

Jamila Begum (D) Thr. Lrs. vs Shami Mohd. on 14 December, 2018

Equivalent citations: AIR 2019 SUPREME COURT 72, 2019 (2) SCC 727, AIRONLINE 2018 SC 853, 2019 (2) ALJ 230, (2019) 1 CURCC 1, (2019) 194 ALLINDCAS 260 (SC), (2019) 195 ALLINDCAS 865 (DEL), (2019) 133 ALL LR 276, (2019) 194 ALLINDCAS 260, (2019) 1 ALL RENTCAS 1, (2019) 1 CAL HN 152, (2019) 1 CIVILCOURTC 643, 2019 (1) KCCR SN 22 (SC), (2019) 1 MAD LW 506, (2019) 1 RECCIVR 387, (2019) 2 ANDHLD 24, (2019) 2 ICC 197, (2019) 2 JCR 96 (SC), (2019) 3 MPLJ 406, (2019) 4 CIVLJ 156, (2019) 4 GUJ LR 2854, (2019) 4 MAH LJ 500, AIR 2019 SC (CIV) 914

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Bench: R. Banumathi, Indira Banerjee

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.1007 OF 2013

JAMILA BEGUM (D) THR. LRS.

....Appellant

VERSUS

SHAMI MOHD. (D) THR. LRS. & ANOTHER

...Response

JUGEMENT

R. BANUMATHI, J.

This appeal arises out of the judgment dated 07.09.2007 passed by the High Court of judicature at Allahabad dismissing the Second Appeal No.135 of 1998 thereby upholding the oral gift by Wali Mohd. in favour of respondent No.1-plaintiff and the Will dated 30.09.1970 and directing the original plaintiff-deceased respondent No.1 to pay the mortgage amount of Rs.11,000/- and holding that the mortgage dated 21.11.1967 registered on 12.01.1968 shall stand redeemed and further directing appellants-defendants to handover the vacant possession of the property.

2. Facts giving rise to this appeal are that deceased respondent No.1-Shami Mohd. filed O.S. No. 130 of 1978 against the appellant and one Sakina (deceased predecessor in interest of respondent Nos.2 to 11) for declaration that the mortgage deed dated 21.11.1967 and also sale deed dated 21.12.1970 in favour of appellant-Jamila Begum in respect of the suit house is void and consequently to cancel the sale deed. In the alternative, respondent-plaintiff claimed redemption of the mortgage, in case, that the mortgage is held to be valid.

3. Case of the respondent-plaintiff is that Wali Mohd., father of respondent No.1 had purchased two plots and along with respondent No.1 got the disputed house constructed which was gifted to respondent No. 1 through an oral gift on 30.09.1970 and he was put in possession. On the very same day, a Will was also executed in favour of Nababun, step mother of respondent No.1 in respect of certain properties and in the said Will, Wali Mohd. also mentioned about the oral gift. Respondent No.1-plaintiff further averred that though the appellants contend that Wali Mohd. had executed a mortgage deed dated 21.11.1967 in respect of the suit property in favour of the appellant and one Sakina for a sum of Rs.11000/-, Wali Mohd. was not in requirement of money and the alleged mortgage deed was got executed without consideration. Respondent No. 1 has alleged that the appellant was the mistress of Abdul Rahim who is husband of Sakina. It is further averred that the said Abdul Rahim and Wali Mohd. were friends and because of this, the appellant got the said usufructuary mortgage deed executed in her name and Sakina in collusion of Abdul Rahim and as such no money was advanced under the said mortgage deed and the same was obtained by fraud and undue influence.

4. Resisting the suit, the appellant filed written statement inter- alia contending that Nababun is not the legally wedded wife of Wali Mohd. and that she was simply his maid servant. It was averred that Wali Mohd. never executed any Will in favour of Nababun. Further, it was stated that respondent No. 1 was not in possession of the disputed house. Since 1960, relations between Wali Mohd. and respondent No. 1 were strained and Wali Mohd. had turned out respondent No.1 from the suit house and had also lodged FIR against him. Wali Mohd. duly executed mortgage deed dated 21.11.1967 for Rs.11,000/- in favour of Jamila Begum and Sakina. Wali Mohd. had sold the suit property in favour of appellant for consideration of Rs.30,000/- and executed the sale deed dated 21.12.1970. After the sale deed in her favour, the appellant had continually exercised acts of ownership and the suit filed in the year 1978 challenging the mortgage deed and sale deed dated 21.12.1970 is barred by limitation.

