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twenty-one. If that was so, the Second Schedule prescribes that the father or the guardian, as the case may be, must sign the statement of the bride. This was not done and there is no manner of doubt that the girl was under twenty-one years of age when she was married. I agree with the order proposed by my learned brother and would confirm the decree *nisi*.

APPELLATE CIVIL

1951

April 16

Before Harnam Singh and Soni, JJ.

MOHD HUSSAIN,—*Defendant-Appellant,*

versus

FIDA HUSSAIN, Plaintiff, and THE DELHI CLOTH AND GENERAL MILLS COMPANY,—*Defendant-Respondents.*

Regular First Appeal No. 390 of 1946

Indian Contract Act (IX of 1872) Sections 19 and 19-A—Deed of transfer—alleged to be executed under undue influence, coercion and fraud—not a void but voidable transaction—suit challenging the transaction governed by article 91 of the Indian Limitation Act (IX of 1908).

One S owning 60 shares in a Limited company executed a deed of transfer in favour of M and the company registered the same in November 1936, in the name of M. In October 1944, one F instituted the present suit alleging that he was the owner of 30 shares under the Customary Law of Inheritance governing the parties and that the transfer of shares in question by S in favour of M was under undue influence, coercion and fraud and was a void transaction and he on his own showing, came to know about the transfer of shares in May 1940. The defendant pleaded, *inter alia*, that the suit was barred by time.

Held, that the plea of *Non est factum*, i.e., the contract not having been executed by S at all was not taken in the plaint and the trial proceeded on the assumption that the deed of transfer was executed by S and therefore Sections 19 and 19-A governed the contract and the suit was barred by time under article 91 of the Limitation Act as the transaction in question was a voidable and not a void transaction.

Raja Singh and others v. *Chaichoo Singh* (1), *Surat Chandar Gupta* v. *Kanai Lal Chukerbutty and another* (2), referred to.

Regular first appeal from the decree of Fazl-i-Ilahi, Esquire, Sub-Judge, 1st Class, Jullundur, dated the 9th day of July 1946, granting the plaintiff a decree against the defendants declaring that he is the owner of thirty shares in dispute described in the plaint and ordering that his costs shall be paid by Mohd Hussain defendant No. 1 only.

I. D. DUA, for Appellant.

K. C. NAYAR, for Respondents.

JUDGMENT

Harnam Singh J.

HARNAM SINGH, J. Dr. Saif-ur-Rahman owned 60 ordinary shares of the Delhi Cloth and General Mills Company Limited, Delhi, hereinafter referred to as the Company.

On the 23rd of November 1936, the Company registered the sixty shares mentioned above in favour of Mohammad Hussain defendant No. 1 on the basis of a deed of transfer executed by Dr. Saif-ur-Rahman in favour of Mohammad Hussain defendant No. 1 on the 20th of November 1936.

On the 30th of October 1944, Fida Hussain, son of Rahmat Ullah instituted civil suit No. 202 of 1944, alleging that he was the owner of thirty shares under the Customary Law of Inheritance governing the parties and that the transfer of shares in question by Dr. Saif-ur-Rahman in favour of defendant No.1 was under undue influence, coercion and fraud. In para No. 2 of the plaint Fida Hussain pleaded that Dr. Saif-ur-Rahman did not sign the deed of transfer and that if it was proved that Saif-ur-Rahman signed the deed of transfer the contract was void on account of fraud, coercion and undue influence. Mohammad Hussain defendant No. 1 and Rahmat Ullah father of Fida Hussain plaintiff were sons of Dr. Saif-ur-Rahman. Of them Rahmat Ullah predeceased his father and died before the 20th of November 1936.

(1) 1940 A.I.R. (Pat.) 201. (2) 1921 A.I.R. (Cal.) 786.

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Mohammad Hussain, defendant No. 1, resisted the suit pleading that the parties were governed by Mohammadan Law in the matter of inheritance, that the transfer of shares was for consideration, that there was no fraud, coercion or undue influence and that the suit was barred by time. On the pleadings of the parties the trial Court fixed the issues specified hereunder :—

1. Is the suit within limitation ?

2. Whether the transfer of shares in question by Dr. Saif-ur-Rahman in favour of defendant No. 1 was under undue influence, coercion and fraud ?

