



A.S. No.532 of 1993

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Dated: 16.02.2024

CORAM:

THE HON'BLE MR.JUSTICE **P. DHANABAL**

A.S.No.532 of 1993
and
C.M.P. No.2310 of 2022

1.Abdul Aziz (died)
2.A.Khaja Mainuddeen (died)
3.S.Shahida Haque
4.K.Ruxana
5.K.Mohamed Abbas
*(Appellants 3 to 5 are brought on record as Lrs
of the deceased sole appellant vide Court order
dated 03.03.2017)*

.VS.

1.Sophia Bibi (Died)
2.Omandur
3.Ramakrishna Reddiar
4.Siraj (Died)
5.S.Damodaran
6.K.Mohammed Imthias Ahamed
7.K.Abdul Khader (Died)
8.M.Mohammed Elias
9.Naseema Begum (died)
*Memo Recorded as R4, R7 & R9 are died vide Court
Order dated 04.09.2017 in A.S(MD)No.532 of 1993*
10.Shameem Begam
11.Shakeela Begam
12.S.A.Azara Thapasum
13.A.K.Iqbal Ahamed
*(R19 to R 13 are brought on record as Lrs of the
deceased 1st respondent vide Court Order, dated
03.03.2017)*
14.Najumunisha Begam
*(Given up-Notice may be dispensed with) (R14 is
brought on record as LR of the deceased sole
appellant vide Court Order dated 03.03.2017)*
15.Shabbar
16.Muzammil
17.Fathima Begam
18.Jabeena Begam



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19.Ayesha Begam

20.Gowshia Begam

21.Sulthana Begam

22.Mohamed Abdullah

R11 who is already on record is recorded as LR of the deceased R4 and R15 & R16 are brought on record as Lrs of the deceased R4 RR6, 9 to 13 are recorded as Lrs of the deceased R7 and R17 to R 22 are brought on record as Lrs of the deceased R9 vide Court order dated 19.07.2018

23. R.Sharmila

24.R.Mohamed Rafi

(Respondents 23 & 24 are impleaded vide Court Order dated 20.04.2018 made in C.M.P(MD)No.11219/2017)

.... Respondents

Prayer : This Appeal Suit has been filed under Section 96 r/w. Order 41 Rule 1 of C.P.C to set aside the judgment and decree passed by the learned Principal Subordinate Judge, Tiruchirapalli made in O.s. No.217 of 1984 dated 21.01.1993

For Appellant

: Mr.A.Arumugam

for M/s.Ajmal Associates

For RR6,10,12,13 & 17 to 21 : Mr.M.Saravanan

For RR23& 24

: Mrs. S.Mahalakshmi

For R11

: Mr.K.S.Sankar Murali

JUDGMENT

This Appeal Suit has been filed as against the judgment and decree passed in O.S.No.217 of 1984 on the file of the learned Principal Subordinate Judge, Tiruchirapalli, dated 21.01.1993, wherein the first appellant herein has filed a suit as against the defendants for the relief of declaration and recovery of possession and for *mesne* profits.



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2. The suit was partly decreed and partly dismissed. As against the dismissal, the present appeal has been preferred.

3. For the sake of convenience and brevity, the parties hereinafter will be referred to as per their status/ranking in the trial Court.

4. The averments of the plaint are as follows:

The first item of the scheduled property was situated at Tiruverumbur, Trichy District, and the 2 to 4 items scheduled properties are situated in Periyar District. Originally the first item belongs to the plaintiff's father Ghudumian Sahib and his mother Jainath Bibi plaintiff. The said Jainath Bibi mother of the plaintiff died on 19.03.1958. The plaintiff is the only legal heir of Jainath Bibi. After the demise of Jainath Bibi the father of the plaintiff enjoyed the properties for himself and on behalf of the plaintiff. The father of the plaintiff's Ghudumian Sahib died on 16.01.1979. The first item of the property was leased out to the second defendant and the second defendant agreed to give 13 kalam of Paddy towards premium of lease. After the demise of the father of the plaintiff the second defendant has not paid the lease premium at the instigation of the first defendant.



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4.1.The items 2,3,4 belong to the mother of the plaintiff namely Jainath bibi. The said Jainath bibi died intestate leaving behind the plaintiff as her only legal heir. Therefore, the properties of Ghudumian Sahib and Jainath Bibi, who are the parents of the plaintiff, belongs to the plaintiff. After the demise of the plaintiff, he used to receive the lease amount from the lessors. The third respondent is the lessee of the second item of the property. The fourth defendant is the lessee of the third item of the property. Defendants 3 and 4 were already vacated from the premises . Defendants 1,6 and 7 are enjoying the said properties as tenants. In the second item of property one Maha Elais was inducted as tenant and the first defendant is collecting rent illegally. The fifth defendant purchased one portion of the property of the third item from the first defendant and the said sale deed is false and not binding on the plaintiff. The sixth defendant is the son of the first defendant and he was a tenant of fourth item of property under the father of the plaintiff. The fourth defendant is the son-in-law of the first defendant. The fourth and sixth defendants have not paid rent and the first defendant has no right to collect rent from the other defendants.



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4.2.The first defendant proclaims that she is the daughter of the Ghudumian Sahib and Jainath Bibi and the same is not correct. The first defendant was not born to Ghudumian Sahib and Jainath Bibi but she is the foster daughter. Therefore, the first defendant is not the legal heir of Ghudumian Sahib and Jainath bibi The first defendant states that the Jainath Bibi executed a settlement deed in their favour and the same is false and not binding upon the plaintiff. No right or title was transferred through that settlement deed and it was not acted upon. The said Jainath Bibi was affected by cancer, blood pressure and paralysis and she was taking treatment at Vellore Hospital, since her health condition was too worse the doctor advised them to take her to home and thereby she was taken to Erode. Therefore, few days before her death she was taken to Erode, at that time, she was not in a proper state of mind and she was unconscious. Therefore, she could not execute any document.

