REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

CIVIL APPEAL NO 42 OF 1975

JAYANTILAL LALJI GANDHI

BHOVANLDAI LALJI GANDHI …….. APPLELLANTS

(also known as Bhavanlal Lalji Gandhi)

AND

MAVJI RUDA ……..……. RESPONDENT

(Court of Appeal at Nairobi (Kneller, Hancox JJ A and Gachuhi, Ag J A) March 14, 1986)

JUDGMENT

Duress and **Equitable doctrine of undue influence** – whether pressure to execute a mortgage amounted to either duress or undue influence – meaning and application in law**, Consideration** – whether it it essential to support a document under seal, **Evidence** – is recital in a document conclusive evidence that such consideration has actually passed – whether proof that money did not pass infringes the statutory provision that parole evidence is not admissible to contradict or vary the document.

The action is based on a mortgage conveyed to the respondent by the second appellant as surety for a debt due by the first appellant to the respondent. The conveyance was of the second appellant as surety for debt due by the first appellant to the respondent. The conveyance was of the second appellants' undivided half share in the mortgage property.The appellants did not dispute that the Mortgage Deed was executed by them but they contend that this was procured by threats and duress and that the consideration stated therein was fictitious and illusory. They applied to the High Court for a declaration that the mortgage was null and void and that the property was free of encumbrance and for delivery up of the title deed to them. The trial judge found for the respondent.

Not satisfied, the appellants appealed contending that the mortgage was so vitiated by duress and that the mortgage was so vitiated by duress and coercion to the extend that it was rendered void.

HELD: (i) That the appellants had failed to prove that the consideration was fictitious of illusory.

(ii) That documentary and oral evidence availed do not support a finding of undue influence in that there was no compulsion on the appellant to execute the mortgage.

(iii) Though not pleaded or argued, consideration is not essential to support a document which is under seal.

Cases referred to:

1. Allcard v Skinner [1887] 36 ch.D 145.

2. Huguenin v Baseley [1807] 33 English Reports, 526.

3. Lal Chand Kohil v Machar Singh & Others, Supreme Court Civil Case 130 of 1960.

4. Devkunverben v Buth, appeal no. 38 of 1964. Privy Council

5. Sah lal Chand v Indavji [1900] Indian appeals, 95

6. Flonter v Sadder [1882] 10 Q BD,572

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(Coram: Kneller, Hancox, JJA and Gachuhi, Ag JA)

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(also known as BHAVANLAL LALJI GANDHI)

AND

MAVJI RUDA ……..…….. RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi

(Simpson, J dated January 20, 1975

In

Civil Case NO 379 of 1972

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JUDGMENT OF HANCOX, KNELLER AND GACHUHI JJ A

The action in the High Court before Simpson, J (as he then was) was based on a mortgage dated the April 15, 1965, whereby the second appellant conveyed to the respondent his undivided half share in the

property situated in the Vanga District of the Savidie Province of the former East African Protectorate (now part of the Republic of Kenya) comprising 320.12 acres. In that document he was described as the first surety, and it provided that he and the third appellant (therein described as the second surety), who is his son, should be deemed to be principal debtors under the mortgage deed though they were in fact standing as sureties for a debt of Kshs 75,000.00, said to be due by the first appellant (therein described as the debtor) who was the brother of the second appellant, to the respondent.

This alleged debt arose in the following way (I say “alleged” because it has been urged by Mr D N Khanna on behalf of the appellants in this appeal that this money never in fact passed between the parties to the earlier contract). There was a verbal agreement on August 18, 1960, between the first appellant and one C M Patel, acting as the agents for a Mrs Jocelyn de Safrin of Leeds, England on, the one hand, and the respondent and one Chagan Odhavji on the other hand, for the supply of the three Indian motion pictures to the latter for exhibition in what were then Kenya, Uganda, Tanganyika and Zanzibar.The stated consideration was that they “remitted” Kshs 120,000.00 to Mrs De Safrin of which the respondent contributed Kshs 60,000.00, against the first appellant’s guarantee that Mrs Safrin would duly perform her part of the verbal agreement to supply the films.