5. Upon consideration of evidence, the trial court dismissed the suit holding that the mortgage deed dated 21.11.1967 was legal and valid. It was also held that the sale deed dated 21.12.1970 was executed for due consideration of Rs.30,000/- and the same cannot be assailed on the ground of undue influence or inadequate consideration. Trial court also held that a suit for cancellation of sale deed has to be filed within the period of limitation of three years and the suit filed in the year 1978 challenging the sale deed of the year 1970 is barred by the limitation. The trial court held that the alleged Will cannot be accepted since it does not bear the signature of the scribe and was not registered. The trial court rejected the stand of plaintiff-respondent No.1-Shami Mohd. that the suit house was jointly constructed by Wali Mohd. and respondent No. 1. The trial court also held that the contents of the Will that Nababun is the second wife of Wali Mohd. is also not correct in the light of

statement of respondent No. 1 where he specifically stated that after death of his mother, his father did not remarry.

6. In appeal, the first appellate Court allowed the appeal by holding that Wali Mohd. had no necessity to mortgage or sell the suit property for such inadequate consideration of Rs.30,000/-. The first appellate Court placed burden of proof upon appellant-Jamila Begum that she had to prove the genuineness of the mortgage deed as well as sale deed dated 21.12.1970 and that they were validly executed by Wali Mohd. and the said burden has not been discharged by the appellant. Insofar as the oral gift and Will dated 30.09.1970 in favour of Nababun relied upon by the respondent- plaintiff, the first appellate Court held that the execution of the oral gift and Will has been proved and it has also been proved that Wali Mohd. was mentally fit and capable of understanding the contents of the Will. The first appellate Court set aside both mortgage deed dated 21.11.1967 and also the sale deed dated 21.12.1970 and reversed the judgment of the trial court and thereby allowed the appeal.

7. In the second appeal, the High Court affirmed the judgment of the first appellate Court by holding that the suit property was of large extent and it could not have been sold for such inadequate consideration of Rs.30,000/- and the appellant failed to discharge the burden cast on her of proving that the sale deed was validly executed. The High Court affirmed the findings of the first appellate Court that oral gift in favour of respondent No.1 had been proved whereas, the alleged mortgage deed and the sale deed were sham and void documents. The High Court also held that the respondent- plaintiff is entitled to redeem the mortgage and directed him to pay the mortgage amount of Rs.11,000/- for redemption of mortgage and also ordered delivery of possession.

8. Mr. R.B. Singhal, learned senior counsel for the appellant submitted that the sale deed dated 21.12.1970 has been executed for due consideration and the first appellate Court and the High Court erred in placing the burden of proof upon the appellant. It was submitted that when the respondent-plaintiff assailed the document as vitiated by fraud and undue influence, burden lay upon respondent No.1 to establish coercion and undue influence. It was submitted that the plaintiff failed to establish that appellant-Jamila Begum was in a position to influence Wali Mohd. to get the sale deed executed in her favour. It was further submitted that the alleged oral gift and Will dated 30.09.1970 has not been proved and is clearly an afterthought. It was contended that delivery of possession which is the essential ingredient of oral gift has not been established by the respondent-plaintiff. The learned senior counsel further submitted that the suit filed in the year 1978 for cancellation of the sale deed dated 21.12.1970 and the mortgage deed dated 21.11.1967 is barred by limitation.

9. Refuting the contentions, Mr. Braj Kishore Mishra, learned counsel for the respondents submitted that the first appellate Court being a final fact-finding court has found that the respondent-plaintiff has proved the oral gift whereas, the alleged mortgage deed and the sale deed were sham and void documents and the same cannot be assailed. It was further submitted that within three years after execution of the mortgage deed by Wali Mohd., sale of the property on the ground that he was unable to redeem the mortgage is unbelievable. It was further contended that there were two mortgagees viz. Jamila Begum and Sakina, whereas the sale deed was executed only

in favour of the appellant-Jamila Begum and there is nothing to show that the other mortgagee had given possession of her part in the suit property to the appellant-Jamila Begum. It was further submitted that the High Court rightly decreed the prayer for redemption of mortgage and the findings of fact recorded by the first appellate Court and affirmed by the High Court cannot be said to be erroneous. It was contended that as per Article 61 of Schedule to the Limitation Act, 1963 period of thirty years has been prescribed as limitation for filing suit for redemption of mortgage and the suit filed in the year 1978 within eight years of the sale deed was well within time and the High Court was right and justified in granting the redemption of mortgage to the respondent-plaintiff.

