Privy Council Appeal No. 64 of 1927.

Inche Noriah binte Mohamed Tahir - - - - - *Appellant*

v.

Shaik Allie bin Omar bin Abdullah Bahashuan - - - *Respondent*

FROM

THE SUPREME COURT OF THE STRAITS SETTLEMENTS (SETTLEMENT OF SINGAPORE).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 15TH OCTOBER, 1928.

Present at the Hearing:

THE LORD CHANCELLOR.
VISCOUNT SUMNER.
LORD ATKIN.

[*Delivered by the* LORD CHANCELLOR.]

In this case the appellant brings an action against the respondent claiming that a deed of gift, dated the 18th April, 1922, and made between the appellant and respondent, should be set aside on the ground that the relationship between the parties at the time when the deed was executed was such as to raise a presumption of undue influence against the respondent, and that that presumption had not been rebutted. The respondent denies that the relationship between the parties was such as to raise any presumption, and alleges that if there were such a relationship, the presumption was rebutted. The Trial Judge decided in favour of the appellant; but his judgment was reversed by the Court of Appeal, which held, by a majority, that there was no such relationship as raised any presumption of undue influence, and that if there were such presumption, it had been rebutted by the facts proved by the respondent. The facts leading up to the present action are as follows:—

The appellant is a Malay woman, wholly illiterate and of great age. The respondent is of Arab birth, and is the nephew by marriage of the appellant. The appellant's husband died

before the year 1902, leaving her a considerable amount of landed property. This property consisted of

(*a*) Two pieces of leasehold land of an area of some 4,097 sq. ft., situate at Minto Road, in Singapore, and held by him at a rental of $2 per annum for a term of 99 years from October, 1858.

(*b*) A house known as 104, Southbridge Road, Singapore, held for a term of 999 years at a rent of $1 per annum.

(*c*) Certain leasehold premises known as 1, 2 and 3, Minto Road, together with a small piece of land in McPherson Road, Singapore.

Shortly after her husband died, the appellant conveyed the whole of this estate to her daughter, Seetee Mariam, who was herself a widow and the sole surviving child of the appellant: and the appellant and her daughter then lived together at No. 2, Minto Road. The respondent came to Singapore about the year 1905, being then some twenty-three years of age. He went to live with his aunt, the appellant, and his cousin, Seetee Mariam, at No. 2, Minto Road. The respondent married in 1908, and brought his wife to live with him at this house. The respondent was entirely without means when he reached Singapore, and the appellant started him in business. At a subsequent date the respondent divorced his wife and remarried, and then went to live at No. 3, Minto Road, which he rented from Seetee Mariam at $10 a month. The two houses, Nos. 2 and 3, Minto Road, adjoined one another and there was a through communication between the two, and the respondent saw the appellant daily.

From 1918 onwards the respondent collected the rents of her properties for Seetee Mariam. On the 25th August, 1921, Seetee Mariam died, and the appellant became entitled to the properties as her next of kin. On the 12th September, 1921, the appellant executed a deed appointing the respondent her attorney for the purpose of obtaining letters of administration of the estate of Seetee Mariam, to be granted to him for her benefit; on the 23rd September, 1921, letters of administration were granted to the respondent accordingly. On the 1st March, 1922, the respondent conveyed to the appellant the whole of the properties as the legal personal representative of Seetee Mariam, but he continued to collect the rents. The respondent had employed Messrs. Drew and Napier, a well-known firm of solicitors in Singapore, to act for him in regard to the grant of letters of administration. On the 18th April, 1922, the appellant executed a deed of gift whereby she gave to the respondent absolutely the whole of the properties referred to under (*a*) and (*b*) above, and left herself with a total gross income of about $30 a year. The properties comprised in the deed of gift had been sworn by the respondent for probate at $23,600, and No. 104, Southbridge Road was then let at a rental of $100 a month, and was assessed for rates at $250 a month. At the time when the deed was executed,

