Before M.M.Kumar, J

HAMELO—*Plaintiff/Appellant*

Verses

JANG SHER SINGH—*Defendant\Respondent*

RSA No. 2137 OF 1980

19th November, 2001

Code of Civil Procedure, 1908—O.6 Rls 2 & 4 and S.100—Evidence Act, 1872—S.111-Specific Relief Act, 1961—S.34—Execution of a registered lease deed of agricultural land by a widow in favour of her real brother's son— Defendant taking advantage of her illiteracy, sickness & old age to extract the execution of the lease deed for a period of 99 years instead of one year—Allegation of undue influence—Being in a position to dominate the will of the plaintiff, burden to prove absence of misrepresentation, fraud or undue influence on the defendant—Defendant failing to discharge the onus of proving that the deed was executed bonafide and there was no misrepresentation, fraud or undue influence—Lease deed for a period of 99 years for a meagre sum of Rs. 2500\- per annum even without paying any consideration amount—Different character of the lease deed than the one which the plaintiff intended to execute—Doctrine of non est factum—Applicability—Mistake as to the character as well as contents of the lease deed executed by the plaintiff—Plaintiff never intended to execute such a lease deed for a period beyond one year—Appeal allowed while declaring the lease deed to be illegal and unenforceable.

Held, that the defendant was in a position to dominate the will of the plaintiff for the reason that she used to consult him off and on. Secondly, she was an illiterate,old and sick. For the second stage, the requirement of the law is whether the person who was in a position to dominate the will actually exercised his position. The answer to this question have to be in the affirmative because the defendant took advantage of the illiteracy, sickness and old age to extract the execution of the lease deed from the plaintiff and the contents of the lease deed were never read over to her.The lease deed for 99 years was a virtual sale deed. The third stage namely, the transaction recorded in the lease deed was unconscionable has to be answered in the affirmative because the suit used to yield Rs. 20,000/

per year to the plaintiff was leased out to the defendant for Rs. 2500/ per year and that too for a period of 99 years.The lease deed was virtually a sale deed. Therefore, I am convinved that there was undue influence exercised by the defendant and the transaction is hit by the provisions of Section 16 of the Contract Act,1872. The onus to prove the absence of misrepresentation, fraud or undue influence was on the defendant which he has miserably failed to discharge. There is no evidence to show as to why the agricultural land measuring 241 kanals 12 marlas was given on lease for a period of 99 years and that too at a meagre rent of Rs.2500\- per annum when the same land used to earn Rs. 20,000\- p.a. There is also no evidence to show why there was no consideration paid for the lease executed for a period of 99 years. The defendant has failed to discharge the heavy onus of proving that the transaction was bonafide and there was no misrepresentation, fraud or undue influence.

(Paras 19 & 31)

Further held, that the intention of thumb marking of the document by the plaintiff was to consent for lease for a period of one year and not for a lease that was for a period of 99 years. The lease deed executed by the plaintiff cannot be considered to have been executed in the.belief of mistake to the contents alone but it was a mistake which was as to the character of the document. Therefore, the signatures of the plaintiff on the document can only be considered for a period of one year.

R.S. Mittal, Sr. Advocate with S.S Dinapur, Advocate *for the Appellant*

S.C Kapoor, Sr. Advocate with Pritam Saini, Advocate. *for the respondent.*

JUDGMENT

M.M.KUMAR,J

(1) This is a plaintiff-appellant's (for brevity the plaintiff) second appeal directed against the judgment and decree passed by the Additional District Judge, Karnal dated 6th March, 1980. The Addl. District Judge, Karnal in his judgment partially agreed with the findings recorded by the Sub Judge 2nd Class, Karnal on 13th February, 1979. The relief claimed in the suit was that the registered sale deed dated 9th February, 1976 executed by the plaintiff-appellant in favour of the defendant-respondent (for brevity the defendant') for

a period of 99 years be declared as null and void and thus not binding on the plaintiff-appellant. As a consequence of the declaration, further relief claimed was that the plaintiff be given possession of agricultural land measuring 241 kanals 12 marlas situated in village Bhauji, Tehsil and District Karnal, as described in the plaint.

(2) The case set up by the plaintiff is that she is the owner of the suit measuring 241 kanals 12 marlas situated in village Bhauji, Tehsil and District Karnal as per Jamabandi for the year 1970-71. The defendant is her real brother's son. The agricultural property was inherited by the plaintiff from her husband after his death. It is claimed that the plaintiff was in self cultivating possession of the afore-mentioned agricultural land till kharif 1976. Earlier to 1976, she used to give this land for cultivation to Ramjilal and Gian Singh as tenant who were her husband's brother's sons. It is further pleaded that on account of advance age she was not keeping well and became weak because of her illness. The defendant is alleged to have approached her with a request that he be given land on lease for a period of one year and she was assured of proper medical care by him and it is alleged that the defendant promised to hand over possession of the land to the plaintiff after completion of one year. It was in pursuance of this understanding that the plaintiff was asked to sign some papers at Karnal which was believed to be a lease in favour of the defendant for a period of one year. On completion of one year, the defendant was to surrender possession of the suit land and she was told for the first time that the land had been leased for 99 years and there was no question of handing over possession. After this revelation, the plaintiff obtained an attested copy of the said lease deed and she was shocked to discover that her thumb mark was obtained on a lease which, in fact, was for 99 years. The plaintiff further claimed that she was victim of a fraud as she was illiterate, old, ill and ignorant village womem and the afore-mentioned lease was manipulated by the defendant with a malafide intention of divesting her from the property. It was also alleged that nobody would lease out the land for a vowfully small amount of Rs. 2,500/- per year. In any case no amount of money was ever paid by the defendant to the plaintiff. On the basis of the afore mentioned assertions the relief claimed in the suit was that the registered sale deed dated 9th February, 1976 in favour of the defendant be declared null and void, hence not binding on the plaintiff. As a consequence of the declaration possession of the suit land has also been claimed.