In fact, so it is recited in the mortgage deed, Mrs de Safrin failed to perform her part of the bargain and, consequently, it was agreed between the first appellant and the respondent that he would in accordance with his guarantee, discharge Mrs De Safrin’s liability to repay the Kshs 60,000.00, plus a further Kshs 15,000.00 by way of interest, as agreed damages presumably for such non-performance. The document further recited that the 2nd and 3rd appellants had requested the respondent to desist from demanding the Kshs 75,000.00 from the first appellant for thirty months from April 1, 1965, and, in consideration thereof, that they would guarantee payment of that amount, securing it, as I said, on the second appellant’s property, which was described in the schedule to the agreement.

Again there was a default, since the Kshs 75,00.00 was not paid by the due date, namely October 1, 1967, and the respondent, accordingly sued all three appellants for this sum plus interest, which began to run from the date of the second default, commencing the action Kshs 27,000.00, representing an interest in accordance with the eight recital in the mortgage deed. The appellants did not dispute the execution of the mortgage deed, but alleged in their joint defence that this was procedured by threats and duress and also that the consideration stated therein was fictitious and illusory. They consequently counterclaimed for a declaration that the mortgage was null and void, that the property was free of encumbrance and for delivery up of the title deed to them. All these matters were denied in the reply and defence to counterclaim, and in particular that the matters particularized in paragraph 1 of the defence amounted in law to duress.

It is perfectly true that duress as common law is confined to violence to the person, or threats of violence, and I am content to adopt, the following extract from Chesire & Fifoot’s Law of Contract, 8th Edition at page 281 as a correct statement of legal duress; sufficient to vitiate an agreement one side:-

“Duress at common law, or what is sometimes called legal duress, means actual violence or threats to violence to the person i.e, threats calculated to produce fear of loss of life or readily harm. It is a part of the law which nowadays seldom raises an issue.

That a contract should be procured actual violence is difficult to conceive, and a more probable means of inducement is threat of violence. The rule here is that the threat must be illegal in the sense that it must be threat to commit a crime or a tort. Thus to threaten an imprisonment that would be unlawful if coerced constitutes duress, but not if the imprisonment would be lawful. Again a contract procured by a threat to prosecute for a crime that as actual been committed, or to sue for a civil wrong, or to put the member of

a trade association on a stop list, is not as a general rule voidable for duress:.

It follows that the respondent's contention in his reply as regards duress was correct, as it was never alleged that there was any violence or threat thereof. However, the appellants, presumably by an amendment, added the words, "coercion and /or before "duress"' in their defences which term I would regard as included the equitable doctrine of undue influence, which is stated by Lindley L J in All Card v Skinner, [1887] 36 Ch D 145 at p 181 as follows:-

"The doctrine relied upon by the appellant is the doctrine of undue influence expounded in Huguenin v Baseley and other cases of that class. These cases may be subdivided into two groups, which, however, often overlap. First, there are the cases in which there has been some unfair and improper conduct, some coercion from outside, some form of cheating and generally, though not always, some personal advantage obtained by a donee placed in some close and confidential relation to the donor, Morton v Rally; Nottige v Prince, Lyon v Home, and Whyte v Meade all belong to this group. In Whyte v Meade a gift to a convent was set aside, but the gift was the result of coercion, clearly proved. The evidence does not bring this case within this group.

The second group consists of cases in which the position of the donor to the donee has been such that it has been duty of the donee to advise the donor, or even to manage his property for him. In such cases the court throws upon the donee the burden of proving that he has not abused his position, and of proving that the gift made to him has not been brought about by any undue influence on his part. In this class it has been considered necessary to show that the donor had independent advice, and was removed from the influence of the donee when the gift to him was made. Huguenin v Baseley was a case of this kind. The defendant had not only acquired consisderable spiritual influence over the plaintiff, but was entrusted by her with the management of the property."