3. Is defendant No. 1 entitled to special costs ; if so, to what extent ?

4. Relief.

On the 22nd of November 1945, the trial Court added issue No. 5 reading :—

5. Whether the plaintiff has no right to claim a share in the inheritance of the deceased Saif-ur-Rahman ?

In deciding civil suit No. 202 of 1944 the trial Court found issue No. 2 in favour of the plaintiff. On issue No. 1, the trial Court found that as the transfer was void Article 91 of the Indian Limitation Act, 1908, did not govern the suit and that the suit was governed by Article 120 of the Indian Limitation Act. On issue No. 5 the Court found that there was no proof on the record that the parties were governed by Mohammadan Law in the matter of succession and inheritance. In the result, the trial Court decreed with costs the plaintiff's suit declaring that he was the owner of the 30 shares in dispute. Defendant No. 2 did not defend the suit and so an *ex parte* decree was passed against defendant No. 2.

From the decree passed by the trial Court on the 9th of July 1946, Mohammad Hussain defendant

No. 1 preferred an appeal in the High Court of Judicature at Lahore, under section 96 of the Civil Procedure Code, 1908, and the appeal has been transferred for disposal to this Court under Article 13 of the High Courts (Punjab) Order, 1947.

Mr. Indar Dev Dua, counsel for the appellant, urges that the trial Court was in error in finding that the contract of transfer of shares was void. In this connection counsel cites sections 19 and 19-A of the Indian Contract Act, 1872, hereinafter referred to as the Act.

In plain English sections 19 and 19-A of the Act, provide that when consent to an agreement is caused by coercion, fraud and undue influence the agreement is a contract voidable at the option of the party whose consent was so caused. In other words sections 19 and 19-A declare that an agreement entered into as a result of coercion, fraud or undue influence is voidable at the option of the aggrieved party. Again, a party to a contract whose consent was caused by fraud may, if he thinks fit, insist that the contract shall be performed and that he shall be put in the position he would have been if the representation so made had been true. Clearly, the contract in question was not void but was voidable at the instance of Dr. Saif-ur-Rahman.

Mr. K. C. Nayyar, however, urges the plea of *non est factum*, that is, that the deed is void. On this point Mr. Nayyar cites *Raja Singh and others* v. *Chaichoo Singh* (1), and *Surat Chandar Gupta* v. *Kanai Lal Chukerbutty and another* (2).

In Sarat Chandar Gupta v. *Kanai Lal Chukerbutty and another* (2), the judgment proceeded upon the basis that Ranganmoni signed the document under the belief that she was signing a power-of-attorney whereas she was made to execute a deed of gift and

(1) 1940 A.I.R. (Pat.) 201.
(2) (1921-22) 26 C.W. No. 479. = 1921 A.I.R. (Cal.) 786.

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exchange, thereby alienating the property from herself to the defendant. Upon those facts the Court found that the contract was void *ab initio* and the suit was governed by Article 120 or Article 144 of the Indian Limitation Act.

In *Raja Singh and others* v. *Chaichoo Singh* (1), Meredith, J., (Fazl Ali, J., concurring) said :—

> " If Titai executed the document under the impression that it was a lease, when in fact it was a deed of gift, then I think there was no real execution since Titai's mind would have been directed to one thing whereas what he put his hand to was something of an altogether different character. If there was no real execution, the document was wholly void and not merely voidable. That is what was laid down in *Surat Chandar Gupta* v. *Kanai Lal Chukerbutty and another* (2)."

Now, the rule of English law is that if a person who seals and delivers a deed is misled by the misstatements or misrepresentations of the persons procuring the execution of the deed, so that he does not know what is the instrument to which he puts his hand, the deed is not his deed at all, because he was neither minded nor intended to sign a document of that character or class, as for instance a release while intending to execute a lease.

Applying the law stated above to the facts of the present case I have no doubt that the plea of *non est factum* has no application to this case.

In the present case Fida Hussain, plaintiff pleaded in paragraph No. 2 of the plaint—

> " Dr. Saif-ur-Rahman was suffering from fatal diseases. Consequently he did not possess sound mind and brain. Defendant

(1) 1940 A.I.R. (Pat.) 201.
(2) (1921-22) 26 C.W. No. 479.