and ever since the death of her daughter, the appellant had lived alone at No. 2, Minto Road, with the respondent in the communicating house next door. The appellant was so old and infirm that she was unable ever to leave the house, and she seldom saw any of her relatives or friends; the respondent managed the whole of her affairs, including all her domestic affairs, and bought her food and clothing. The respondent called evidence to show that before executing the deed, the appellant had independent advice from Mr. James Aitken, a lawyer of Singapore. Mr. Aitken gave evidence, and deposed that early in April, 1922, the respondent sent for him and told him that the appellant desired him to prepare a deed of gift in his, the respondent's, favour; that he accordingly attended at No. 2, Minto Road, and received instructions from the appellant to prepare such a deed of gift; he thinks that the details as to the leases of the land were given by the respondent. After receiving these instructions he saw the respondent at his office on a number of occasions, and he stated that on one occasion he told the respondent that he had better get another solicitor to represent him in order to protect his interests. After preparing the deed of gift, he took it to the appellant's house and explained it to her; the respondent was there when he arrived, but was not present during the explanation. He read the deed to the appellant and told her that it was irrevocable, and that it gave the property absolutely to the respondent, and he asked her if she signed voluntarily. He did not know that she was parting with practically the whole of her property, and he asked no questions as to the value of her total estate; he thought when he saw her that she was about 80 years of age and that she would not live long; he did not advise her that if she desired to ensure the respondent having her property after her death it would be possible to do so by will. His fees for drawing the deed of gift were paid by the respondent out of rents collected by him on behalf of the appellant. In addition to this evidence, a Mr. Campbell, another lawyer of Singapore, was called by the respondent, and stated that on the instructions of one of the appellant's relatives who had heard of the deed of gift, he went to see the appellant at her house on the 20th May, 1922; that the appellant was very angry at his coming, and said that she had made the deed voluntarily and that the respondent maintained her and took care of her, and that she did not wish the transaction set aside. The interview lasted about ten minutes; the respondent was not present when he arrived, but as Mr. Campbell was explaining to the appellant why he had come, the respondent came in and asked what was happening, and the witness thereupon explained how he came to be there, and left the house.

The appellant's evidence at the trial was disregarded because it was recognised by both sides that her mind was then in such a state as to render her evidence quite valueless. The respondent gave evidence, but the learned Trial Judge did not believe his

testimony. The learned Trial Judge found that from the death of her daughter onwards the appellant was a feeble old woman, unable to leave the house, relying entirely upon the respondent for everything—even for her food and clothes—leaving the management of her affairs to him, so that she had no knowledge of her own affairs or as to the value of her properties, and so that she was totally and completely in the respondent's hands. He held that when the deed was executed by the appellant her relationship with the respondent was such that he had gained complete ascendancy over her, and that the presumption arose that the deed was procured by his undue influence. He held further that the appellant had had no independent legal advice, and that the circumstances were not such as to rebut the presumption. At the hearing before this Board the respondent contended that there was no confidential relationship between the parties giving rise to any presumption; that if there was any such relationship, the gift was not referable to the relationship; and that in any event the evidence called by the respondent was sufficient to rebut the presumption, if it ever arose.

The principles upon which this case falls to be decided have been the subject of a series of decisions in the English Court of Chancery; and it was not disputed between the parties that the principles of English law must be applied. The question to be decided is stated in the judgment of Lord Justice Cotton in the well-known case of *Allcard* v. *Skinner*, 36 Ch. D., p. 145, at p. 171, as follows:—

> "The question is: Does the case fall within the principles laid down by the decisions of the Court of Chancery in setting aside voluntary gifts executed by parties who at the time were under such influence as, in the opinion of the Court, enabled the donor afterwards to set the gift aside? These decisions may be divided into two classes: first, where the Court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose: secondly, where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor. In such a case the Court sets aside the voluntary gift, unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justifies the Court in holding that the gift was the result of a free exercise of the donor's will. The first class of cases may be considered as depending on the principle that no one shall be allowed to retain any benefit arising from his own fraud or wrongful act. In the second class of cases the Court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused."

In their Lordships' view the relations between the appellant and respondent are correctly summarised in the judgment of the Trial Judge, and they are amply sufficient to raise the presumption of the influence of the respondent over the appellant and to render it incumbent upon him to prove that the gift was the spontaneous act of the appellant, acting under circumstances which enabled her to exercise an independent will, and

which justified the Court in holding that the gift was the result of the free exercise of her will.

At the hearing before this Board there was much discussion upon the question whether the presumption can be rebutted in any other way than by proof of independent legal advice, and also as to what constituted sufficient independent legal advice for this purpose. A number of cases were cited containing expressions of opinion by various learned judges, some of which are not easy to reconcile unless they are treated as governed by the particular facts of the case then under discussion. Their Lordships are satisfied that in the present case there were no circumstances except the giving of independent legal advice, if that was given, to rebut the presumption; but since the cases have never been reviewed in any ultimate Court of Appeal, their Lordships think it right to state the conclusion which they have reached.

