt. Santi was a genuine transaction and that execution of sale deed by Harcharan Singh in favour of present appellants-defendants was also a fair transaction and that consideration of Rs. 36,000 was actually paid by Harcharan Singh to Smt Santi and, however, they have failed to prove the same.

(28) Hence, learned first appellate Court has rightly come to the conclusion that execution of power of attorney by Smt. Santi in favour of Harcharan Singh is a result of fraud having been committed upon her and that subsequent registration of sale deed by Harcharan Singh in favour of his sons, i.e. present appellants-defendants is also a sham transaction and hence, respondent-plaintiff is not bound by the said sale.

(29) In view of these facts, both the aforementioned substantial questions of law, stated to be arising in this appeal by learned counsel for the appellants, are decided against the appellants and in favour of respondent-plaintiff.

(30) As a consequence of my above discussion, there is no merit in the present regular second appeal. The same is, hereby, dismissed.

(31) However, in view of peculiar facts and circumstances of the case, parties are left to bear their own costs.

J. THAKUR