(3) Defendant filed written statement controverting the averments made by the plaintiff in the plaint. It was claimed that the suit was benami and the plaintiff was estopped from filing the suit by her own act and conduct. It was also claimed that the defendant had installed a tube-well in the suit land and no objection was raised by the plaintiff at that time. The allegation that the plaintiff is 70 years old or is totally illiterate and ignorant was controverted. It was also claimed that the plaintiff had no daughter. The version of the plaintiff that the defendant had approached her for taking land for a period of one year and that assurance was given by defendant to get her medically treated at Karnal has also been controverted. Defendant, however, admitted that she was a widow. The reason for leasing out the land pleaded by the defendant is that the plaintiff did not have any source of income and to generate some income the lease deed was executed. Defendant pleaded in para graph 5 of the written statement that the plaintiff-appellant did not accept the lease money from the defendant. However, no date is given when the lease money was offered or refused. On the basis of the lease deed even mutation has been sanctioned and the plaintiff executed a power of attorney in favour of one Babu Ram for getting the mutation sanctioned.

(4) The plaintiff-appellant filed replication reiterating the stand taken in the plaint and emphasised that the preliminary objections were frivolous. She also pointed out that she had a daughter with the name of Smt. Pan Pori. On the question of undue influence it was stated that the defendant-respondent took undue advantage of a helpless and illiterate old lady and she was made to thumb mark some papers fraudulently and with ulterior motive. It was further asserted by the plaintiff-appellant that defendant-respondent was definitely guilty of abuse of faith and committing fraud. She repeatedly denied the assertion that she executed a lease deed on her own free volition and consent. On the ground that the lease deed has been obtained by committing fraud and in any case it was without any consideration, the plaintiff-appellant sought a declaration for invalidation of the lease deed.

(5) The trial Court examined the plaintiff who appeared as PW1. Ramji Lal son of Laja Ram who was cultivating the land earlier appeared as PW 2. The plaintiff also tendered in evidence Ex. P1 to P5. Ex P1 is the attested copy of the lease deed. Ex. P2 is the copy

of jamabandi for the year 1970-71 showing that the plaintiff is owner in possession of the suit land. Ex. P3 is also copy of jamabandi for the year 1970-71 in respect of some other khasra numbers, Ex. P4 is copy of khasra girdawari for the year 1974-75 and 1975-76 showing that Ramji Lal was the cultivator in that year, Ex. P5 is jamabandi for the year 1976-77 where the plaintiff herself is shown in cultivating possession and the land is shown on lease with Jang Sher Singh defendant.

(6) The defendant produced DW1 Ram Lubhaya, deed writer who had scribed the lease deed on 9th February, 1976. DW2 Lachhman Singh who is the marginal witness on the lease deed. DW3 Jang Sher Singh defendant has himself appeared in the witness box. Ex. D1 was produced on record which is an original lease deed.

(7) The trial Court after detail examination of the statement as well as documents exhibited by the parties concluded that the plaintiff had failed to prove that the lease deed was executed by her because of misrepresentation or fraud. An issue was framed being issue No. 5 to this effect and the onus to prove this issue was placed on the plaintiff. The view of the trial Court and its findings on the vital issue No. 5 are as under :

> In para No. 1 of the plaint, the plaintiff has pleaded that she is an ignorant lady but at the same time she has pleaded in para No. 3 of the plaint that she was in self cultivating possession of the land upto kharif 1976. If the plaintiff was in self cultivating possession of the suit land upto kharif 1976, then it means that she was intelligent enough to cultivate the land or control and supervise over her servants. *The entire case of the plaintiff is based on self contradictory pleas.* Further the evidence of the plaintiff is not in accordance with the pleadings. She has deposed that she never went to fields while she has *pleaded in the plaint that she was in self cultivating possession of the suit land.* In any case, the execution of the lease deed in question is admitted. However, the grievance of the plaintiff is that the suit land was given on lease for one year only and not for 99 years. Since the execution of the lease deed is admitted by the plaintiff, it is immaterial whether the attesting witnesses were of

the *distant village or of the same village ;* whether DW2, is the interested witness or not ; whether the plaintiff was old and feeble or not. The plaintiff has admitted in her pleadings that she was made to thumb mark some papers at Karnal for one year lease deed but on the other hand she has deposed that when the lease deed was written she was not in full senses. Further, she was not aware as to whether she appeared before the Tehsildar or not. She has further deposed that Lehna Singh and Lachhman Singh attesting witnesses of the lease deed are uncles (fuffas) of Ramji Lal who is the son of the brother-in-law (Jeth). It means that the attesting witnesses are also related to her. Thus, the fact, that the attesting witnesses are not of village Bhauji where the plaintiff resides, is immaterial."

The trial Court also came to the conclusion that it was for the plaintiff to prove the perpetration of fraud which she miserably failed to prove. Relying on the judgment of the Supreme Court in the case of Subhash Chandra Das v. Ganga Prasad Das AIR 1967 SC 878, Page 368 the trial Court concluded as under :

"Therefore, it is for the plaintiff to prove that the facts are different from that indicated in the lease deed. So for as the relationship between the plaintiff and the defendant is concerned, because the parties are related to each other or merely because the plaintiff was old or of weak character, no presumption of undue influence can arise. In this connection, attention can be had to a case Subhash Chandra Das Vs. Canga Prasad Das reported in AIR 1967 Supreme Court 878. When the scribe of the lease deed Ex. D.1. DW1, Ram Lubhaya, Deed Writer appeared in the court as witness, no suggestion was put to him that the deed was not read over to the plaintiff, Hence it follows, that the lease deed was read over to the plaintiff and it was accepted as correct by the plaintiff as deposed by DW1, Ram Lubhaya.