4.3.The first defendant filed suit in O.S. No. 1016/1979 before the District Munsif Court, Tiruchirapalli and that the suit was filed based on the agreement dated 13.01.1979 and she alleged that the said agreement was executed by the plaintiff in favour of the first defendant, but, that agreement was executed on coercion with undue influence. Therefore, in that suit it was decided that the



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agreement was obtained with undue influence and thereby it is null and void. As against the judgment and decree, the first defendant has preferred an appeal in A.S. No.4 of 1982 and the same was dismissed on 25.08.1982. Thereafter, the first defendant insisted to execute release deed after 40 days of demise of his father and he has also executed a relinquishment deed, since the agreement was not acted upon, the relinquishment deed was not executed voluntarily. Therefore, the 1st defendant is not entitled to any rights through the said agreement as well as the release deed. The said release deed was obtained by playing fraud. At the time of execution of settlement, the Ghudumian Sahib was not in talking terms with the plaintiff and he had illegal intimacy with the first defendant and he was under the influence of the first defendant. Therefore, the settlement deed was obtained by playing fraud. The power deed executed in favour of Ghudumian Sahib is also a false one. In order to defeat the rights of the plaintiff those documents were created. Already the plaintiff issued notice dated 30.03.1992 and the same was replied by the first defendant with false averments. The third defendant has filed RCOP No.42 of 1982 before the Rent Controller, Erode and in that petition the plaintiff and the first defendant were added as parties for the second item of the properties. In that petition, the plaintiff pleaded that he is entitled to the rent amount.



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Now the rent amount has been deposited before the Rent Controller, therefore the plaintiff has filed the suit for declaration, recovery of possession of for *mesne* profits.

5. The written statement filed by the first defendant and adopted by defendants 4,6, and 7 are as follows:

The first item of the suit property is having an extent of 16.5 cents and the second item of the property was having an extent of 38 cents, totally 54.5 cents. Out of 54.5 cents, the mother of the first defendant, namely, Jainath Bibi is entitled to 18-1/6 cents and the remaining properties belong to the first defendant and Ghudumian Sahib. The Jainath Bibi executed settlement deed on 18.06.1958 in respect of her 1/3 share. Therefore, the first defendant is entitled to 2/3 share and Ghudumian Sahib is entitled to 1/3 share over the properties. Therefore, the properties of Ghudumian Sahib devolved on the plaintiff and the first defendant. The plaintiff is entitled to 2/3 share and the 1st defendant is entitled to 1/3 share of Ghudumian Sahib. The defendant as the daughter of Ghudumian Sahib is entitled to 0.12-2/18 cents and the plaintiff is entitled to remaining 0.23-4-18 cents. On 26.02.1879 the plaintiff has released the properties of items 1 and 2 through relinquishment deed. Therefore, the plaintiff is not entitled to any extent in the properties mentioned in item Nos.1 and 2.



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5.1.The averments that Jainath Bibi died interstate is false, on the other hand before the death she executed registered settlement deed 18.03.1958 in favour of the first defendant. The settlement deed was duly executed, attested and registered and the same was accepted and acted upon. After execution of settlement deed, the defendant has become owner of the suit properties. After settlement deed the first defendant was alone in possession and enjoyment of the property and she also executed power deed in favour of his father Ghudumian Sahib and he enjoyed the properties on behalf of the first defendant. Since the first defendant is the owner of items 1 and 2 of the schedule properties the tenants are paying rent to the first defendant. Further, since the plaintiff is not the owner of the items 1 and 2 he cannot claim anything as rent from the tenants. Since the 1st defendant is the daughter of Jainath Bibi, she as a legal heir is entitled to succeed the estate of Jainath Bibi and Jainath Bibi has also executed the settlement deed. Either Ghudumian Sahib or plaintiff have no interest in the suit properties after the settlement deed was executed by Jainath Bibi in favour of the first defendant.

5.2.The first defendant sold one portion of the property in item No. 3 to the fifth defendant. The sixth defendant is the son of the



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first defendant and he is in possession and enjoyment of the fourth item of the property as tenant. The sixth defendant never paid any rent to Ghudumian Sahib. The fourth defendant is the son-in-law of the first defendant and he is not in possession of the property as tenant. The allegation that this defendant was brought up as foster daughter by Ghudumian Sahib and Jainath bibi and his wife is false. This defendant was born to Ghudumian Sahib and Jainath bibi. The plaintiff cannot claim any right or title or interest over the suit properties. The plaintiff is fully aware of the settlement deed in favour of the first defendant. After the settlement deed, the first defendant mutated the revenue records in her name. Pursuant to the settlement deed possession was also given to the first defendant. The plaintiff never raised any objections for the mutation of records in the municipal register.

5.3. It is false to state that the mother of the plaintiff was admitted in the hospital and she was also unconscious at that time settlement deed was obtained. Till the death of the mother of the first defendant and plaintiff was in sound disposing state of mind and settlement deed was executed voluntarily. Reference to the suit in O.S. No. 1016 of 1979 is unwanted to the present suit. The properties of O.S. No. 1016 of 1979 are not the subject matter of this



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suit. The plaintiff is well educated and he executed settlement deed in favour of the 1st defendant in respect of items 1 and 2 of the suit properties on 26.02.1979. The said deed was executed voluntarily in the Registrar's Office, but on the same date this defendant also executed similar release deed in favour of the plaintiff. Therefore, the plaintiff is bound by the release deed dated 26.02.1979. Both the release deeds were executed by the respective plaintiff and 1st defendant for consideration. The allegation that Ghudumian Sahib was not in good terms with the plaintiff and he has intimacy with the 1st defendant, this is defamatory statement. After receiving the notice, the same was suitably replied. Therefore, the plaintiff will not be entitled to any share over the properties.