For the appellant reliance was placed on the case of *Rhodes* v. *Bate* (L.R., 1 Ch., p. 252), and the passage in the judgment of Lord Justice Turner at p. 257 :—

> " I take it to be a well-established principle of this Court that persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can show to the satisfaction of the Court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them ",

and the language used by Farwell, J., in *Powell* v. *Powell*, [1900] 1 Ch., p. 243, at pp. 245-6 :—

> " It has been for many years well settled that no one standing in a fiduciary relation to another can retain a gift made to him by that other if the latter impeaches the gift within a reasonable time, unless the donee can prove that the donor had independent advice, or that the fiduciary relation had ceased for so long that the donor was under no control or influence whatever. The donee must show (and the onus is on him) that the donor either was emancipated, or was placed, by the possession of independent advice, in a position equivalent to emancipation."

and on the further statement of the learned Judge :—

> " Further, it is not sufficient that the donor should have an independent adviser unless he acts on his advice. If this were not so, the same influence that produced the desire to make the settlement would produce disregard of the advice to refrain from executing it, and so defeat the rule; but the stronger the influence the greater the need of protection. The real meaning of the rule is that the youth, being in the eye of the Court unfit to deal irrevocably with his parent or guardian in the matter of a gift of this kind, must appoint some independent adviser to act for him. It is the action resulting from the advice, not action against the advice, that binds the donor."

On the other hand, the respondent relied on a number of statements of the law which indicate that independent advice is only one of the methods by which the presumption can be rebutted.

As an instance, the judgment of Wright, J., *Morley* v. *Loughnan*, [1893] 1 Ch., 736, at p. 752, where the learned Judge says :—

> "The burthen lies on the recipient to show that the donor had independent advice or adopted the transaction after the influence was removed, or some equivalent circumstances."

and on the judgment of the Court of Appeal in the case of *Re Coomber*, [1911] 1 Ch., p. 723.

The decision in each of these cases seems to their Lordships to be entirely consistent with the principle of law as laid down in *Allcard* v. *Skinner* (*supra*). But their Lordships are not prepared to accept the view that independent legal advice is the only way in which the presumption can be rebutted ; nor are they prepared to affirm that independent legal advice, when given, does not rebut the presumption, unless it be shown that the advice was taken. It is necessary for the donee to prove that the gift was the result of the free exercise of independent will. The most obvious way to prove this is by establishing that the gift was made after the nature and effect of the transaction had been fully explained to the donor by some independent and qualified person so completely as to satisfy the Court that the donor was acting independently of any influence from the donee and with the full appreciation of what he was doing ; and in cases where there are no other circumstances this may be the only means by which the donee can rebut the presumption. But the fact to be established is that stated in the judgment already cited of Lord Justice Cotton, and if evidence is given of circumstances sufficient to establish this fact, their Lordships see no reason for disregarding them merely because they do not include independent advice from a lawyer. Nor are their Lordships prepared to lay down what advice must be received in order to satisfy the rule in cases where independent legal advice is relied upon, further than to say that it must be given with a knowledge of all relevant circumstances and must be such as a competent and honest adviser would give if acting solely in the interests of the donor.

In the present case their Lordships do not doubt that Mr. Aitken acted in good faith ; but he seems to have received a good deal of his information from the respondent ; he was not made aware of the material fact that the property which was being given away constituted practically the whole estate of the donor, and he certainly does not seem to have brought home to her mind the consequences to herself of what she was doing, or the fact that she could more prudently, and equally effectively, have benefited the donee without undue risk to herself by retaining the property in her own possession during her life and bestowing it upon him by her will. In their Lordships' view the facts proved by the respondent are not sufficient to rebut the presumption of undue influence which is raised by the relationship proved to have been in existence between the parties ; and they regard it as most important from the point of view of public policy to

maintain the rule of law which has been laid down and to insist that a gift made under circumstances which give rise to the presumption must be set aside unless the donee is able to satisfy the Court of facts sufficient to rebut the presumption.

It follows that in their Lordships' opinion the appeal must be allowed ; the judgment of the Trial Judge be restored, and the respondent must pay the costs of the action in the Courts below and of the appeal to His Majesty in Council.

Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

INCHE NORIAH BINTE MOHAMED TAHIR

v.

SHAIK ALLIE BIN OMAR BIN ABDULLAH BAHASHUAN.

DELIVERED BY THE LORD CHANCELLOR.

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