I am of the view that it was for the plaintiff to prove fraud and she cannot claim benefit of being old or weak"

The plaintiff has also claimed that she was a *Parda Nashin* lady and the contention of the plaintiff was repelled by the trial Court on the ground that there were no such pleadings in the plaint filed by the plaintiff and in the absence of such a plea in the plaint it cannot be raised. Rejecting this contention the trial Court came to the following conclusion :

> "Firstly, it is clear that the plaintiff has no where pleaded in the plaint that she is a parda nashin lady. It is during the evidence that the plaintiff stated that she remains in parda but at the same time when she appeared as PW1, she was not having any parda. PW3 Hari Ram has deposed that the plaintiff used to have parda but at the same time he has deposed that all the women in the village talk from Parda. It means that the plaintiff is not at all a strict parda nashin lady. The ruling cited by the learned counsel for the plaintiff, therefore, become irrelevant. It has been held in Hukam Devi vs. Salig Ram and another reported in AIR 1935 Lahore 184, that a wife of a person in humble position in life who was going about but hiding her face in public was not a parda nashin lady. In the present case also it is clear that the plaintiff is not a parda nashin lady but has been hiding her face in public. Thus, the protection pleading by the learned counsel for the plaintiff in respect of a parda nashin lady is not available to the plaintiff. PW1, Smt. Hamelo has admitted that his (sic) son-in-law has been visiting him (sic). PW3, Hari Ram has also deposed that he has been visiting the house of the plaintiff. It means that she had independent advice available to her. Further the lease deed Ex. D1 is a registered document. *As a matter of law there is a presumption about the regularity of the proceedings before the Sub Registrar on the lease deed Ex. D1 that it was read over to Smt.* Hamelo. This endorsement of the Sub Registrar carries a presumption of truth. Thus, it is for the plaintiff to prove by cogent and definite evidence that the lease deed Ex. D1, was not read over to her. Where there is a registered document, the presumption is to be drawn in favour of its correctness and it is then for the other side to prove that its contents are wrongly recorded."

The plaintiff has further asserted that an amount of Rs. 2,500 per year for the lease of land measuring 241 kanals 12 marlas was too meagre an amount to raise an inference that lease deed was a unconscionable document. The trial Court rejected this argument as well with the following findings :

> "I do not agree with the views expressed by the learned counsel for the plaintiff. It has been pleaded by the defendant in his written statement that the suit land was brani and banjar and it did not yield any income and it was not productive in nature. It is also clear from the copy of khasra girdawar x. P5 that some of the land in khasra No. 26,23,24, 25, 27/21, 22, 23, 44/6/22 and 46/1, 2 which was earlier shown as banjar kadim is not being cultivated. Thus, considering the nature of the suit land, it is not improbable that the plaintiff lease out her land for 99 years for this amount.
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> The learned counsel for the plaintiff has further contended that PW2 Ramji Lal has deposed that he and Gian Singh had been paying Rs. 20,000 per year to the plaintiff earlier. He has argued that this witness has not been cross-examined on this point. He has argued that when the suit land was giving Rs. 20,000 per year, to the plaintiff then what was the necessity for her to give the suit land on lease to the defendant for a period of 99 years for a meagre amount of Rs. 2500 per year. I do not find any *force in this contention of the learned counsel for the plaintiff because of Ramji Lal and Gian Singh had been giving an amount of Rs. 20000 per year to the plaintiff earlier then what was the necessity for her to give her land to the defendant for Rs. 2500* per year. So far as the plea of the plaintiff that the defendant had to get the plaintiff treated, therefore, the suit land was given to him on lease is concerned, it is not convincing because if she was getting Rs. 20000 per year from Ramji Lal and Gian Singh then she could easily get herself treated from that money. The plea of fraud is to be proved like a criminal charge and the plaintiff has miserably failed to do so."

On other issues the trial Court also gave finding in favour of the defendant and against the plaintiff. The trial Court concluded that the suit has been filed at the instance of other persons and it was a benami litigation and that the plaintiff was estopped from bringing the suit because when defendant installed a tube-well no objection was raised.

(8) Having lost before the trial Court on the vital issue of procuring the lease dated 9th February, 1976 by misrepresentation or fraud the plaintiff filed appeal before the Additional District Judge, Karnal which was dismissed on 6th March, 1980. The learned Additional District Judge set aside the finding of the trial Court on the issue that (a) the plaintiff was estopped from filing the suit on the ground that in the lease deed itself a right was given to the defendant to install a tube-well. Therefore, installation of a tube-well would not work as estoppel to challenge the validity or legality of the lease. (b) Even on issue No. 2, it was held that the suit was not filed at the instance of some other persons and, as such, was not benami. The learned Additional District Judge came to the conclusion that the trial Court had committed an error. In paragraph 11 the following findings have been recorded.

> "I am of the view that from the facts stated above, either individually or collectively, an inference cannot be drawn that the suit is benami and that it has been filed by the plaintiff in collusion with some other people. *The plaintiff is an old lady. She has to depend upon the help of other people. Therefore, if she took the help of Ramji Lal and Giano either in obtaining copies of the* revenue record or in prosecuting the present case or if she borrowed money from Ramji Lal and Giano to pursue (illegible) the litigation, an inference cannot be drawn that she is not the real plaintiff and that the suit is benami It is not shown that the plaintiff is fighting out the litigation not for her own benefit but for the benefit of some other person. I, therefore, reverse the finding of the learned lower court on issue No. 2 as well."

(9) On the vital issue as to whether the lease deed dated 9th February, 1976 was procured by fraud and/or misrepresentation, the

findings of the trial Court were affirmed by the Additional District Judge on the basis of following reasons :

(a) The lease was not questioned on the ground that there was undue influence.

(b) The statement of DWI Ram Lubhaya, Deed writer dated 9th February, 1976 was not challenged in the cross-examination nor any suggestion was put to him suggesting that the contents of the deed were not read over to her or that it was wrongly read over to the plaintiff that it was a lease for one year whereas actually it was for 99 years.

(c) Similarly, Lachhman DW2 who was an attesting witness made a statement before the trial Court that the contents of the lease deed were read over and that the lease deed was for a period of 99 years.

(d) There is endorsement of the Registering Officer that the contents were admitted to be correct by the plaintiff which furnishes a proof of the execution of the lease deed by the plaintiff.

(e) The plaintiff herself appeared as PW1 and nowhere stated that the contents of the deed were not read over to her or that they were wrongly read over and it was told out to her that the lease deed was for a period of one year.

(10) The learned appellate court on the basis of above reasons came to the conclusion that the evidence led by the plaintiff did not inspire confidence and recorded findings which are as under :

"After carefully considering the evidence I am of the view that the evidence led by the appellant *does not inspire the confidence.* On the contrary the evidence led by *the defendant about the execution of the lease deed is free from any blemish or infirmity. Both the* witnesses who deposed about the execution of the lease deed were not at all cross examined on the point. Both the witnesses said that contents of the lease deed were read out and

were admitted as correct by Smt. Hamelo. They were not challenged on that point.