5.4. In fact Jainath Bibi has borrowed money by executing mortgage deeds, one of them being in favour of one A.T. Sambasivam, who has filed a suit in O.S. No. 56 of 1956 on the file of the Sub Court, Erode. The above said A.T.Selvam filed civil suit as against the defendant's father Ghudumian Sahib in O.S. Nos. 137 of 1962 on the file of the Sub Court, Erode in which plaintiff and 1st respondent was impleaded as defendants. The plaintiff was also fully aware of the filing of the suit and in that suit itself this defendant was impleaded solely as the settlee on the basis of the settlement



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deed executed by the deceased mother. The plaintiff, who was impleaded as second defendant in the suit did not raise any objection. Therefore the plaintiff has knowledge about the execution of settlement deed through the above said suit. The decree was passed in that suit and amount was fully discharged by this defendant as settlee under settlement deed. The first defendant has been making encumbrance over the properties. The first defendant had also executed mortgages in the year 1960 in respect of the same properties and then discharged the same.

5.5 The plaintiff also fully aware of the above said encumbrance. Never the plaintiff raised any objection so far. Further, the first defendant had sold some of the properties to third parties. The plaintiff also not taken any steps as against those properties. The claim of the plaintiff is barred by limitation. The second item of the suit property was originally vacant site at the time of settlement deed and thereafter the first defendant put up construction in that land. At the time of mortgage, the said construction were referred in that deed. The plaintiff was fully aware of the construction raised by the first defendant but he did not raise any objection. Therefore, the suit is barred by limitation. Hence the suit is liable to be dismissed.



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6. Based on the above said pleadings and hearing both sides,
the trial Court has framed the following issues:

1. கூடுமியான் சாகிப் மற்றும் ஜைனப் பீபி ஆகியோருக்கு வாதி மட்டும் ஒரே வாரிசா?
2. கூடுமியான் சாகிபுக்கு வாதி ஒரே வாரிசா?
3. முதல் பிரதிவாதி சோபியா பீபி கூடுமியான் சாகிப் மற்றும் ஜைனப் பீபி ஆகியோரின் வளர்ப்பு மகளா?
4. கூடுமியான் சாகிப், ஜைனப் பீபி ஆகியோருக்கு முதல் பிரதிவாதி பிறந்த மகளா?
5. 26.02.79ம் தேதியன்று வாதி, முதல் பிரதிவாதிக்கு எழுதிக் கொடுத்த விடுதலை பத்திரம் உண்மையானதா? நடைமுறைப் படுத்தப்பட்டுள்ளதா?
6. பிராது 1,2 இலக்க சொத்துக்கள் முதல் பிரதிவாதிக்கு பாத்தியமானதா?
7. 18.03.58ம் தேதியன்று ஜைனப் பீபி முதல் பிரதிவாதிக்கு தானசெட்டில்மெண்ட் பத்திரம் எழுதிக் கொடுத்தாரென்பது உண்மையா, அது நடைமுறைப்படுத்தப்பட்டுள்ளதா?
8. பிராது 3,4 இலக்க சொத்துக்கள் வாதிக்கு பாத்தியமானதா?
9. பிராது 3,4 இலக்க சொத்துக்கள் முதல் பிரதிவாதிக்கு பாத்தியமானதா?
10. முதல் பிரதிவாதியிடமிருந்து பிராது 3வது இலக்க சொத்தின் ஒரு பகுதியை 5வது பிரதிவாதி கிரயம் வாங்கியுள்ளாரா? அதன் மூலம் ஒரு பகுதி 5வது பிரதிவாதிக்கு பாத்தியமானதா?
11. பிராது 4வது இலக்க சொத்தில் முதல் பிரதிவாதியின் மகள் என்ற முறையில் 6வது பிரதிவாதி அனுபோகத்திலிருந்து வருகிறாரா?
12. 5,6 பிரதிவாதிகள் வாடகைதாரர்கள் என்பது உண்மையா?
13. இந்த வழக்கு காலவரம்பிற்குள் தாக்கல் செய்யப்பட்டுள்ளதா?



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14. வழக்கிடைச் சொத்துக்களில் வாதி பாத்தியதை உரிமை கோருவதை அவருடைய நடத்தையின் மூலமும் மற்றும் பிராது 2வது இலக்க சொத்தில் வாதி உரிமை கோருவது அவருடைய நடத்தையின் மூலமும் தடை செய்யப்பட்டுள்ளதா?
15. வாதி கேட்டுள்ள பரிகாரங்கள் கிடைக்கத்தக்கதா?
16. வாதிக்கு கிடைக்கத்தக்க பரிகாரங்கள் என்ன?

7.In order to prove the case before the trial Court, on the side of the plaintiff they have examined P.W.1 to P.W.3 and marked Exs.A1 to A35 and on the side of the defendants the D.W. 1 to D.W3 were examined and documents Exs.B.1 to B.108 were marked.

8. After analysing the evidence adduced on both sides, the trial Court has partly decreed the suit and partly dismissed the suit by holding that the second item of the first scheduled property is undivided share of $13 \frac{3}{4}$ cents and second item of the first scheduled property undivided share of $31 \frac{2}{3}$ cents which belongs to the plaintiff and the plaintiff can take steps for partition of the above said property and in other aspects the suit was dismissed with costs. Aggrieved over the decree and judgment of the trial Court, the present appeal has been filed by the plaintiff on various grounds.