10. We have perused the impugned judgment and the materials on record. Upon consideration of submission, the following points arise for consideration:-

(i) Whether the first appellate Court and the High Court were right in placing the burden of proof upon the appellant to prove that the sale deed dated 21.12.1970 was validly executed by Wali Mohd. with his free will and that the appellant has not discharged that burden cast upon her?

(ii) Whether the High Court and the first appellate Court were right in accepting the case of the plaintiff that Wali Mohd. orally gifted the suit house to plaintiff and also executed the Will on 30.09.1970 in favour of Nababun and rejecting the sale deed dated 21.12.1970 relied upon by the appellant-defendant.

(iii) Whether the High Court was right in granting the alternative relief of redemption of mortgage deed on payment of Rs.11,000/- the amount mentioned in the mortgage deed treating the suit as suit simpliciter for redemption of mortgage.

(iv) Whether the suit O.S. No.130 of 1978 filed by the respondent-plaintiff in the year 1978 to set aside the mortgage deed dated 21.11.1967 and sale deed dated 21.12.1970 was barred by limitation?

(v) Whether the impugned judgment of High Court is sustainable?

Mortgage deed dated 21.11.1967 and sale deed dated 21.12.1970– Whether valid and execution duly proved?

11. The mortgage deed dated 21.11.1967 (Ex.74 Kha.) was executed by Wali Mohd. for Rs.11,000/- in favour of Jamila Begum and Sakina. DW-4 – Abdul Hamid – attesting witness of the mortgage deed was examined who has stated about the execution of mortgage deed by Wali Mohd. and thus, the appellants have proved the execution of mortgage deed in accordance with law. There is also mention about the mortgage deed dated 21.11.1967 in the sale deed dated 21.12.1970 and that Wali Mohd. was not in a position to repay the mortgage deed amount of Rs.11,000/-. The respondent No.1-plaintiff-Shami Mohd. has not adduced any reliable evidence of proof to establish that the mortgage deed was not executed by Wali Mohd. out of his free will or without any consideration.

12. Wali Mohd. sold the suit property for Rs.30,000/- to the appellant-Jamila Begum by a registered sale deed dated 21.12.1970 (Ex.75 Kha.). The recitals in the registered sale deed are natural and cogent showing that it was validly executed by Wali Mohd. The sale deed refers to the mortgage deed dated 21.11.1967 and that Wali Mohd. received Rs.11,000/- from the mortgagees – Jamila Begum and Sakina. Recitals in the sale deed also refer to the fact that the house was in the possession of the tenants and that the rental income was Rs.1440/-. The recitals in the sale deed makes a clear reference to the receipt of sale consideration of Rs.30,000/- as:- (i) that the vendor Wali Mohd. had received the mortgage amount of Rs.11,000/- and that he had not been able to get the property released from mortgage; (ii) receipt of consideration of Rs.11,000/- from the purchaser at the time of entering into the agreement to sell; and (iii) receipt of consideration amount of Rs.8,000/- in the presence of Sub-Registrar, Kanpur at the time of execution of the sale deed.

13. In the sale deed dated 21.12.1970, vendor Wali Mohd. had stated that he had executed the sale deed out of his free will and volition. The relevant recitals of sale deed dated 21.12.1970 read as under:-

“.....Therefore, in my full senses and in disposing mind and body and without any pressure or coercion from anybody, I execute this agreement to sell, of my own will, for a consideration of Rs.30,000/- (Rupees Thirty Thousand Only) in favour of Smt. Jamila alias Nandani so that it may be of use when the need arises.”