The learned Additional District Judge also gave a finding of fact with some doubts about the education and age of the plaintiff and because of that disability the plaintiff did not have the benefit of independent advice. The learned Additional District Judge recorded its findings as under :

> "I am of the view that from these facts an inference cannot be drawn that the fraud was practised upon the appellant. The matter has to be decided on the basis of evidence that has actually been led in the case. I have already discussed the evidence above. At the most a *close scrutiny of the evidence may be called for on account of the fact that the appellant is an illiterate and old lady.*

(11) I have heard Shri R.S. Mittal, learned Senior Counsel for the plaintiff and Shri S.C. Kapoor, learned Senior Counsel for the defendant and have perused the record with their assistance.

(12) Shri R.S. Mittal, learned Senior Counsel for the plaintiff has argued that the learned appellate court has drawn a very fine distinction between the expression fraud and misrepresentation on the one hand and undue influence on the other. He further submitted that a bare look at the averments in the plaint and evidence would show that the plaintiff had pleaded undue influence without this expression having been used in the pleadings. He drew my attention to the statement of PW 1, DW 2, DW 3 and then submitted that there is complete mis-reading of the statement made by the plaintiff as PW1, scribe DW2 and defendant DW3. Shri Mittal further urged that no reliance could be placed on the endorsement made by the Sub Registrar with regard to authenticity of the contents of the document and it has been erroneously done by the lower appellate Court. Condemning the approach adopted by the trial Court as well as the appellate Court, Shri Mittal submitted that the onus of proof in such cases would shift to the defendant for the reaon that the lease deed dated 9th February, 1976 was executed by an old and sick woman. The learned Additional District Judge while recording a finding to reverse issue No. 2 had also come to the conclusion that plaintiff was an old lady and was dependent upon the help of other people. Therefore, according to the

learned counsel once this is the finding of the appellate Court then it cannot be claimed that the plaintiff was not a woman who was old and sick and felt handicapped in her day to day activities and that she was dependent upon the help of others.

(13) In support of his submission, the learned senior counsel placed reliance on the judgment of the Supreme Court in the case of *Subhas Chandra Das Mushib* vs. *Ganga Prosad Das Mushib and others* (1) a judgment of the Gauhati High Court in *Gulian Bibi* vs. *Nazir-ud-din Mia* (2) and a Division Bench judgment of the Allahabad High Court in the case of *Dava Shankar* vs. *Smt. Bachi* (3) and contended that in cases of this nature where the executor of the deed is an illiterate, old and sick women, the burden would shift to the defendant to establish that the deed was executed *bona-fide* and there was no mis-representation fraud or undue influence. He also relied on the provisions of Section 111 of the Evidence Act, 1872 and Section 34 of the Specific Relief Act, 1961 to argue that in such a case where one party is in a position to dominate the will of the other party then the defendant was required to prove that the deed was not induced by undue influence, mis-representation or coercion. For this proposition, he relied on the Division Bench judgment of the Oudh High Court in the case of *Sant Bux Singh* vs. *Alia Raza Khan and others* (4).

(14) Shri S.C. Kapoor, learned counsel for the defendant controverted the argument of Shri Mittal and urged as under :

(a) No inference could be drawn of undue influence unless it is pleaded as is required by Order 6 Rule 2 and 4 of the Code of Civil Procedure.

(b) Undue influence is a question of fact and no issue on this question was claimed nor any one was framed.

(c) There is no fiduciary relationship in as much as no confidence is reposed or betrayed.

(1) AIR 1967 SC 878
(2) AIR 1975 Gauhati 30
(3) AIR 1982 All 376
(4) AIR 1976 Oudh 129

(d) There is no plea that she is a parda nashin lady.

(e) Endorsement of the Sub Registrar on the lease deed Ex.P1 is admissible.

(f) No second appeal is competent on a question of fact as held by the Supreme Court in Pakeerappa Rai v. Seethamma Hengsu 'D' by LRs and others All Instant Judgments 2001 (3) AIJ (SC) 103 and Karnataka Board of Wakf v. Anjuman-E-Ismail Madris-Un-Niswan JT 1999 (5) SC 573.

(15) In order to clear the preliminary objection raised by Shri Kapoor by citing two judgments of the Supreme Court on Section 100 of the Code of Civil Procedure which required framing of a question of law, Shri Mittal pointed out that no difficulty would arise once this Court comes to the conclusion that the documents and statements have been read by the Courts below in such a manner that it would make a material difference to the findings then such a defect would itself be a question of law. In support of this proposition, learned counsel relied on para 34 of the judgment of the Supreme Court in *Kulwant Kaur v. Gurdial Singh Mann (dead) by LRs* and others (5) reads as under:

> "Admittedly, Section 100 has introduced a definite restriction on to the exercise of jurisdiction in a second appeal so far as the High Court is concerned. Needless to record that the Code of Civil Procedure (Amendment) Act, 1976 introduced such an embargo for such definite objectives and since we are not required to further probe on that score, we are not dealing out, but the fact remains that while it is true that in a second appeal a finding of fact, even if erroneous, will generally not be disturbed but where it is found that the findings stand vitiated on wrong test and on the basis of assumptions and conjectures and resultantly there is an element of perversity involved therein, the High Court in our view will be within its jurisdiction to deal with the issue. This is,however, only in the event such a fact is brought to light by the High Court explicitly and the judgment should also be categorical as to the issue of perversity vis-

(5) 2001 (4) SCC 262 Paragraph 34

a-vis the concept of justice.Needless to say however, that perversity itself is a substantial question worth adjudication-what is required is a categorical finding on the part of the High Court as to perversity. In this contest reference be had to Section 103 of the Code which read as below :

"103. In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue necessary for the disposal of the appeal,—

(a) which has not been determined by the lower appellate court or by both the court of first instance and the lower appellate court,

or

(b) which has been wrongly determined by such court or courts by reasons of law as is referred to in Section 100.

The requirements stand specified in Section 103 and nothing short of it will bring it within the ambit of Section 100 since the issue of perversity will also come within the ambit of substantial question of law as noticed above. The legality of finding of fact cannot but be termed to be a question of law. We reiterate however, that there must be a definite finding to that effect in the judgment of the High Court so as to make it avident that Section 100 of the Code stand compiled with ."