Grounds of Appeal



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i) the judgment and decree of the trial Court are against law, weight of evidence and probabilities of case?

ii) the trial Court failed to consider that the very execution of settlement deed itself was denied by the plaintiff, thereby the first defendant ought to have examined the attesting witness but she has not examined any witness and thereby she failed to prove the settlement deed.

iii) Even though the scribes were died, the plaintiff has not taken any steps to prove the attestation in accordance with law.

iv) The trial Court failed to consider that Jainath bibi at the time of alleged execution of Hiba was in coma and not in sound disposing state of mind and the trial Court believed the evidence of P.W.3 and the oral testimony of P.W.3 is liable to be rejected.

v) the trial Court ought not to have relied solely upon the endorsement made by the Sub Registrar to base his findings on the issue of execution, attestation of impugned Hiba deed.

vi) the trial Court failed to consider the fact that the father of the plaintiff who was not in talking terms with the plaintiff and he was interested with the first defendant with whom he has in illegal intimacy and therefore he attested the document.

viii) The trial Court ought to have held that the impugned Hiba, power of attorney and the transaction contained in Exs. B.27



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to 32 and Exs.B.55 to 57 are nothing but a make belief documents in the light of Exs.A.24 and 28 to A35 and the conduct of the first defendant and the father of the plaintiff.

ix) The findings of the trial Court on the point of delivery of possession by alleged donar to the alleged donee is erroneous .

x) The trial court exercised its discretion under Section 90 of the Indian Evidence Act is Arbitrarily and unjustifiable. The presumption and assumption cannot be take a piece of legal evidence.

xi) There is no motive for Jainath Bibi to exclude her only son or husband from inheriting her properties or paupering herself completely.

xiii) the trial Court ought to have found that the gift of a share if at all in the suit item no.1 and 2 in which is undivided share of the alleged donor is invalid under Mohamedan Law?

xiv) the trial Court failed to consider that the mutation of name in the Municipal register does not constitute possession or enjoyment?

xv) The judgment and decree of the lower court are liable to be set aside insofar as they are against these appellants

9. The learned counsel appearing for the appellant would



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contend that the originally the properties belongs to the father and mother of the plaintiff and the plaintiff is the only legal heir of the Ghudumian Sahib and Jainath Bibi and the first defendant is not a biological daughter of Ghudumian Sahib and Jainath Bibi and she is only a foster daughter, therefore she is not entitled to any share of the properties of Ghudumian Sahib and Jainath Bibi, who are the biological parents of the appellant/plaintiff. Therefore, the appellants are entitled for the properties of Ghudumian Sahib and Jainath Bibi. The first defendant falsely claiming that the 1st appellant/plaintiff executed release deed in respect of the second item of the suit property and other properties were settled in favour of the first respondent/first defendant. The plaintiff never executed any release deed in favour of the first respondent/first defendant. Infact. there was no talking terms between the plaintiff and his father Ghudumian Sahib. Taking advantage of the same, the appellant/first defendant played fraud and obtained settlement deed. The mother of the plaintiff was affected by cancer and she was taking treatment in Vellore Hospital and thereafter she was taken to Erode and at that time Jainath Bibi was not in the state of disposing mind and she was in coma stage, therefore, the first defendant taking advantage of the same created alleged settlement deed in her favour dated 18.03.1958. The appellant / plaintiff denied the execution,



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attestation and validity of settlement deed. Whiles, it is the duty of the first defendant to prove the settlement deed in the manner known to law but she failed to examine the attesting witness. Though the father of the first appellant / plaintiff is claiming to be one of the attester and he died the plaintiff failed to examine any other witnesses to prove the attestation in accordance with the provisions of evidence act. Therefore the first defendant failed to prove the settlement deed executed in her favour. Further, the mutation of records in the name of the first defendant alone is not sufficient to prove the actual possession of the properties and the possession of properties was not given to her. Therefore, the settlement deed was obtained by playing fraud. Therefore, the settlement deed was not duly proved by the first defendant but the trial Court failed to consider the same and erroneously dismissed the suit in respect of other properties and only decreed the suit in respect of undivided share in the first item of the scheduled property.

10. Further the parents of the plaintiff were under the influence of the first defendant and thereby they are in fiduciary capacity, therefore the first defendant has to prove that the deed was executed voluntarily. To support his contention, he relied on the



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judgment of the Hon'ble Supreme Court in the case ***Pratima Chowdhury .vs. Kalpana Mukherjee and another*** reported in ***(2014) 4 SCC 196***.

11. The learned counsel appearing for the first respondent/first defendant would contend that the first respondent/first defendant is the daughter of Ghudumian Sahib and Jainath Bibi and she is not a foster daughter as alleged by the appellant/plaintiff. The Ghudumian Sahib and Jainath Bibi were under the care and custody of the first defendant. The first schedule of the property belongs to the father of the plaintiff and the first defendant and items 2 to 4 of the schedule property belongs to the mother of the plaintiff and the first respondent / first defendant. In respect of the properties of Jainath Bibi she executed settlement deed dated 18.03.1958 and the deed was duly executed, attested and registered and through the settlement deed possession was given to the first respondent/first defendant. Mutation of revenue records was also taken place pursuant to the registration of the settlement deed. Therefore, on and from the date of settlement deed the first respondent/first defendant has been enjoying the properties as her absolute property. Therefore, the appellant/plaintiff has no right over the properties which were given through settlement deed through the first



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respondent/first defendant. The first item of the property belongs to Ghudumian Sahib and the plaintiff executed release deed in favour of the first defendant on 26.02.1978 in respect of first and second items of properties, therefore the plaintiff is not entitled to suit properties but the first respondent/first defendant leased out the properties situated in Erode District to various persons and collecting rents from them.

12. The first appellant/plaintiff never shared any rent from the said properties. The properties are under the exclusive possession of first respondent/first defendant. The settlement deed was executed in the year 1958 and the plaintiff relinquished his rights through settlement deed dated 26.02.1979 and the first appellant/plaintiff is also aware of the above said settlement deed and the release deed, therefore the suit is barred by limitation. Moreover, Jainath Bibi mortgaged one portion of the property, thereby the mortgagor filed a suit before the Sub Court, Erode in O.S. No.137 of 1962 and the plaintiff was also added as one of the party in the suit. The appellant/plaintiff and this respondent were also added as party. This first respondent/first defendant was added as settlee to the property and the said suit was decreed in favour of the plaintiff therein and the first respondent/first defendant only



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settled the mortgage amount and at that time the plaintiff never raised any objection, after having knowledge about the settlement deed in favour of the first respondent/first plaintiff.

