

**HIGH COURT OF TRIPURA
AGARTALA**

RSA 41 of 2014

Rahim Khan
Son of Late Ahmad Khan and late Karibunnessa of
Kailashahar, P.O. Tillagaon, P.S. Kailashahar, Unokoti.

----Appellant(s)
Versus

1. Akbar Khan
Son of Late Ahmad Khan and late Karibunnessa of
Village Dhaliarkandi, P.O. Tillagaon, P.S. Kailashahar,
Unokoti.
2. Ayub Khan
3. Gulab Khan
4. Ismail Khan
All sons of Late Ahmad Khan & late Karibunnessa.
5. Mayarunnessa
D/o Late Ahmad Khan & Late Karibunnessa,
W/o Tajmul Ali of Village Samrurpar, P.O. Dhaliarkandi,
P.S. Kailashahar, Unakoti District.
6. Mourunnessa
D/o Late Ahmad Khan & Late Karibunnessa
W/o Asbar Ali of Village Dhaliarkandi,
P.O. Tillabazar, P.S. Kaishahar, Unokoti District.
7. Attarunnessa
D/o Late Ahmad Khan & Late Karibunnessa
W/o Khurshed Ali, resident of Village Dhaliarkandi,
P.O. Tillabazar, P.S. Kailashahar, Unokoti District.

----Respondent(s).

1. Achaddar Ali
S/o Unknown, Deed Writer,
Kailashahar S.R. Office, P.O & P.S. Kailashahar,
Unokoti District.
2. Sajjarunnessa,
D/o Late Ahmad Khan & Late Karibunnessa
W/o Gulab Ali of Ramnagar PEC Brick Field,
Agartala Town, Ward No.10, P.O. Agartala,
P.S. Agartala, West Tripura District.
3. Ajid Khan S/o Late Ahmad Khan & Late Karibunnessa
C/o Kutubunnessa of Village Kalerkandi,
P.O. Tillabazar, P.S. Kailashahar, Unokoti District.

4. Amirunnessa, D/o Late Ahmad Khan & Late Karibunnessa
W/o Ekram Ali of Village & P.O. Latiapura,
P.S. Kaishahar, Unokoti District.

-----Proforma Respondents

For Appellant(s)	:	Mr. B Saha, Adv.
		Mr. S Bhattacharjee, Adv.
For Respondent(s)	:	Mr. GK Nama, Adv.
Whether fit for reporting	:	NO

HON'BLE MR. JUSTICE S. TALAPATRA

Judgment & Order (Oral)

27/03/2018

Heard Mr. B Saha, learned counsel appearing for the appellant as well as Mr. GK Nama, learned counsel appearing for the respondents No.1 to 7. None appears for the remaining respondents.

2. This is an appeal from the concurrent finding of fact returned by the judgment dated 03.06.2014 delivered in Title Appeal No.24/2013 by the District Judge, North Tripura, Kailashahar, as he then was.

3. By the order dated 08.06.2015, this appeal was admitted on the following substantial question of law:

“Whether in absence of finding supported by the evidence that the defendant No.1 was in the fiduciary relationship and in the active confidence of Karibunnessa, the executant of the sale deed at Exbt.A series can it be held that the onus of proving that there was no misrepresentation, fraud or undue influence in executing the sale deed, Exbt.A series lies with the defendant No.1 in view of Section 111 of the Evidence Act?”

4. S.111 of the Evidence Act provides that proof of good faith in transaction where one party is in relation of active

confidence remains on the party who is in a position of active confidence.

5. In the suit filed by the plaintiff-respondents it has been alleged that taking the opportunity of active confidence, the defendant No.1, the appellant herein, with his evil and greedy intention had taken his mother to Kailashahar on 23.02.2011 for providing her medical treatment. After taking the medical advice while she was awfully suffering under pain of Carcinoma (cancer) the defendant No.1 managed one earlier written kabala deed showing the execution on 21.02.2011 to be registered in the Sub-Registry office at Kailashahar. The said deed was executed by thumb impression and she herself presented it for registration. She was totally unaware what she was doing but the defendant No.1, the appellant herein, had exploited the active confidence and got the said deed dated 21.02.2011 (Exhibit-A) registered. Within few months, the executant of the said deed, namely, Karibunnessa, the mother of the plaintiffs and the defendants, died.

6. The suit land was not demarcated nor was separated for purpose of exclusive possession by the defendant No.1-appellant. When it came to the knowledge that such deed was registered, all the plaintiffs were taken a-back. Be it mentioned here that all the plaintiffs are the other sons and daughters of Karibunnessa, since deceased. The certified copy of the said deed was collected on 03.03.2012 to locate all these facts.

7. For purpose of establishing mis-representation and exploitation of the active confidence the plaintiffs have stated as under:

- I. The defendant No.1 with the unlawful assistance of scribe, the defendant No.2 manufactured this suit deed applying undue influence, fraud & mis-representation upon plaintiffs' mother and her thumb impressions were taken thereon without letting her know anything about this deed or its contexts & because during the days succeeding this date 23.02.2011 and the date of her death 01.06.2011 she never disclosed to anybody that she had sold out this suit land to the defendant No.1 for any price whatever.
- II. The deed-copy disclosed that she sold out the suit land for Rs.2.50 lakh. But not a single farthing was paid to her. All her heirs were jointly carrying out expenses of her treatment etc. she had two Bank A/Cs such as 3345 at T.G.B Tillabazar Branch which bore only Rs.199/- as balance on 21.07.2011 and another A/c for old age pension at the same Bank bearing No. 4291 (CBS 8089011704291) which also did not show any big credit balance like 2.50 lakh or even any big withdrawal at the time.
- III. In such a fabulous transaction, no relation or near men of hers was witness in that deed.
- IV. She was falsely shown as the presenter of the document for registration. Rather some strangers were shown as witnesses therein.
- V. She was aged, disease-stricken and illiterate and her T.I. were taken indiscriminately.
- VI. Though the mother, Karibunnessa, was living throughout at village Kalerkandi, but in the deed she was shown to be of Dhaliarkandi.
- VII. Wrong and incorrect description of the suit land or the Kabala lands were given therein and these incorrect descriptions made the land non-existent as per the schedule-description of this suit deed. The defendant No.1 committed mistakes in the descriptions because he had no physical idea about their lands. Those errors at land-descriptions of the deed are noted at the 2nd schedule. Plots no. and boundary-descriptions did not tally.
- VIII. This suit-deed was manufactured just to deprive all other heirs of Karibunnessa.