(16) Shri Mittal urged that once lower appellate court has reached the conclusion that instead of misrepresentation and fraud the plaintiff could have pleaded undue influence then the question of undue influence should have examined by the lower appellate court and it should not have felt handicap for the reason that undue influence was not pleaded because misrepresentation and fraud are closely associated with undue influence and all the facts showing undue influence are on record. In cases of misrepresentation and fraud the nature of document executed is entirely different than the one represented to be excuted. For example, representation may be made for execution of a deed of guarantee whereas actually a lease deed is got executed. Such type of cases would be covered by the expression of misrepresentation and fraud. However, the cases of

undue influence would be such cases where one party is in a dominant position to influence the mind and position of the executor. In other words, where the executor is not willing to execute a document but because of undue influence the document is got executed. In this category would fall the cases like where a doctor influence his patient to execute a document in his favour or a lawyer influence his client to do such a thing.

(17) From the statements of various witnesses and the findings given by the learned Addl. District Judge, it is clear that the palintiff was an illiterate, old and sick lady. It is also clear that there was no consideration paid for execution of lease for a period of 99 years. The learned Addl. District Judge while reversing the finding on issue no. 2 that the suit was a proxy litigation filed by the plaintiff gave a finding that the plaintiff being an old lady was dependent upon the help of other people. It has been stated by the plaintiff as PW1 that she used to consult defendant on day to day affairs and she had never visited the fields. It is also clear from the statements of plaintiff as well as of PW 2 Ramji Lal that she used to get an income of Rs. 20,000 P.A. from the suit land when Ramji Lal and Giano used to cultivate the suit land. Ramji Lal in his statement had also stated that three years prior to 1976 he used to cultivate the suit land and when plaintiff insisted for treatment and medical care they refused. On their refusal she had called her nephew namely defendant-respondent to look after the health of the plaintiff and to get her treated. She had agreed in consideration of her treatment that the land would be given on lease for a period of one year to her nephew defendant. The statements of PW1 and PW2 contains a natural flavour and the sequence of events have also been stated in a manner which appeal to the common sense. The learned Addl. District Judge has observed that the evidence led by the plaintiff did not inspire confidence. These observations of the learned Addl. District Judge are based on conjectures and surmises. His further observation that the evidence led by the defendant about the execution of the lease deed is free from blemish or infirmity is also not based on any substance because it ignores the vital fact that there was no consideration for the lease; the consideration recorded in the lease deed is too meagre i.e. Rs. 2,500\- per annum for a lease of 99 years as against the lease amount of Rs. 20,000 p.a. which the plaintiff used to earn from Ramji Lal and Giano.On the face of these facts, I do not think that it can be observed by a reasonable

man that the evidence led by the defendant is free from any blemish or infirmity. Moreover, it is wrongly recorded by the Addl. District Judge that the plaintiff did not state in her statement that the contents of the deed were not read over to her. PW 1, plaintiff, in her statement has categorically testified in the first ten lines that from the suit land she used to earn about Rs. 20,000 per year from the sons of her husband's brother i.e. Giano and Ramji Lal. The statement made by her is in consonance with her averments that no body would lease out the land for an amount of Rs. 2,500 p.a. for a period of 99 years. The fact that Ramji Lal and Giano used to cultivate the land is borne out from the Khasra Girdawari, Ex.P.4. for the Rabi Crop of November, 1974 and for the Kharif April, 1975, the plaintiff has deposed in her statement that the Sub Registrar or the Scriber never read over the document to her and she was never apprised that the lease deed was being executed for a period of 99 years. It is clear from the record that defendant is son of plaintiff's real brother. On the basis of these facts and findings given by the Courts below, it has to be examined whether the lease deed executed by the plaintiff on 9th February, 1976 was executed by her out of free will and volition or it is a document tainted by mis-representation, fraud or undue influence. The names and tags on the documents would not be material.

(18) The judgment of *Subhas Chandra's case (supra)* lays down three stages to conclude whether there was undue influence or not. The first stage envisaged by the judgment is that one must ascertain that relations between the parties to each other must be such that one is in a position to dominate the will of the other; secondly, the deed had been induced by undue influence; and thirdly whether the transaction was unconscionable and if it is proved, then the burden of proving that the deed was not induced by undue influence is to lie upon the person who was in a position to dominate the will of the other. The principle that three stages for consideration of undue influence have to be seen were expounded in the case of *Raghunath Prasad* vs. *Sarju Prasad* (6) 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

(6) AIR 1924 P.C. 60

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 unconscionablness of the bargain is not the first thing to be considered. The first thing to be considered is the relation of these parties. Were they such as to put one in a position to dominate the will of the other."

The above para of the judgment of the Privy Council has been quoted with approval by their Lordshisps of the Supreme Court in *Subhas Chandra's case (supra).*

(19) On applying the principles laid down in the aforementioned judgments to the facts of the present case, it is crystal clear that the defendant was in a position to dominate the will of the plaintiff for the reason that she used to consult him off and on. Secondly, she was an illiterate, old and sick. For the second stage, the requirement of the law as laid down in the aforementioned judgments is whether the person who was in a position to dominate the will actually exercised his position. The answer to this question in the present case have to be in the affirmative because the defendant took advantage of the illiteracy, sickness and old age to extract the execution of the lease deed from the plaintiff and the contents of the lease deed were never read over to her. The lease deed for 99 years was a virtual sale deed. The third stage namely, the transaction recorded in the lease deed was unconscionable has to be answered in the affirmative bacause the suit land used to yield Rs. 20,000 per year to the plaintiff was leased out to the defendant for Rs. 2,500 per year and that too for a period of 99 years. The lease deed was virtual a sale deed. Therefore, I am convinced that there was undue influence exercised by the defendant and the transaction is hit by the provisions of Section 16 of the Contract Act, 1872. I am fortified in my view by the judgment of a Contitution Bench of the Supreme Court in the case

of *Ladli Parsad Jaiswal* versus *The Karnal Distillery Co. Ltd. Karnal and others (7).* Their Lordships of the Supreme Court while dealing with the cases where the transaction is vitiated on account of undue influence observed as under :—