13. Therefore, in the year 1962 itself the plaintiff had knowledge about the settlement deed. Therefore, the suit is barred by limitation. However, the trial Court after considering the evidence adduced on both sides hold that the plaintiff is entitled to the properties of undivided share in the first item of the property and directed the plaintiff to take steps for partition and dismissed the suit in respect of other properties, hence, the present appeal is liable to be dismissed.

14. This Court heard both sides and perused the records and upon hearing both sides and perusing the records the points for determination in this appeal are as follows:

- 1) Whether the first defendant is the biological daughter of Ghudumian Sahib and Jainath Bibi ?
- 2) Whether the appellant/plaintiff executed release deed in favour of the first respondent/first defendant in respect suit items 1 and 2 of first scheduled properties?
- 3) Whether Jainath Bibi executed a settlement deed in



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favour of the first respondent/first defendant on 18.03.1958?

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4) Whether the plaintiff is entitled to the relief of declaration of title over the suit properties?

5) Whether the plaintiff is entitled to the relief of recovery of possession over the suit properties?

6) Whether the suit is barred by limitation?

7) Whether the appeal is liable to be allowed or not?

8) To what other relief the parties are entitled to?

Point No.1

15. In this case the suit is filed by the plaintiff alleging that he is the only legal heir of the deceased Ghudumian Sahib and Jainath bibi and the first respondent/first defendant is the foster daughter of Ghudumian Sahib and Jainath bibi. According to the first respondent/first defendant, she is not the foster daughter and she is the biological daughter of her parents Ghudumian Sahib and Jainath Bibi. In order to prove the same, the first respondent/first defendant has not produced any documents like birth certificate or school records. More over in Ex.A.1 notice dated 13.03.1982, the plaintiff has categorically stated that first respondent/first defendant was not the biological daughter of Ghudumian Sahib and Jainath Bibi and the same was not denied in Ex.A.21 which is reply notice given by



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the first respondent/first defendant. More over, in that reply notice there is no mention about the place of birth and date of birth of the first respondent/first defendant. Per contra, Ex.A4 dated 19.02.1935, it shows that one Venkatachala Mudhaliyar had concubine by name Mariyayee and she has one female child. After the birth of female child the said Mariyayee died and thereafter the said Venkatachala Mudhaliyar only brought up the child and the said girl was given to Ghudumian Sahib and the said document was filed in O.S.No. 1016 of 1979. Therefore, as per Ex.A.4 the first respondent/first defendant is the foster daughter of Ghudumian Sahib and Jainath Bibi.

16. In Ex.A.5, there is a recital that one Ajmadkulla was the witness and the said document was not denied by the first respondent/first defendant. Therefore, from the above said evidence it is clear that the first respondent/first defendant is not biological daughter of Ghudumian Sahib and Jainath Bibi and she is the foster daughter to them. Thus, the point no.1 is answered

Point No.2

17. According to the first respondent/first defendant, items 1 and 2 of the suit scheduled properties were relinquished by the first appellant/plaintiff through release deed dated 26.02.1979 but the



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said deed has been marked as Ex.B.108. On a careful perusal of the above said documents, it is revealed that the first appellant/plaintiff had relinquished his right over the properties of items 1 and 2 of the first schedule. The first appellant/plaintiff also in the pleadings stated that he executed a deed after one day of expiry of 40th ceremony of wakf nama and further he pleaded that the first defendant refused to allow the plaintiff to see his father and thereby inorder to see his father he exeucted Exs.B.107 and 108 and in Ex.B. 108 seven persons attested as witnesses and now they are no more, but the trial Court in the judgement already discussed that Ex.B.107, which is agreement alleged to have been executed by the appellant/plaintiff was challenged in O.S. No.1016 of 1976 and the trial court had decided that the agreement was not executed voluntarily and in the appeal also the same was discussed and confirmed. Therefore, the agreement Ex.B.107 is not a valid document and Ex.B. 108 is not acted upon. As per agreement referred in Ex.B.107, Ex.B.108 was not registered and the same was revealed through Ex.A.23 i.e letter of Sub Registrar. Therefore, the trial Court has held that Ex.B.108 was not acted upon.

18. The first respondent / first defendant has not stated the reasons for non registration of the document Ex.B.108 and Ex.B.108 is based on Ex.B.107. The genuinenity of Ex.B.107 was decided in



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O.S.No.116/1976 and therefore, under Ex.B.108 properties were not relinquished to the first respondent/first defendant by the first appellant/plaintiff. Therefore the first respondent/first defendant failed to prove his contention that the first appellant/plaintiff had relinquished her rights through release deed dated 26.02.1976 has not been proved. Thus, the second point is answered.

Substantial question of law No.3

19.According to appellant/plaintiff, the properties in item 2 to 4 of the schedule properties belong to the mother of Jainath Bibi and the properties are situated in Erode, and since the appellant/plaintiff alone is the legal heir of the deceased Jainath Bibi, who died intestate, thereby the first appellant/plaintiff being the sole heir is enjoying the properties. Per contra, the first respondent's/first defendant's contention is that the said Jainathbibi during her life time executed a settlement deed and the same was duly executed, attested, registered and the possession of the properties were also given to the first respondent/first defendant. Therefore on and from the date of settlement deed itself the first respondent/first defendant has been in exclusive possession of the properties. The first respondent/first defendant only received rents from the tenants and the plaintiff never received any share from the properties. The settlement deed was executed by the Jainath Bibi while she was in



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sound state of mind. In order to prove the settlement deed, the defendants have not examined any attesting witnesses of the alleged settlement deed.