IX. She being illiterate did not know anything about this deed, its creation and its contexts and therefore she was not a conscious executant therein.

X. The suit-deed was a fake, ingenuine, illegal and artificial deed devoid of any consideration. Not a single farthing was ever paid to her and nothing was read out to her. It was spurious one.

XI. The suit serial plot no.III of the 2nd schedule was shown in part in the deed-schedule for an area of 0.04 acre within its total area 0.31 acre but at the site, there was/is not such sub-plot.

XII. The suit land was of much higher value than Rs.2.50 lakh at that time.

8. In reply to the said para 5, where these facts were succinctly stated, the defendant No.1-appellant has simply refuted by stating that those were not true and, therefore, the defendant No.1-appellant did not admit such allegations of fraud, collusion or mis-representation.

9. The trial court for purpose of adjudication of the suit framed several issues including:

“Whether the suit deed of first schedule is illegal being effects of fraud, undue influence, misrepresentation and collusion and also for non consideration?”

10. The trial court after recording the evidence has observed that the burden of establishing the plea of fraud and mis-representation shifts to the defendant to show that the executor of the suit deed had actually been competent at the time of executing the deed. In this context, it has been observed that Karibunnessa at the relevant point of time was aged about 87 years and at her death bed. She was not in a position to make a rational judgment of anything. It has been further stated that from the cross-examination of DW1, the defendant No.1-

appellant, it appears that DW1 admitted that his mother was suffering from Cancer and she was being treated in the Cancer Hospital and during that time she had executed the suit deed.

11. From a reading of the said deed (Exhibit-A) it appears that the entire land was transacted in favour of the defendant No.1 without leaving any part and parcel of the land for any other sons and daughters.

12. Finally, the trial court having scrutinized the records came to the inference that the defendant No.1 in order to discharge his onus has failed to prove that any consideration money was paid to his mother for executing the sale deed. There cannot be any amount of dispute that when the fiduciary relation or the relation of active confidence is proved, the onus immediately shifts to the person who was in the active confidence and in whose favour certain act has been done, even though DW3, the deed writer, has stated that the deed was written as per the version of Karibunnessa to establish the *bona fide*. However, it has been pleaded that the suit deed was read in presence of the witnesses. Thereafter, the thumb impression was put on the suit deed but DW3 has categorically stated that he did not make any endorsement in this regard on the body of the deed.

13. Finally, the trial court has observed that for failure to prove that the defendant No.1 did not exploit the active confidence and the transaction was *bona fide*, the trial court has declared the said suit deed (Exhibit 1 series) as described in the

first schedule as illegal being tainted by fraud, mis-representation or undue influence and being without consideration. Hence, it has been declared that the said deed will not have any binding effect on the plaintiffs or other legal heirs of Karibunnessa, since deceased. Thereafter, the trial court proceeded to determine the respective shares of the legal heirs of Karibunnessa, since deceased.

14. The said judgment dated 05.08.2013 was challenged in the appeal filed by the defendant No.1 in Title Appeal No. 24/2013 in the Court of the District Judge, North Tripura, Kailashahar, as he then was. The first appellate court affirmed the said judgment without interfering with the findings of the trial court. According to the first appellate court, Section 111 of the Evidence Act is one of the Sections in the said act creating exceptions in respect of the burden of proof. It provides, as stated earlier, that one of whom stands to the other in a position of active confidence, the burden of proving the good faith to the transaction is on the party who is in a position of active confidence.

15. The first appellate court on appreciation of the evidence has given a clear finding that in the case at hand there no iota of evidence has been laid to show that the consideration to the extent of Rs.2,50,000/- or any part thereof, was deposited in the two pass books of Karibunnessa, since deceased (Exhibit-1 series). Further, the defendant No.1-appellant has not pleaded or proved that Karibunnessa had any other bank account or any

other account with any banking institution and thus, finally the first appellate court has observed as under:

“....the defendant-appellant has failed to discharge his onus that no fraud, misrepresentation, etc. were practiced upon Karibunnessa and that, Karibunnessa, since deceased, was mentally sound within the meaning of section 12 of the Contract Act to execute a sale deed. Consequently, the transaction in Ext.A series, the suit deed, has been proved to be unconscionable.”

16. The appeal, on such finding, was dismissed on affirmance of the judgment dated 05.08.2013 delivered in Title Suit No. 26/2012.

17. Having appreciated the grounds as taken in this appeal filed under Section 100 and having reference to the substantial question of law as framed, this Court is of the opinion that there is no infirmity which might persuade to upset the concurrent finding in this appeal, inasmuch as, Mr. Saha, learned counsel appearing for the appellant has fairly submitted that the onus of proof in terms of Section 111 of the Evidence Act could not be discharged by the appellant (the defendant No.1 in the suit) and, hence, this appeal being devoid of merit is dismissed.

18. Draw the decree accordingly.

Send down the LCRs thereafter.

JUDGE