> "A transaction may be vitiated on account of undue influence where the relations between the parties are such that one of them is in a position to dominate the will of the other and he uses his position to obtain an unfair advantage over the other. It is manifest that both the conditions have ordinarily to be established by the person seeking to avoid the transaction: he has to prove that the other party to a transaction was in a position to dominate his will and that the other party had obtained an unfair advantage by using that position. Clause (32) lays down a special presumption that a person is deemed to be in a position to dominate the will of another where he holds a real or apparent authority over the other or where he stands in a fiduciary relation to the other or where he enters into a transaction with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress. Where it is proved that a person is in a position to dominate the will of another (such proof being furnished either by evidence or by the presumption arising under sub-section (2) and he enters into a transation with that other person which on the face of it or on the evidence adduced, appears to be unconscionable the burden of proving that the transaction was not induced by undue influence lies upon the person in a position to dominate the will of the other. But sub-section (3) has manifestly a limited application; the presumption will only arise if it is established by evidence that the party who had obtained the benefit of a transaction was in a position to dominate the will of the other and that the transaction is shown to be unconscionable. If either of these conditions is not fulfilled the presumption of undue influence will not arise and burden will not shift."

(7) AIR 1963 SC 1279

(20) In so far as the objection of Shri S.C. Kapoor with reagrd to the absence of pleadings on this question is concerned, I am satisfied that even in the absence of actual words 'undue influence' there are sufficient averments in paragraphs 6 and 7 of the plaint and in paras 4 and 7 of the replication. These averments clearly show that the plaintiff was an old, ill and illiterate and she was allured by the defendant with a *mala fide* intention of usurping her property and that he was guilty of abuse of faith. She has asserted that she never leased out the agricultural property to the defendant for a period of 99 years as recorded in the lease deed by a ridiculously and vowfully amount of Rs. 2,500 p.a. and not a single penny was paid. It has also been asserted in the replication that defendant took undue advantage of a helpless, illiterate and old lady and made her to thumb mark some papers with ulterior motive. In these circumstances, I have no hesitation in rejecting the submission of Shri Kapoor that there is no pleading with regard to undue influence. The observations of the learned Single Judge in *Guljan Bibi's case (supra)* supports the proposition that when fraud, mis-representation or undue influence is alleged by a party in a suit then ordinarily the burden is on him to prove scuh fraud, undue influence or mis-representation but when such a person like an illiterate widow women is in fiduciary relationship with another and the latter is in a position of active confidence, the burden of proving absence of fraud, mis-representation and undue influence is upon the person in a dominating position. Also see *Munshu Buzloor Ruhum v. Shumsoonisa Begum* (8) In that case, the plaintiff was an illiterate parda Nashin widow and the defendant was her son-in-law who obtained her thumb impression on a sale deed in his own favour representing to her that it was a gift deed in favour of her daughter. Relying on the provisions of Section 16 of the Contract Act, Section 111 of the Evidence Act and Section 34 of the Specific Relief Act, it was observed that in such a situation the onus of proof would shift on the person who was in a position to dominate or influence the will of the other. The observations of the court in para 14 are as sunder :

> "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

(8) 1867 MIA 551 (PC)

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 genuine and *bona 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 butrden 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 such 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 everything 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 my opinion the learned Courts below were right in holding that this section does apply to the facts of the instant case."

(21) There is another aspect of the matter. The principle that a party executing a document was completely bound by the whole of the document which he had signed had long been mitigated by the doctrine of non est factum: On the basis of this doctrinem, it can be arged that a person who is induced by the false statement of another, and who has signed a written contract that is fundamentally different in character from the one which he envisaged then such a person is competent to say that it is not his document. The doctrine was initially

evolved by the courts to relieve illiterat or blind people from the effects of a contract which owing to natural infirmities they were unable to read with no fault of theirs or which was not properly explained to them. *The principle was accepted in England in the case of Thoroughgood* v. *Cole (9)* by the court of Common pleas. In that case one William Chicken was in arrear of the rent. He proffered to Mr. Thoroughgood, the landlord, a deed by which he was relieved from "all demands whatsoever" which Mr. Thoroughgood had against him. Obviously, the exclusion comprised not only arrears of rent, but also the right to recover the land. Thoroughgood was illiterate, but a abuystander picked up the deed and explained " that you do release to William Chicken all the arrears of rent that he doth owe you and no otherwise, and thus you shall have your land back again. Thoroughgood signed the deed, after replying, "If it be no otherwise, I am content". Subsequently, Mr. Chicken sold the land to an innocent purchaser, Mr. Thoroughood sued in trespass and revcovered his land. It was said by the Court of Common Pleas to be the usual course of pleadings that the defendant was a layman and illiterate and that he had been defrauded of a misrepresented recital of the contents of the deed. The principle laid down in *Thoroughgood's case (supra) was further expounded in the case of Foster* v. *Mackinnon (10)* where the defendant was induced to sign the back, of a paper, the face of which was covered and was not shown to him. He was told that it was an ordinary guarantee the like of which he had signed before and under which no liability came to him when, in fact, the paper was a bill of exchange. He was sued by the plaintiff, a holder in due course, as an indorser. Byles J. observed in his oft-quoted judgment as under

> ".....if a blind man, or a man who cannot read, or who for some reason (not) implying negligence) forbears to read, has a written contract falsely read over to hin, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs ; then, at least if there be no negligence, the signature so obtained is of no force.

(9) (1582) 2 Co Rep. 9a
(10) (1869) LR 4 CP 704

> And it is invalid not merely on the ground of fraud, where fraud exists, *but on the ground that the mind of the signer did not accompany the signatures; in other words, that he never intended to sign, and therefore in contemplation of law never did sign the contract to which his name is appended....*"

Citing various authorities the learned judge continued.

> "He was deceived, not merely as to the legal effect, but as to the actual contents of the instruments"

(22) In *Sannibibi* v. *Siddik Hussain* (11) the plaintiffs asked for cancellation of a sale deed if land on the ground that they had signed it on the representation that it was *jimba nama* for their maintenance for a term of three years. It was held that the document was void ab *initio,* as there was no consent at all to the sale deed. Approving the judgments of *Thoroughgood's case (supra) and Mackinnon's case (supra)* Newbound and *Patron JJ.* observed as under :

> "....the plaintiff executed the deed of sale believing that they were executed a deed of a different kind, there was in law no execution of the deed by them. The same contention put in another form is that, though when consent to an agreement is caused by fraud or misrepresentation the agreement is a contract voidable under s. 19 Contract Act, and not void, here there was no consent at all...It is based primarily on the authority of the English cases, Thoroughgood's Case and Forster v. Mackinnon."