20. The learned counsel appearing for the first appellant/plaintiff argued that the first respondent/first defendant has failed to examine any attesting witness and thereby the execution and attestation of the deed was not proved, but according to the first respondent/first defendant, the attesting witnesses are not alive, thereby the defendant unable to examine those witnesses. Moreover the plaintiff himself admitted the execution of document in the year 1962, wherein the suit was filed by one of the mortgagor in O.S.No. 137 of 1962. In this context the defendants have marked Ex.A.23 to Ex.A.26. On careful perusal of those documents, it reveals that the Jainath Bibi mortgaged the property to one Sambasivam and he filed suit for recovery of money in O.S. No.137 of 1962 based on mortgage and the same was decreed and in that suit the plaintiff as well as the first defendant are parties to the suit. The first defendant was added as a party on the basis of settlement and she only settled the amount to the plaintiff in the above said suit. Therefore, the first appellant/plaintiff has knowledge about the settlement deed in favour of the first defendant through Exps.A.23 to 26. Therefore, the plaintiff has not taken any steps as against the settlement deed



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immediately after having knowledge about the settlement deed.

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21. Further the learned counsel appearing for the appellant argued that though settlement deed executed by Jainath Bibi is one type of Hiba under Mohamadeen Law, under the Mohamadeen Law the gift can be oral while so when gift was given in the form of document and the same has been registered, there is no need of attestating witnesses.

22. In this context, the learned counsel appearing for the first respondent relied judgment of the Hon'ble Apex Court in the case of ***Hafeeza Bibi and others vs Shaikh Farid (Dead) by Lrs and others*** reported in ***(2011) 6 MLJ 309(SC)***, wherein it is held as follows:

“29. In our opinion, merely because the gift is reduced to writing by a Mohammadan instead of it having been made orally, such writing does not become a formal document or instrument of gift. When a gift could be made by Mohammadan orally, its nature and character is not changed because of it having been made by a written document. What is important for a valid gift under Mohammadan Law is that three essential requisites must be fulfilled. The form is immaterial. If all the three essential requisites are satisfied constituting 20 valid gift, the transaction of gift would not be rendered invalid because it has been written on a plain piece of paper. The distinction that if a written deed of gift recites the factum of prior gift then such deed is not required to be registered but when the writing is contemporaneous with the making of the gift, it must be registered, is inappropriate and does not seem to us to be in conformity with the rule of gifts in



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Mohammadan Law.

30. *In considering what is the Mohammadan Law on the subject of gifts inter vivos, the Privy Council in Mohammad Abdul Ghani¹ stated that when the old and authoritative texts of Mohammadan Law were promulgated there were not in contemplation of any one any Transfer of Property Acts, any Registration Acts, any Revenue Courts to record transfers of possession of land, and that could not have been intended to lay down for all time what should alone be the evidence that titles to lands had passed.*

31. *Section 129 of T.P. Act preserves the rule of Mohammadan Law and excludes the applicability of Section 123 of T.P. Act to a gift of an immovable property by a Mohammadan. We find ourselves in express agreement with the statement of law reproduced above from Mulla, Principles of Mahomedan Law (19th 21 Edition), page 120. In other words, it is not the requirement that in all cases where the gift deed is contemporaneous to the making of the gift then such deed must be registered under Section 17 of the Registration Act. Each case would depend on its own facts.*

32. *We are unable to concur with the view of the Full Bench of Andhra Pradesh High Court in the case of Tayyaba Begum⁵. We approve the view of the Calcutta High Court in Nasib Ali³ that a deed of gift executed by a Mohammadan is not the instrument effecting, creating or making the gift but a mere piece of evidence, such writing is not a document of title but is a piece of evidence.*

33. *We also approve the view of the Gauhati High Court in the case of Md. Hesabuddin¹⁰. The judgments to the contrary by Andhra Pradesh High Court, Jammu and Kashmir High Court and Madras High Court do not lay down the correct law.*

34. *Now, as regards the facts of the present case, the gift was made by Shaik Dawood by a written deed dated February 5, 1968 in favour of his son Mohammed Yakub in respect of the properties 'A' schedule and 'B' schedule appended thereto. The gift – as is recited in the deed – was based on love and affection for Mohammed Yakub²² as after the death of donor's wife, he has been looking after and helping him. Can it be said that because a declaration is reduced to writing, it must have been registered? We*



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think not. The acceptance of the gift by Mohammed Yakub is also evidenced as he signed the deed. Mohammed Yakub was residing in the 'B' schedule property consisting of a house and a kitchen room appurtenant thereto and, thus, was in physical possession of residential house with the donor. The trial court on consideration of the entire evidence on record has recorded a categorical finding that Shaik Dawood (donor), executed the gift deed dated February 5, 1968 in favour of donee (Mohammed Yakub), the donee accepted the gift and the donor handed over the properties covered by the gift deed to the donee. The trial court further held that all the three essentials of a valid gift under the Mohammadan Law were satisfied. The view of the trial court is in accord with the legal position stated by us above. The gift deed dated February 5, 1968 is a form of declaration by the donor and not an instrument of gift as contemplated under Section 17 of the Registration Act. As all the three essential requisites are satisfied by the gift deed dated February 5, 1968, the gift in favour of defendant 2 became complete and irrevocable.

23. As per Mohammaden Law there are three essential requisites to make a gift valid

- i) the declaration of the gift by the donor.
- ii) acceptance of gift by the donee expressly or impliedly and
- iii) delivery of possession to and taking possession thereof by the donee actually or constructively. No written document is required in such a case. Section 129 Transfer of Property Act, excludes the rule of Mahomedan law from the purview of Section 123 which mandates that the gift of immovable property must be effected by a registered instrument as stated therein. But it cannot be taken as a *sine qua non* in all cases.