Huguenin v Baseley [1807] 33 English Reports, 526 was a case where a clergyman was said to have used his position and influence over a widow who was entitled to large estates, to convey one of the estates to him. At page 533 of the Report, Lord Eldon L C said:

"But the view I take in this case is that, attending to the effect of the letter, the evidence of transactions among these parties, and attending more especially to the evidence of the attorney, the defence rests in a great measure upon this, that the court is by the nature of the defence required to look at this deed, not merely by itself, but as being more or less justified with reference to the transactions, in the course of which it was executed."

The latter part of this citation forms a part of Mr Khanna's submissions in this case, namely that in order to decide the validity or otherwise of the consideration in the instant case, it is incumbent upon the court to look at the whole set of transactions which occurred over the years. Later on in the report Lord Eldon said:

To the question, whether, these instruments being such as I have represented them, the consequences is, that this court shall undo them, I answer, no; if they are the pure, voluntary, well understood, acts of her mind: but if they have not that character, if they are the result of her notion, that this is the true effect of that friendly assistance, that kind, providential, interference, to which she was looking for the management of her affairs with advantage and facility to herself, if the conveyance was executed under the effect of that, which has always been considered in this court as undue influence, if the deeds themselves, which are the best evidence, demonstrate and if they are confirmed by extrinsic evidence, that they are not the pure, well understood, acts of her mind, this court will undo them."

However, although it formed the first ground of the memorandum of appeal to this court, Mr Khanna did not, as I understood him, rely specifically in his argument, on behalf of the appellants, on the doctrine of undue influence as procuring the execution of the mortgage by the third appellant on his own and the other two appellants' behalf. Still less did he cross the line on to the more modern group of cases dealing with inequality of bargaining power. Instead he relied on it as a background of pressure for his contention, based on the remaining grounds in the memorandum of appeal, that the only possible conclusion was that the consideration for the mortgage was fictitious and illusory.

To return, however, to the history of this case, when the matter came for hearing before Simpson J he ruled that as the mortgage itself was not denied, and as the appellants sought to have it declared null and void on the grounds stated in their defence, they should have the right to begin, and that that which was described as the major burden of proof should lie on them. Neither of the first two appellants was available to give evidence, having left for India well before this action was filed, and so the only oral evidence called before the learned judge on the appellant's behalf was that of the unfortunate third appellant. After hearing him, the respondent, the son Chagan Odhavji, Mr Kassam, the advocate who prepared the mortgage in the presence of the third appellant (and who explained its effect to him as required under the India Transfer of Property Act, 1882, as amended,) and one other formal witness, the judge found as a fact that though third appellant "may have been" under pressure when he executed the mortgage the pressure did not amount either to duress or coercion, which I take to mean undue influence.

What was the nature of the pressure to which the learned judge referred" Apart from the background which I have endeavoured to narrate, another suit had been filed previously. No 662 of 1964, in which the respondent's company sued "B L Ghandi (sued as a firm)", a firm in which the third appellant's father obviously had a substantial interest, for Kshs 15,277.89 due on two promissory notes, plus interest, and had initiated proceedings for execution by attachment of their movable property. Portions of these proceedings were exhibited as Ex 1 at the hearing, as were documents filed in the action by the respondent and Chagan Odhavji against Mrs de Safrin for the return of the Kshs 120,000.00 on the ground of a total failure of consideration. That action proved fruitless, since the decree for Kshs 162,428.15 against her, which was registered in England under the Administration of Justice Act, 1920 by Master Ritchie, was subsequently set aside by him on November 22. For good measure the respondent's then advocate, Mr Kassam, also extracted from the third appellant an undertaking to pay Kshs 1,200.00 for services rendered to him (the third appellant), by four monthly installments of Kshs 300.00, starting on June 5, 1965. This undertaking was dated May 10, 1965, that is to say after the execution of the mortgage deed.

At the material time the only income the third appellant seems to have had was the rental from a block of flats which belonged to his father, the second appellant. This amounted to Kshs 2,400.00 per month, from which he said had to be deducted Kshs 800.00 for outstanding rates and tax, and a further Kshs 300.00 which was being directly collected by a Mr Kanji Lalji, who was another creditor. Thus he only had Kshs 1,300.00 per month on which to keep himself, his wife and their two children.