Similarly, in *Brindaban Mishra Adhikary* v. *Dhurba Charan Roy and others* (12) the validity of a deed of gift fell to be considered because it was executed on the defendants' representation that it was a power of attorney. It was found that the deed was absolutely of a different character than the one which the signatory thought she was executing. On these facts the Calcutta High Court, following the judgment in *Sannibibi's* case (supra) held that the transaction was void *ab initio* not merely *voidable.*

(11) AIR 1919 Cal 728
(12) AIR 1929 Cal 603

(23) However, where a deed is not of a different character a contract it used to be *voidable* only and not void ab initio. Thus, where a husband obtained the signatures of his wife to a deed of a gift without making any misrepresentation as to its character, but subsequently included two more plots in the deed it was held by the Supreme Court that the transaction was only voidable and not void in case of *Ningawa v Byrappa Hirekurahar* (13). Their Lordships of the Supreme Court relying on Foster v Mackinnon's case *(supra)* observed :—

> It is well established that a contract or other transaction induced or tainted by fraud is not void but only voidable at the option of the party defraud, until it is avoided, the transaction is valid, so that third parties without notice of the fraud may in the meantime acquire rights and interests in the matter which they may enforce against the party defrauded."

(24) What should be the degree of difference between the actual document and what the signer believed it to be ? On this problem, the Courts in England as well as in India until recently had been guided by the principles laid down in the cases of *Thoroughgood* (supra) and *Foster v Mackinnon* (supra). This case laid down, inter alia, that to ground the plea of non est factum there should be a mistake as to the character as against the contests of the document. A contract was considered void where the mistake had been as to character and voidable where it was as to its contents.

(25) To the same effect are the Queen's Bench decisions in *Lewis* v. *clay (14)* and *Muskham Finance Ltd.* v. *Howard (15).*

(26) The principle that a distinction between character or nature and contents or details may determine whether the contract is to be void or voidable held ground for about one century with small variations in emphasis. But the distinction has been held to be no longer decisive. It is stated not to be an intelligible one for a document takes its character from its contents. This approach found support in *England in the leading case of Saunders* v *Anglia Building Society (16)* decided by the House of Lords. The appellant in this case was the executrix of one Mrs. Rose Maud Gallie, who executed a deed

(13) AIR 1968 SC 956
(14) (1897) 67 LJ Q.B. 224
(15) (1963) I Q.B. 904
(16) (1970) AIIER 961

which she believed was gift of her house to her affectionate nephew Parkin but which was in fact an assignment of sale of the house of one Lee for £ 3,000 (the money was never paid). Lee mortgaged the property to the respondents for £ 2,000 but defaulted on mortgage instalments. The Building Society claimed possession of the house. Gallie began an action asking for a declaration that the assignment was void. She pleaded non est factum on the ground that she had broken her spectacles and did not read the document but signed it on the faith of the representation made to her by Lee. But the plea failed. The House of Lords affirming the decision of the Court of Appeal held that she was bound by the contract. It was only voidable by reason of the mis-statements made by Lee that too was not allowed for it was too late once the Building Society had advanced a sum on the house in good faith.

(27) The House of Lords further held that the distinction between character or nature and contents or details was no longer decisive because it has been difficult to apply in practice. After all a document takes its character from its contents. Lords Denning M.R in *Gallie* v. *Lee (17)* in the Court of Appeal observed that the execution of a deed of gift, for £ 10,000 which the donor was led to believe was a deed of gift for £ 100 (£ 10) and would involve a mistake as to contents, and no mistake as to the technical legal nature of the instrument. It would still be a mistake as to the class and character of the transaction basing the plea of non est factum. This approach has been approved by Lords Hodson and Reid in the House of Lords. The traditional distinctions as to "character and nature" or "class and character" of the transaction do not refer to the technical legal nature of the transaction as a gift, a loan, or a transfer and the like, or even mistaking the identity of the other party. Secondly, the doctrine if applied rigidly is likely to produce unreasonable results. After a detailed examination Jullius Stone in his stimulating article :The Limits of Non Est Factum after *Gallie v. Lee*(18) concluded that "the distinction between class and character' and 'contents' offered by the cases is in the area of overlap meaningless and it does not "make sense".

(17) 1969 (2) Ch 17
(18) (1972) 88 LQR 190 at 197

(28) The Supreme Court while considering Foster v Mackinnon case (supra) *in Ningawa* v. *Byrappa Hirekuraba* (supra) concluded on the facts that where a husband obtained the signature of his wife to a gift deed of land without making any misrepresntation as to its character but subsequently included two more plots in the deed, the transaction was only voidable and not void. Their Lordships of the Supreme Court observed as under :

> "The authorities make a clear distinction between fraudulent misrepresentation as to the character of the document, and fraudulent misrepresentation as to the contents thereof.With reference to former, it has been held that the transaction is void while in the case of the latter it is merely voidable".

(29) The above distinction drawn by various Courts in England before the judgment rendered in the case of *Saunders* (supra) and of the Supreme Court in the case of *Ningawa* (supra) was not approved by the Supreme Court in the case of Smt. *Bismillah vs. Janeshwar Prasad (19)* .The distinction between the character of a document and the contents of the document stands abrogated in *Bismillah's case* (supra). In that case Smt. Bismillah challenged the validity of sale deeds concerning agricultural land executed by her agent. The ground for invalidation of the sale deed was that the agents were not authorised to do so and in the suit filed by her it was asserted that a clause in the instrument of agency drafted in Hindi had been incorporated by the agent which she never authorised nor she knew Hindi language. As a consequence of declaration concerning invalidation of sale deeds possession of the agricultural land was also claimed. A preliminary objection was raised to the maintainability of the suit by pleading Section 331 of the U.P Zamidari Abolition and Reforms Act, 1951 and it was argued that filing of the suit was barred and the civil Court had no jurisdiction. The preliminary objection having been sustained by the Allahabad High court, the appeal was filed by Smt. Bismillah before the Supreme Court. Reversing the view taken by the High Court, their Lordships of the Supreme Court observed as under :

> "The common law defence of non est factum to actions on specialities in its origin was available where an illiterate

(19) AIR 1990 SC 540

person to whom the contents of a deed had been wrongly read executed it under a mistake as to its nature and contents, he could say that it was not his deed at all. In its modern application, the doctrine has been extended to cases other than those of illiteracy and to other contracts in writing. In most of the cases in which this defence was pleaded the mistake was induced by fraud; but that was not perhaps, a necessary factor, as the transactions is "invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signor did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended."