14. Sale deed dated 21.12.1970 in favour of Jamila Begum is a registered document and the registration of the sale deed reinforces valid execution of the sale deed. A registered document carries with it a presumption that it was validly executed. It is for the party challenging the genuineness of the transaction to show that the transaction is not valid in law. In Prem Singh and Others v. Birbal and Others (2006) 5 SCC 353, it was held as under:-

“27. There is a presumption that a registered document is validly executed. A registered document, therefore, prima facie would be valid in law. The onus of proof, thus, would be on a person who leads evidence to rebut the presumption. In the instant case, Respondent 1 has not been able to rebut the said presumption.” The above judgment in Prem Singh’s case has been referred to in Vishwanath Bapurao Sabale v. Shalinibai Nagappa Sabale and Others (2009) 12 SCC 101.

15. Contention of the respondent-plaintiff is that at the time of the execution of the sale deed, Wali Mohd. was mentally weak and therefore, he was not in a position to understand and that the sale deed was not executed out of his free will and volition. To substantiate their case, respondent No.1-plaintiff has examined Dr. Wasim (PW-5) who has stated that he has treated Wali Mohd. from the period 15.11.1970 to 25.12.1970 and produced the medical certificate-Ex.50 Kha. From the evidence of Dr. Wasim (PW-5) and from his medical certificate-Ex.50 Kha., respondent-plaintiff has thus tried to show that at the time of the execution of the sale deed, Wali Mohd. was not in such a position to apply his mind and understand the contents of the sale deed. As pointed out by the trial court, Dr. Wasim was doing private practice from the year 1969 and that at the time of issuing medical certificate, he had experience of medical practice for only two years. Dr. Wasim has

admitted that he was not knowing Wali Mohd. from before. By way of clarification from Dr. Wasim, it is brought in evidence that Dr. Wasim did not prepare the medical certificate-Ex.50 Kha. after seeing the prescriptions written and maintained by him during illness of Wali Mohd.; but he prepared the same only on the basis of his memory. Dr. Wasim also clarified that about 10-15 days prior to the treatment of Wali Mohd., Dr. K.N. Srivastava and Dr. Sikka also treated Wali Mohd; but the other two doctors were not examined, though Dr. Sikka was stated to be in Kanpur.

16. The trial court also referred to Exs.44 Kha. to 49 Kha. and Ex.51 Kha. filed by the respondent-plaintiff to show about the illness of Wali Mohd., all of which relate to the period from March 1971 to June 1971. The prescriptions relate to the period from March 1971 to June 1971. After referring to these documents, trial court observed that the condition of Wali Mohd. started deteriorating after March, 1971. From the evidence of Dr. Wasim and the medical certificate -Ex.50 Kha. issued by him, it cannot be said that Wali Mohd. was not mentally fit at the time of execution of the sale deed dated 21.12.1970 and that the same was not validly executed.

17. On the contrary, the appellant-defendant has examined Advocate Ahmad (DW-3) who has prepared the sale deed and the scribe of sale deed dated 21.12.1970. At the time of writing the sale deed, Advocate Ahmad (DW-3) was having Bar experience of nine years. In his evidence, DW-3 – Shri Ahmad has stated that on the instruction of Wali Mohd., he had prepared the sale deed and that sale deed was validly executed by Wali Mohd. out of his free will and consent. As pointed out by the trial court, DW-3 – Advocate Ahmad was personally knowing Wali Mohd. and that being the scribe of the sale deed, Ex.75 Kha. contains the signature of DW-3 – Shri Ahmad, Advocate.

18. The trial court upon consideration and weighing the evidence of Advocate Ahmad (DW-3) and Dr. Wasim (PW-5) held that “.....the evidence of Shri Ahmad, Advocate is comparatively more acceptable and believable.” Upon appreciation of oral evidence, when the trial court has recorded the findings that the evidence of Advocate Ahmad (DW-3) is credible and acceptable, in our considered view, the first appellate Court and the High Court ought not to have interfered with the findings recorded by the trial court; more so, when the sale deed dated 21.12.1970 was a registered document. The first appellate Court and the High Court were not right in holding that the sale deed Ex.75 Kha. (21.12.1970) was not validly executed.

Whether there was a valid oral gift in favour of the respondent- plaintiff-Shami Mohd. as claimed?