Accordingly, when the respondent and his advocate threatened to attach the rents in execution of the decretal sum due in Civil Suit No 662 of 1964, which after interest and costs, amounted to Kshs 17,611.76, the third appellant became alarmed, and, when he was also informed for the first time about the Safrin debt, was only too ready to sign the mortgage in return for the respondent accepting payment by installments. In fact, he appears to have executed a second mortgage over the same land, on the same day but this is not shown to have been registered, nor was it the subject of the plaint in the action from which this appeal is brought.

Mr Kassam confirmed the foregoing, in the sense that he said that the respondent had agreed to accept the Kshs 17,611.26 by installments, and instructed him to lift the warrants of attachment and to prepare the mortgage. The account of these two witnesses then begins to diverge because the third appellant said that when he asked why he was expected to sign a mortgage in 1965 for a debt incurred in 1960 he was told that he would have to do it if he wanted “help” with the installments in the second case. He said he was “very nervous” and that he had no alternative but to sign Mr Kassam, however said:

“I saw no evidence of any duress. Vasant signed. He appeared to be perfectly willing – made no objections. Had there been any reluctancy on his part or of Ruda I would never have had the documents executed.”

The learned judge, however, expressly found that the third appellant executed the mortgage in order to avoid attachment of rents, and that he had relied on the respondent’s undertaking to “use his best endeavour to recover the Kshs 120,000.00 from Mrs de Safrin, that he did obtain a decree dated March 13, 1967 and that this decree was registered in England on May 30, 1967, even though it was subsequently set aside.

Mr Khanna’s argument regarding the fictitious and illusory consideration supporting the execution of the mortgage by the third appellant was presented in this way. He said that the appellant, confronted as he was with the allegation regarding Mrs de Safrin, had no means of knowing whether this transaction was genuine or not (indeed, the defence was that it was a bogus transaction) in the absence of the other two appellants in India. The statement in the recitals that there was such a transaction was not sufficient to prove its existence, particularly when, the surrounding circumstances, and in particular the tenor of the correspondence in the record of appeal are analyzed.

Mr Kanna referred us to the payment of sterling pounds 6000 shown in the register of telegrams, and in the Barclays Bank statement and request of telegraphic transfer made on August 18, 1960, and yet he said there was nothing to show what it was for until the letter of February 15, 1961, when Mr Odhavji wrote in these terms:

“Dear Madam,

Hope you are in best of health.

I would like to introduce myself to you. I think that you might have heard my name through your bank, my name is Chagan Odhavji of Nairobi, the person who has sent you sterling pounds 6,000 through your bank on August 18, 1960. I haven’t received acknowledgement from you since then.

I shall be pleased if you kindly furnish me with details of what arrangements have been made with the money sent to you by me.

My intention of knowing the arrangement made with the money, to say that I have given the detail to the Local Income Tax Department.

Hoping to hear soon from you.

Thanking you very much,

Yours sincerely.”

Then there is further confirmation of the sum that had been remitted in the joint letter of March 8. In other words, Mr Khanna submitted, there was no contemporaneous conversion or correspondence to show that this remittance was for films or anything else.Why, if they were doing business to that extent, should Chagan Odhavji wish to “introduce” himself nearly six months later" The first reference to films is over a year later in the letter of September 12, 1962 to Mrs de Safrin, followed by a general letter from the respondent to the second appellant on April, 1962, of which the translation was produced as exhibit 6A, in which there, is a passing reference only to distribution of films, but nothing about a deal with Mrs de Safrin. In other words the whole matter of the alleged agreement with Mrs de Safrin was surrounded by suspicious circumstances and , Mr Kahnna submitted that we should hold, as Farrell J did in lal Chand Kohl v Machar Singh and others Supreme Court, Civil Case 130 of 1960, that no such transaction took place. Similarly in the Privy Council case of Devkunverben v Butt, Appeal No 38 of 1964, the acknowledgement of indebtness by one of the principal debtors was held to be unsafe to support the alleged liability of the guarantor.