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24.In the case on hand also the first respondent/first defendant has marked so many documents to prove the taking of possession and she produced municipal records in her name and also she sold properties to some other person i.e., the fifth respondent. The plaintiff after having knowledge of sale by the first defendant to the fifth defendant has not taken any steps to set aside the sale executed by the first defendant in favour of the fifth defendant. All these would show that already the property was handed over to the first defendant and she was in possession of the property and she has taken possession over the property. Once the document need not be reduced in writing and registered, then question of proving the document through examination of witnesses under Sections 68 and 69 of the Indian Evidence Act would not arise.

25.In this context the learned counsel appearing for the appellant/plaintiff has argued that the settlement deed was obtained due to the fiduciary capacity and Jainath Bibi was under the custody of the first defendant and thereby she failed to prove that the deed was voluntarily executed by Jainath Bibi as per Section 113 of Indian Evidence Act. In this context the learned counsel appearing for the appellant had relied on the judgment in the case of



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Pratima Chowdhury .vs. Kalpana Mukherjee and another

reported in (2014) 4 SCC 196, wherein it is held as follows:

“The subject of fiduciary relationship as also examined by this Court in, Krishna Mohan Kul alias Nani Charan Kul vs. Partima Maity (2004) 89 SCC 468, wherein it was held as under “:

“12. When fraud, mis-representation 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 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 and 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. In such a case the burden 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 against 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 Indian Evidence Act, 1872 (in short the '[Evidence Act](#)'). The rule here laid down is in accordance with a principle long acknowledged and administered in Courts of Equity in England and America. This principle is that he who bargains in a matter of advantage with a person who places confidence in him is bound to show that a proper and reasonable use has been made of that confidence. The transaction is not necessarily void ipso facto, nor is it necessary for those who impeach it to establish that there has been fraud or imposition, but the burden of establishing its perfect fairness, adequacy and equity is cast upon the person in whom the confidence has been reposed. The rule applies equally to all persons standing in confidential relations with each other. Agents, trustees, executors, administrators, auctioneers, and others have been held to fall within the rule. The Section requires that the party on whom the burden



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of proof is laid should have been in a position of active confidence where fraud is alleged, the rule has been clearly established in England that in the case of a stranger equity will not set aside a voluntary deed or donation, however, improvident it may be, if it be free from the imputation of fraud, surprise, undue influence and spontaneously executed or made by the donor with his eyes open. Where an active confidential, or fiduciary relation exists between the parties, there the burden of proof is on the donee or those claiming through him. It has further been laid down that where a person gains a great advantage over another by a voluntary instrument, the burden of proof is thrown upon the person receiving the benefit and he is under the necessity of showing that the transaction is fair and honest.

13. In judging of the validity of transactions between persons standing in a confidential relation to each other, it is very material to see whether the person conferring a benefit on the other had competent and independent advice. The age or capacity of the person conferring the benefit and the nature of the benefit are of very great importance in such cases. It is always obligatory for the donor/beneficiary under a document to prove due execution of the document in accordance with law, even de hors the reasonableness or otherwise of the transaction, to avail of the benefit or claim rights under the document irrespective of the fact whether such party is the defendant or plaintiff before Court.

14. It is now well established that a Court of Equity, when a person obtains any benefit from another imposes upon the grantee the burden, if he wishes to maintain the contract or gift, of proving that in fact he exerted no influence for the purpose of obtaining it. The proposition is very clearly stated in Ashburner's Principles of Equity, 2nd Ed., p.229, thus:

"When the relation between the donor and donee at or shortly before the execution of the gift has been such as to raise a presumption that the donee had influence over the donor, the court sets aside the gift unless the donee can prove that the gift was the result of a free exercise of the donor's will.

The above conclusions recorded by this Court, came to be reiterated recently in Anil Rishi v. Gurbaksh Singh

26. On a careful perusal of the above said judgment, it is clear



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that when a person obtains any benefit from another imposes upon the grantee the burden, if he wishes to maintain the contract or gift, of proving that in fact he exerted no influence for the purpose of obtaining it. In the case on hand, according to the plaintiff, the mother was under the custody of the first defendant thereby the first defendant failed to prove that the deed was executed voluntarily. In this context, the records shows that the settlement deed was dated 18.03.1958 and thereafter, either the plaintiff or his father never questioned the settlement deed till filing of the suit. The suit was filed in the year 1982. Prior to that, the plaintiff is having knowledge about the settlement deed has not taken any steps, thereby the first appellant/plaintiff is estopped from raising such plea in the suit. Therefore, the contention of the appellants that the first defendant failed to prove his voluntariness is not acceptable one.

27. Another contention raised by the learned counsel for the first appellant/plaintiff is that the trial court has held that the execution of settlement deed is proved by relying Section 90 of Indian Evidence Act. As far as Section 90 of the Indian Evidence Act is concerned if the document is more than 30 years old then the presumption would arise. In this case the date of settlement deed is 08.03.1958 and the suit was filed in the year 1984. Therefore, on the



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date of filing the said document not even completed 27 years, thereby Section 90 of Indian Evidence Act would not attract. This Court has perused the entire records and on perusal of the entire records they revealed that the date of settlement deed is 08.05.1958 and the date of filing of the suit is 18.01.1984, therefore on that date the said document is below 30 years and thereby the findings of the trial Court that under Section 90 of Indian Evidence Act execution, attestation were proved validly is not acceptable one and the same is liable to be set aside.

28. However, the other evidences show the declaration of gift by the donor and the acceptance by the donee and actual delivery of possession. Therefore the gift under the Mohameden Law was duly proved by the first respondent/first defendant. Therefore, the trial Court has also elaborately discussed in its judgment and held that the document was registetered in the house of the plaintiff and thereby they hold that execution of document was proved. In this context the trial Court after refering judgments concluded that the settlement deed was proved by the defendants. In view of the above said discussions, the first respondent/first defendant proved that Jainath Bibi executed settlement deed in her favour and pursuant to the settlement the first respondent/first defendant is in possession of



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the property. Thus, the third point is answered.