19. Respondent-plaintiff claims right to the suit property by virtue of oral gift in favour of respondent No.1 followed by the Will dated 30.09.1970 allegedly made by Wali Mohd. in favour of Nababun. As rightly held by the trial court, the said Will dated 30.09.1970 was a fabricated document. The alleged oral gift followed by the Will dated 30.09.1970, though said to have been executed in the year 1970, the respondent-plaintiff filed the suit only in the year 1978 claiming right in the suit property. Be it noted that during the period between 1970 to 1978, the appellant-defendant-Jamila Begum was asserting her right over the suit property in various eviction proceedings against plaintiff-Shami Mohd., Niyaz Bano and Nababun and some tenants. The respondent No.1-plaintiff-Shami Mohd. has admitted in his evidence that on the basis of sale deed dated 21.12.1970, appellant-Jamila Begum had filed eviction suit No.2441 of 1971 against him, Niyaz

Bano and Nababun in the court of Munsif City. In the said eviction suit, plaintiff-Shami Mohd. filed his written statement and the said suit was decreed against the plaintiff- Shami Mohd. The appellant-Jamila Begum had taken possession of the suit property; plaintiff-Shami Mohd. however, stated that he had filed appeal to set aside the judgment and decree.

20. Appellant-Jamila Begum has also been exercising her right of ownership over the suit house by filing eviction petition against other tenants. In his evidence, plaintiff-Shami Mohd. has stated that appellant-Jamila Begum had also filed suit for eviction of tenant Sher Ali and other tenants viz. Imtiaz and Binda. In those eviction suits, plaintiff-Shami Mohd. had filed impleadment application and the said application came to be dismissed. That apart, the name of appellant-Jamila Begum was mutated in the records of Nagar Mahapalika after four years from the date of sale deed which is admitted by respondent No.1-plaintiff-Shami Mohd. It passes one's comprehension, inspite of all these proceedings, why respondent-plaintiff did not immediately challenge the sale deed and kept quite for eight years. Without proper appreciation of these formidable circumstances, the first appellate Court and the High Court erred in accepting the case of respondent-plaintiff as to the oral gift in his favour and the alleged Will dated 30.09.1970.

21. Under the Mohammedan law, no doubt, making oral gift is permissible. The conditions for making valid oral gift under the Mohammedan law are:- (i) there should be wish or intention on the part of the donor to gift; (ii) acceptance by the donee; and (iii) taking possession of the subject matter of the gift by the donee. The essentials of a valid and complete gift under Mohammedan law have been succinctly laid down in Abdul Rahim and Others v. Sk. Abdul Zabar and Others (2009) 6 SCC 160 as under:-

“13. The conditions to make a valid and complete gift under the Mohammadan law are as under:

(a) The donor should be sane and major and must be the owner of the property which he is gifting.

(b) The thing gifted should be in existence at the time of hiba.

(c) If the thing gifted is divisible, it should be separated and made distinct.

(d) The thing gifted should be such property to benefit from which is lawful under the Shariat.

(e) The thing gifted should not be accompanied by things not gifted i.e. should be free from things which have not been gifted.

(f) The thing gifted should come in the possession of the donee himself, or of his representative, guardian or executor.

14. It is also well settled that if by reason of a valid gift the thing gifted has gone out of the donee's ownership, the same cannot be revoked. The donor may lawfully make a gift of a property in the possession of a lessee or a mortgagee. For effecting a valid gift, the delivery of constructive possession of the property to the donee would serve the purpose. Even a gift of a property in possession of trespasser is permissible in law provided the donor either obtains and gives possession of the property to the donee or does all that he can to put it within the power of the donee to obtain possession.

22. In the light of the above principles, let us consider whether the oral gift pleaded by the respondent-plaintiff satisfies the essential conditions of oral gift and in particular, whether possession has been established by respondent No.1-plaintiff. The respondent No.1- plaintiff claims through oral gift followed by the Will dated 30.09.1970. As discussed earlier, tenants were in occupation of the suit house. Respondent-plaintiff has not proved as to how at the time of oral gift, the possession was delivered to him. Nothing is brought on record to show that respondent No.1-Shami Mohd. has taken any steps to get the property mutated in his name. Likewise, nothing is brought on record to show that pursuant to the oral gift, the respondent-plaintiff collected rent from the tenants or paid house tax, water tax, etc. The essential conditions to make a valid gift under the Mohammedan law have not been established by the respondent-plaintiff to prove the oral gift in his favour. In the absence of any proof to show that the possession of the suit property was delivered to him, the oral gift relied upon by the respondent-plaintiff ought not to have been accepted by the courts below.