Authorities drew a distinction between fraudulent misrepresentation as to the character of the document and fraudulent misrepresentation as to the contents thereof. It was held that the defence was available only if the mistake was as to the very nature of character of the transaction.

In Foster vs. Mackinnon, (1869) L.R. 4 CP 704, Mackinnon, the defendant was induced to endorse a bill of exchange on the false representation that it was a guarantee similar to one he had signed on a previous occasion. He was held not liable when sued even by an innocent endorsee of the bill. Byies, J. said;

".....The defendant never intended to sign that contract or any such contract. He never intended to put his name to any instrument that then was or thereafter might become negotiable. He was deceived, not merely as to the legal effect, but as to the actual contents' of the instrument."

This decision was referred to with approval by this Court in Ningawwa vs. Byrappa in (1968) 2 SCR 797: (AIR 1968 SC 956). It was observed:

".....It is well established that a contract or other transaction induced or tainted by fraud is not void, but only voidable

at the option of the party defrauded. Until it is avoided, the transaction is valid, so that third parties without notice of the fraud may in the meantime acquire rights and interests in the matter which they may enforce against the party defrauded....." (pp. 800-801) (of SCR) : (at p. 958 of AIR)

This would be a voidable transaction. But the position was held to be different if the fraud of misrepresentation related to the character of the document. This Court held :

"*The legal position will be different if there is a fraudulent misrepresentation not merely as to the contents of the document but as to its character.* The authorities make a clear distinction between fraudulent misrepresentation as to the character of the document and fraudulent misrepresentation as to the contents thereof. With reference to the former, it has been held that the transaction is void, while in the case of the latter, it is merely voidable...." (Emphasis supplied) (p.801) (of SCR) : (at p. 958 of AIR)

However the House of Lords in Saunders v. Angila Building Society, (1971) AC 1004, reviewed the law and held that the essential features and the doctrine, as expressed by Byles, J. in Foster v. Mackinnon, had been correctly stated. Lord Raid, however, observed :

"The plea of non est factum could not be available to anyone who signed without taking the trouble to find out at least the general effect of the document. Nor could it be available to a person whose mistake was really a mistake as to the legal effect of the document. There must be a radical or fundamental difference between what he signed and what he thought he was signing."

However the distinction based on the character of the document and the contents of the document was considred unsatisfactory. The distinction base on the character and contents of a document is not without its difficulties in

its practical application ; for, inconceivable cases the 'Character' of the document may itself depend on its contents. The difficulty is to be resolved on a case by case basis on the facts of each case and not by appealing to any principle of general validity applicable to cases. Chitty on contracts (General Principles, 25th Edition, Para 343) has this observation to make on saunders' decision:

".....It was stressed that the defence of non est factum was not lightly to be allowed where a person of full age and capacity had signed a written document embodying contractual terms. But it was nevertheless held that i.e. exceptional circumstances the plea was available so long as the person signing the document had made a fundamental mistake as to the character or effect of the document. Their Lordships appear to have concentrated on the disparity between the effect of the document actually signed, and the document as it was believed to be (rather than on the nature of the mistake) stressing that the disparity must be "radical", "essential",: fundamental", or "very substantial"." (p. 194)

In the instant case, prima facie appellant seems to proceed on the premise that she cannot ignore the sales but that the sales require to be set aside before she is entitled to possession and other consequential reliefs."

(30) The principle of non est factum as discernible from the various judgments when applied to the facts of the present case, it becomes clear that the character of the document itself underwent a change. The intention of thumb marking of the document by Smt. Hamelo, plaintiff was to consent for lease for a period of one year, and not for a lease that was for a period of 99 years. It is probably for this reason that their Lordships of the Supreme Court in Bismillah's case (supra) has left a latitude by bridging up the distinction based on the character and the contents of the document. At the cost of repetition, the obsrvations of Lord Denning **M.R. in Gallie versus Lee's case *(supra)*** may once again be referred. Speaking for the Court of Appeal, Lord Denning observed that execution of deed of a

gift for £ 10,000 which the donor led to believe was deed of £ 100 would involve a mistake as to the contents and no mistake as to the nature of the instrument. It would still be mistake as to the class and character of the transaction to raise the plea of non est factum. On the strength of these principles, the lease deed executed by the plaintiff cannot be considered to have been executed in the belief of mistake to the contents alone but it was a mistake which was as to the character of the document. Therefore, the signatures of the plaintiff on the document can only be considered for a period of one year. On this additional plea also, this appeal deserves to be allowed.

(31) From the various principles discussed above, it is crystal clear that the onus to prove the absence of mis-representation, fraud or undue influence was on the defendant which he has miserably failed to discharge. There is no evidence to show as to why the agricultural land measuring 241 kanals 12 marlas was given on lease for a period of 99 years and that too at a meagre rent of Rs. 2,500 per annum when the same land used to earn Rs. 20,000 p.a. from Ramji Lal and Giano. There is also no evidence to show why there was no consideration paid for the lease executed for a period of 99 years. The defendant has failed to discharge the heavy onus of proving that the transaction was *bonafide* and there was no mis-representation, fraud or undue influence.

(32) For the reasons recorded above, this appeal is allowed and it is held that the plaintiff Hamelo intended to sign the lease deed for a period of one year only and never intended to sign the same for a period of 99 years. The lease deed dated 9th February, 1976 to that extent is declared to be illegal and unenforceable. The suit of the plaintiff is decreed and mandatory injunction is issued to defendant to restore back the possession of the land to the plaintiff within a period of two months from the date of receipt of certified copy of this order. Defendant shall pay back all the benefits which have accrued to him from the illegal possession of the land to the plaintiff from the expiry of period of one year i.e. 9th February, 1977. However, in view of the serious controversy on the legal issue involved, I leave the parties to bear their own costs.

R.N.R.