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Point No. 4

29. This Court has already decided in previous points that the first respondent/first defendant has failed to prove that the plaintiff executed release deed and thereby the property belongs to the first defendant. According to the plaintiff, he is only the legal heir to the deceased Ghudumian Sahib who is the father of the first appellant/plaintiff. However, the properties are under the possession of the first defendant and the same was also admitted by the plaintiff and thereby he sought for recovery of possession. According to the first respondent/first defendant, she is also having share over the properties but plaintiff himself admitted that items 1 and 2 properties belongs to his parents, thereby already the mother of the defendant settled the share belonging to Jainath Bibi on 18.03.1958. Therefore, in respect of remaining extent, the plaintiff is entitled to the property for that he can file appropriate suit for partition, since some of the properties were settled to the first defendant, the plaintiff is not entitled to declaration for the entire property but the trial Court held that the plaintiff is entitled to first item of the first schedule property in undivided $13 \frac{3}{4}$ cents after deducting $1/6^{\text{th}}$ share of the first defendant i.e. $2 \frac{1}{4}$ cents. In second item of the first



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schedule the plaintiff is entitled to $31\frac{2}{3}$ cents by deducting $\frac{1}{6}$ th share i.e $6\frac{1}{3}$ cents and dismissed the suit as against other items, since the first defendant is entitled to property through settlement deed. Therefore, the judgment made by the trial Court is a reasoned judgment based on evidence and document. Thus, the point no. 4 is answered.

Substantial question of law no. 5

30. This Court in previous points has decided that the items 2 to 4 properties are belongs to first defendant through settlement deed and in the first item the first appellant/plaintiff is entitled to undivided share and thereby he is not entitled to recovery of possession without allotting specific share to the first respondent/first defendant. Therefore, the appellants are not entitled to recovery of possession. Thus, the point no. 5 is answered.

Point No. 6

31. The defendants have taken a plea that the suit is barred by limitation since the settlement deed was executed in the year 1958 and thereafter the plaintiff has knowledge about the settlement deed through proceedings in O.S. 137 of 1962 on the file of the Sub Court, Erode, where the first respondent/first defendant was added as settlee of the property. Therefore, the plaintiff has knowledge about



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the settlement deed, thereby the suit is barred by limitation.

According to the first appellant/plaintiff, his father died and after his demise only he is entitled to the properties of his father and thereby the suit is not barred by limitation. As far as items 2 to 4 of the schedule properties are concerned, the plaintiff has knowledge about the properties through suit filed in the year 1962 ie., O.S. No. 137 of 1962 on the file of the Sub Court, Erode, but he has not raised any objections. Further, records also would show that the first defendant has made mutation of her names in the revenue records but the plaintiff has not raised any objections and the plaintiff also admitted that in the year 1979 he executed agreement and the same was challenged under suit in O.S. No. 1016 of 1979, therefore, the first appellant/plaintiff is having knowledge about the settlement deed but he has not filed any suit within limitation period and the suit is filed only in the year 1984 and thereby, the suit is barred by limitation in respect of property settled through settlement deed. Since the suit is filed for recovery of possession, the period of limitation is 12 years, but as far as first schedule of the property is concerned, since the properties belong to Ghudumian Sahib after his demise i.e., from 16.01.1979 suit was filed on 18.01.1984 and thereby the suit is not hit by limitation in respect of first schedule of the property. Thus the point no.6 is answered.



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Point No. 7

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32. In this case, the trial Court has decreed the suit in respect of first item of the property holding that the plaintiff is entitled to $13\frac{3}{4}$ cents in first item of property and $31-\frac{2}{3}$ in the second item of the first scheduled property, thereafter, the first respondent/first defendant has not filed any appeal as against the judgment passed and the appellant/plaintiff only filed appeal as against the dismissal of the suit on so many grounds. This Court has also discussed in the previous points with regard to the grounds raised by the first appellant/plaintiff and the trial Court has also correctly held that the settlement deed executed by the Jainath Bibi in favour of the first defendant is valid based on the evidence adduced on both sides and also held that the suit is not barred by limitation. Since the suit was filed within 12 years after demise of the father of the first appellant/plaintiff. This Court in the previous points decided that as far as properties of items 2 to 4 are concerned, the suit is barred by limitation since the plaintiff failed to file suit within the limitation period since the suit is for declaration and recovery of possession. As far as declaration is concerned, the suit has to be filed within three years for recovery of possession of 12 years and since the appellant/plaintiff has not filed the suit immediately after the knowledge of the settlement deed i.e., after the suit in O.S. No. 137



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of 1962, therefore, the suit is barred by limitation and the same was decided in previous points. As far as first item is concerned, the property belongs to Ghudumian Sahib and he died in the year 1975 and thereafter the suit was filed in the year 1984. Since the properties are undivided properties and so far there is no partition, this Court has held that settlement deed is also valid and the some portion was settled to the first respondent/first defendant, thereby the suit was filed within time.

33. The trial Court also after elaborate discussion correctly came to the conclusion that the plaintiff is not entitled to items 2 to 4 of shedule of properties and he is only entitled to first schedule property after deducting 1/6th share to the first defendant and declared the property and directed the plaintiff to take steps for filing partition suit. Therefore, the order passed by the trial Court is reasoned one and no any infirmity or perversity found in the order of the trial Court, hence the appeal is liable to be dismissed and needs no intereference.

Point No.8

34.In view of the discussions made in the previous point nos. 1 to 7 the appellatant is not entitled to any relief.



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35. In the result, the appeal suit is dismissed and the judgment and decree passed by the trial Court in O.S.No.217 of 1984 on the file of the learned Principal District Judge, Tiruchirapalli is hereby confirmed. No costs.

16.02.2024

NCC : Yes/No
Index : Yes/No
Internet: Yes/No
aav

To:

1. The Principal Subordinate Judge, Tiruchirapalli
2. The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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P. DHANABAL,J.

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