However, there was a considerable difference on the facts between Lal Chand / Kohl v Machar Singh and the present case. There the argument was advanced that there was an antecedent debt to support the mortgage, which was contrary to the plaintiff’s own evidence. In Devjunverden v Butt there was no proof of delivery of the goods in question to Kajiado European Stores, or of their indebtness to the suppliers, and thus nothing to which the guarantee which was sued upon could be appurtenant. In the instant case there was oral evidence from the respondent that he agreed, jointly with Odhavji, to remit Kshs 120,000.00 or sterling pounds 6,000, to Mrs de Safrin, whom he did not then know (thus explaining to some extent the “introduction” in the letter of February 15, 1961), and that the films in question (one with a variation in the title) were shown in Kenya by other companies. It is true that the learned judge did not make an express finding as to the credibility of the respondent, but he did hold that the first appellant’s liability to indemnify the respondent under the guarantee was the essence of the consideration, and, bearing in mind that he had held that the burden of proof lay on the appellants (against which there has been no appeal), he went on to say that in the face of the execution of the mortgage by the third respondent (who was not under duress or coercion) he could not make a finding that the consideration was fictitious or illusory.

It is perfectly true as Mr Khanna submitted on the basis of the Commentary in Sarkar on Evidence, 12th edition at page 802 that a recital in a document as to consideration is not conclusive evidence that such consideration has actually passed. Equally Shahlal Chand v Indarjit [1900] 27 Indian Appeals, 95 at page 97 is authority for the proposition that notwithstanding such a recital it is open to party to prove that no consideration was actually paid. But the commentary and the cases cited therein, and Sarlal Chand v Indarjit, were dealing with section 92 of the Indian Evidence Act, which corresponds to the Kenya section 98, under which parol evidence is not admissible to contradict, add to, vary or subtract from any matter required by law to be embodied in a document. It was held that proof that money did not pass or of some other fact did not infringe the statutory provision, because to do so was not contradicting or varying the document, but was evidence as to a matter of fact.

In the present case, however the judge recognized the oddities of the situation and took them into account. He nevertheless held that the appellants had failed to prove that the consideration was fictitious or illusory. Having carefully considered all the submissions before us, all the documentary and oral evidence, and the authorities, I am not prepared to differ from that finding, or, indeed, from the judge’s finding that there was no undue influence operating on the third appellant to compel him to execute the mortgage. In my opinion he was right, and, on the latter issue, his finding is supported by the words of Cotton L J in Flower v Sadler [1882] 10 Q BD 572 at p 576, (cited by Mr Gautama on behalf of the respondent), as follows:

" A threat to prosecute is not of itself illegal; and the doctrine contended for does apply, where a just and bona fide debt actually exists, where there is good consideration for giving a security, and where the transaction between the parties involves a civil liability as well as, possibly, a criminal act. In my opinion a threat to prosecute does not necessarily vitiate a subsequent agreement by the debtor to give security for a debt, which he justly owes to his creditor."

This principle must apply, a fortiori, as regards a threat to take civil action, or to execute upon a decree. There is nothing unlawful about doing so.

In any case the appellants were not precise as to the consideration which they were alleging was fictitious and illusory. Very probably they meant the initial transaction between the respondent and Odhavji, on the one hand, and the first appellant and C M Patel on behalf of Mrs de Safrin on the other. But other items of consideration appear from the mortgage document. They are first, the guarantee of Mrs de Safrin's debt by the first respondent, secondly the forbearance by the respondent by not demanding payment of the Kshs 75,000.00 for thirty months (a considerable advantage to the debtors), and thirdly that the respondent would use the best endeavour to recover the money from Mrs de Safrin, of which as I said there is evidence in support. To this can be added the lifting of the warrants of attachment in Civil Case 662 of 1964. Furthermore, though this was not argued or pleaded, consideration is not essential to support a document which is under seal, on Chitty on Contracts 25th Edition, paragraph 2.

For these reasons, I consider the judge's finding on both issues should be upheld and I would dismiss the appeal with costs.

Dated at Nairobi this 14th day of March, 1986.

A R W Hancox

Judge of Appeal

A A Kneller

Judge of Appeal

J M Gachuhi

Ag Judge of Appeal