No. 1 was residing at Ludhiana in those days. He took the said doctor to his parents-in-law's house at Ludhiana and himself attended on him. The deceased was helpless and solely depended upon him. For this reason defendant No. 1 had a strong hold on the feelings of the deceased and had undue influence upon him. The deceased was not in possession of sound disposing mind. Under these circumstances defendant No. 1 representing that a form in English bore the signatures of the doctor aforesaid got transfer entry No. 3392 in respect of the aforesaid shares made by defendant No. 2 in its papers on the 29th of November 1936. *In the first place the doctor did not sign the said form. If it is proved that he signed it, this is null and void and ineffectual in view of the above circumstances.* Defendant No. 1 did all this in order to prejudice the rights of the plaintiff. This is tantamount to forgery, fraud and misrepresentation and is totally without consideration."

In para No. 2 of the written statement Mohammad Hussain defendant pleaded—

"Para No. 2 is totally wrong and baseless. Dr. Saif-ur-Rahman while in the enjoyment of right senses and sound intellect for his own satisfaction sold his 60 shares of the company defendant No. 2 to me on the 20th November 1936, for consideration. He having duly sent intimation in that behalf to the office of defendant No. 2 lawfully got transferred those shares in my name."

Before the settlement of issues Fida Hussain plaintiff stated :—

"The transfer of shares took place on the 23rd of November 1936, in favour of defendant

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No. 1, by Dr. Saif-ur-Rahman, who was literate, and died on 21st May 1937."

From what I have said above it appears that the plea of *non est factum* was not raised in the plaint and the trial proceeded upon the assumption that the deed of transfer, Exhibit D. W. 1|1, was executed by Dr. Saif-ur-Rahman.

On merits no reliable evidence was examined at the trial that the deed of transfer, copy whereof is Exhibit D. W. 1|1, was not executed by Dr. Saif-ur-Rahman. Ghulam Qadir, P. W. 6, stated in examination-in-chief that Mohammad Hussain's father-in-law secured the signatures of the doctor in his presence saying that the defendant's application for leave had to be given. In cross-examination Ghulam Qadir stated that he was not a summoned witness and that about a week ago the plaintiff asked him to give evidence in the case. No reliance can be placed upon the evidence given by Ghulam Qadir.

Plaintiff admitted before the settlement of issues *that Dr. Saif-ur-Rahman was literate.* Gilani Khan, P. W. 3, stated at the trial that the doctor had passed the Vernacular Middle Examination. *Rai Bahadur* Dr. Salig Ram, D. W. 4, stated that Dr. Saif-ur-Rahman used to write prescriptions in English. The transfer deed, copy whereof is, Exhibit D. W. 1|1 bears the signatures of Dr. Saif-ur-Rahman in English. Clearly, Dr. Saif-ur-Rahman in executing the deed of transfer must have known that he dealt with the sale of Shares of the Company. As stated above, the plea of *non est factum* is not proved by the evidence of misrepresentation as to the contents of the deed when the person executing the deed knew that he dealt with the property to which it related. Auhority for this proposition is to be found in *Howaston* v. *Webb* (1).

Finding as I do, that in executing the deed of transfer Dr. Saif-ur-Rahman must have known that

(1) (1907) 1 Ch. D. 537.

he dealt with the sale of shares of the Company, the plea of *non est factum* is not open to Fida Hussain, plaintiff.

Mr. Karam Chand Nayyar then urges that the agreement, Exhibit D. W. 1|1, was made without consideration and was, therefore, void. In para No. 2 of the plaint it was said that the contract was without consideration. This plea was not put in issue presumably on account of the statement of Fida Hussain plaintiff that he made at the trial before the settlement of issues on the 3rd of January 1945. No objection was taken at any stage of the proceedings that proper issues had not been fixed at the trial. That being so, the plaintiff-respondent cannot be allowed to urge this point in these proceedings.

For the foregoing reasons, I find that the contract in question was voidable under sections 19 and 19-A of the Act and that Article 91 of the Indian Limitation Act governed Civil Suit No. 202 of 1944.

Considering then that Fida Hussain on his own showing came to know about the transfer of shares on the 29th of May 1940, from the defendant Company and civil suit No. 202 of 1944, was instituted on the 30th of October 1944, the suit was barred by time.

On the above findings it is not necessary to examine the correctness of the finding of the trial Court on issue No. 2.

In the result, I allow the appeal, set aside the judgment and decree of the trial Court and dismiss the plaintiff's suit leaving the parties to bear their own costs in this Court.

SONI, J. I agree.