23. Upon consideration of evidence and facts, the trial court rightly held that the plea of oral gift in favour of respondent No.1-Shami Mohd. and Will dated 30.09.1970 are not true and acceptable. Per contra, the appellant-defendant had brought in evidence to show that she was in possession of the suit property. So far as the mortgage deed dated 21.11.1967, it was a usufructuary mortgage pursuant to which the appellant-Jamila Begum and another mortgagee-Sakina came to be in possession of the suit property. The sale deed dated 21.12.1970 also contains recitals as to handing over of the possession of the suit property as seen from the following recitals:-

“..... the writer of this document has no concern with this property and the purchaser has become the absolute owner of the property from this day of today and the ownership and possession of the property has been given by writer of this document to the ownership and possession of the purchaser.” The sale deed also contains recitals that the appellant-Jamila Begum has a right to get the name transferred in the records of Nagarpalika, Kanpur City as owner of the property and that if there is a need, vendor Wali Mohd. will give his statement to that effect.

That apart, as discussed earlier, the appellant-Jamila Begum had initiated various proceedings for eviction of the tenants and obtained possession. She had also filed eviction Suit No.2441 of 1971 against respondent-plaintiff-Shami Mohd., Niyaz Bano and Nababun which amply proves the exercise of acts of ownership by appellant-

Jamila Begum and the possession of the appellant-Jamila Begum over the suit property. The High Court and the first appellate Court erred in not properly appreciating these circumstances and evidence brought on record.

Sale deed (Ex. 75 Kha.) - whether vitiated due to undue influence

24. In the suit, respondent-plaintiff has challenged the mortgage deed dated 21.11.1967 as well as sale deed dated 21.12.1970 executed by his father Wali Mohd on the ground that they were not executed by him out of his free will and volition. The burden of proving that the documents were vitiated due to undue influence is upon the respondent-plaintiff who is challenging the documents. By examination of Dr. Wasim (PW-5) and Ex.50 Kha., it cannot be said that the burden cast upon respondent-plaintiff is said to have been discharged, so as to shift the burden to the appellant-defendant. From the evidence of Shami Mohd. (PW-1), it is seen that Wali Mohd. was in service in Power House till 1943 and he left his service in the year 1943. As discussed earlier, the sale deed was registered and Wali Mohd. has received part consideration that is Rs.8,000/- before the Sub-Registrar, Kanpur. Having worked in the Power House way back in the year 1943, Wali Mohd. must have been worldly wise and knowledgeable.

25. Insofar as the plea that the documents are vitiated by undue influence, as rightly contended by learned senior counsel for the appellant, the plaint averments are vague. It is alleged by respondent No.1-plaintiff that Wali Mohd. had illicit relationship with appellant-Jamila Begum and that he was mentally infirm on the date of the alleged sale deed and that the sale deed was obtained by taking undue advantage of his infirmity and illicit relationship.

26. Insofar as the plea of undue influence, merely because the parties are related to each other or merely because the executant was old or of weak character, no presumption of undue influence can arise. Court must scrutinise the pleadings to find out that such plea has been made out before examining whether undue influence was exercised or not.

27. While considering the aspect of plea of undue influence and onus-probandi, in Subhas Chandr Das Mushib v. Ganga Prasad Das Mushib and Others AIR 1967 SC 878, it was held as under:-

“4. Under Section 16(1) of the Indian Contract Act 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. This shows that the court trying a case of undue influence must consider two things to start with, namely, (1) are the relations between the donor and the donee such that the donee is in a position to dominate the will of the donor and (2) has the donee used that position to obtain an unfair advantage over the donor?

7. The three stages for consideration of a case of undue influence were expounded in the case of Raghunath Prasad v.

Sarju Prasad and Others (AIR 1924 PC 60) in the following words:

“In the first place the relations between the parties to each other must be such that one is in a position to dominate the will of the other. Once that position is substantiated the second stage has been reached — namely, the issue whether the contract has been induced by undue influence. Upon the determination of this issue a third point emerges, which is that of the onus probandi. If the transaction appears to be unconscionable, then the burden of proving that the contract was not induced by undue influence is to lie upon the person who was in a position to dominate the will of the other.

Error is almost sure to arise if the order of these propositions be changed. The unconscionableness of the bargain is not the first thing to be considered. The first thing to be considered is the relations of these parties. Were they such as to put one in a position to dominate the will of the other?”

28. In the light of the above principles, considering the case in hand, no sufficient pleading in the plaint as to undue influence. Admittedly, Wali Mohd. had executed the mortgage deed dated 21.11.1967 in favour of Jamila Begum and Sakina. Wali Mohd. was in service in Power House till 1943 and was having full knowledge of things as to what he was doing. In this case, respondent No.1-Shami Mohd. failed to prove that Jamila Begum was in a position to dominate the Will of Wali Mohd. to obtain unfair advantage. The mortgage deed was dated 21.11.1967 and the sale deed in favour of the appellant-Jamila Begum was dated 21.12.1970. Wali Mohd. died on 17.05.1971. During his lifetime, Wali Mohd. has not challenged either the mortgage deed or the sale deed. No evidence has been adduced to prove that appellant exercised undue influence to get the documents executed. Respondent No.1-Shami Mohd. has failed to establish that the sale deed in favour of the appellant-Jamila Begum is vitiated by undue influence or fraud.

Passing decree for redemption of mortgage – whether correct

29. As pointed out earlier, the main relief sought for in the suit was for a declaration that the mortgage deed (dated 21.11.1967) registered on 12.01.1968 and sale deed (dated 21.12.1970) are void and be cancelled. Only as an alternative prayer, respondent- plaintiff sought for redemption of mortgage. But both the first appellate Court as well as the High Court proceeded on the footing as if it was a simple suit for redemption of mortgage. Whether decree for redemption of mortgage is correct?

30. Section 60 of the Transfer of Property Act, 1882 provides that at any time after the money becomes due, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money to require the mortgagee to deliver the mortgage deed and all documents relating to the mortgaged property, and where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor. In *Shivdev Singh and Another v. Sucha Singh and Another* (2000) 4 SCC 326, it was held as under:-

“8. ...The right of redemption recognised under the Transfer of Property Act is thus a statutory and legal right which cannot be extinguished by any agreement made at the time of mortgage as part of the mortgage transaction.”

31. The right of redemption can be extinguished as provided in proviso to Section 60 of the Transfer of Property Act. It can be extinguished either by the act of the parties or by decree of a court. The expression “act of parties” refers to some transaction subsequent to the mortgage, standing barred from the mortgage transaction. As discussed earlier, in this case Jamila Begum-one of the mortgagees has purchased the property by the sale deed dated 21.12.1970 and thus, she purchased the entire equity of redemption by the execution of the sale deed, the mortgage qua the appellant has merged with the sale.

32. On behalf of respondent No.1-plaintiff, an argument was advanced that, by the subsequent sale the appellant could not have purchased the entire property since there were two mortgagees viz. Jamila Begum and Sakina and therefore, the appellant could not have derived title over the entire suit property. We find no merit in the above contention, property purchased by the appellant -Jamila Begum from Wali Mohd. by sale deed dated 21.12.1970 is an act of the parties, by which the right of redemption qua the appellant became extinguished by the act of the parties. Without keeping in view the main relief sought in the suit, the High Court was not right in decreeing the suit for redemption of mortgage.

33. The High Court has not followed the provisions of Code of Civil Procedure for passing decree for redemption of mortgage. Order 34 Rule 7 CPC stipulates that in a suit for redemption of mortgage, the court shall prepare the preliminary decree in accordance with Order 34 Rule 7 CPC. The High Court has passed a decree for redemption of mortgage simpliciter without following the provisions of the Code of Civil Procedure. The High Court also erred in directing the delivery of possession of the suit property to respondent No.1-plaintiff and the same cannot be sustained. The High Court could not have passed the decree for redemption without following the procedure laid down in Order 34 Rule 7 and 8 of the Code of Civil Procedure which lays down a detailed procedure for passing a preliminary decree and final decree in a suit for redemption which was not followed by the High Court.

34. Suit barred by limitation :- As discussed, suit was filed for declaration that the mortgage deed dated 21.11.1967 as well as sale deed dated 21.12.1970 executed by Wali Mohd. were not executed by him out of his free will and are void. In paragraph (14) of the plaint, it is averred that the cause of action of the suit arose on 21.11.1967 and 21.12.1970. Under Articles 58 and 59 of the Schedule to the Limitation Act, 1963 in a suit filed for any declaration is to be filed within three years when the right to sue accrues. Under Article 59 of the Limitation Act, suit filed to cancel or set aside the instrument or decree, the suit has to be filed within three years from the date when the facts entitling the plaintiff to set aside or cancel the instrument or decree became first known to him. Plaintiff-Shami Mohd. has admitted in his evidence that he got knowledge about the execution of the sale deed dated 21.12.1970 on the third day of death of his father - 17.05.1971. The suit must have been filed within three years of the date of knowledge or the date of the sale deed but the suit was filed on 12.07.1978. In the case in hand, suit filed challenging the validity of the mortgage deed dated

21.11.1967 and sale deed dated 21.12.1970 is beyond the period of limitation of three years as prescribed under Articles 58 and 59 of the Schedule to the Limitation Act and barred by limitation.

35. There is no justification for the first appellate Court to record findings based on the arguments advanced. Even in the absence of pleadings and evidence, the first appellate Court recorded finding that there was no necessity for Wali Mohd. to execute mortgage deed and within short while thereafter, sale deed as he never performed Haj Pilgrimage and never did any business as written in the documents. Likewise, the first appellate Court recorded its own findings on inadequacy of consideration for the sale deed, even though no such plea was taken by respondent No.1-Shami Mohd.

36. The first appellate Court being the final court of fact has jurisdiction to reverse or affirm the findings of the trial court. Considering the nature and scope of the first appellate Court in *Vinod Kumar v. Gangadhar* (2015) 1 SCC 391, it was held as under:

“15. Again in *B.V. Nagesh v. H.V. Sreenivasa Murthy* (2010) 13 SCC 530, this Court taking note of all the earlier judgments of this Court reiterated the aforementioned principle with these words:

“3. How the regular first appeal is to be disposed of by the appellate Court/High Court has been considered by this Court in various decisions. Order 41 CPC deals with appeals from original decrees. Among the various rules, Rule 31 mandates that the judgment of the appellate Court shall state:

(a) the points for determination;

(b) the decision thereon;

(c) the reasons for the decision; and

(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled.

4. The appellate Court has jurisdiction to reverse or affirm the findings of the trial court. The first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate Court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate Court. Sitting as a court of first appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. (*Vide Santosh Hazari v. Purushottam Tiwari (Deceased)* By Lrs. (2001) 3 SCC 179, SCC p. 188, para 15 and *Madhukar and Others v. Sangram and Others*

(2001) 4 SCC 756 SCC p. 758, para 5.)” The Court of first appeal has jurisdiction to reverse or affirm the findings of the trial Court. When the Court of first appeal takes a different view, the judgment of the first appellate Court must show the conscious application of mind and record its findings based on the evidence adduced by the parties and the judgment must record the reasons as to why the first appellate Court differs from the judgment of the Trial Court. In this case, judgment of the lower appellate Court has not answered all the points arising for determination and the evidence adduced thereon. Likewise, the High Court has not recorded any finding either on fact or on law. The High Court proceeded on the footing as if the suit was a simple suit for redemption of mortgage. Without appreciation of evidence adduced by the parties and sale deed dated 21.12.1970, the High Court erred in ordering the redemption of mortgage and delivery of possession. The impugned judgment of the High Court cannot be sustained and is liable to be set aside.

37. In the result, the impugned judgment of the High Court in Second Appeal No.135 of 1998 dated 07.09.2007 is set aside and this appeal is allowed. Suit No. O.S. 130 of 1978 filed by the respondent-plaintiff is dismissed and the judgment and decree of the Trial Court is affirmed. No costs.

.....J. [R. BANUMATHI]J. [INDIRA BANERJEE] New Delhi;

December 14, 2018