

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

THURSDAY, THE 20TH DAY OF AUGUST 2015/29TH SRAVANA, 1937

RFA.No. 543 of 2004 (B)

**OS 522/1997 of II ADDL. SUB COURT, THRISSUR
POP 104/1989 of MUNSIFF COURT, THRISSUR**

APPELLANT/ADDL.3RD DEFENDANT IN OS NO. 522/1997 :

**PREMALATHA, AGED 40 YEARS,
D/O. KARAPPULLY LATE KUTTAPPAN,
RESIDING AT KARAPPULLY HOUSE,
CHOVUR VILLAGE AND DESOM, THRISSUR TALUK,
THRISSUR DISTRICT.**

**BY ADVS.SRI.P.GOPAKUMARAN NAIR
SRI.C.S.DIAS**

RESPONDENTS :

- 1. KAMALAKSHY, AGED 56 YEARS,
D/O.KARAPPULLY MARASSARY IYYER AND
W/O. ERAVU MARASSARY KOCHUMON, KARAPPULLY, HOUSE
CHOVUR VILLAGE AND DESOM, THRISSUR TALUK.**
- 2. KARTHYAYANI, AGED 53 YEARS,
D/O.KARAPPULLY MARASSARY IYYER AND W/O.
CHETTUPUZHA MARASSARY GENGADHARAN, KARAPPULLY HOUSE,
CHOVUR VILLAGE AND DESOM, THRISSUR TALUK.**
- 3. KUTTAPPAN (DIED), S/O.KARAPPULLY
MARASSARY LATE IYYER, CHOVR VILLAGE AND DESOM
THRISSUR TALUK.**
- 4. SARASWATHY, AGED 63 YEARS,
W/O. KARAPPULLY LATE KUTTAPPAN
CHOVUR VILLAGE AND DESOM, THRISSUR TALUK.**
- 5. MURALEEDHARAN, AGED 38 YEARS,
S/O.KARAPPULLY LATE KUTTAPPAN, CHOVR VILLAGE
AND DESOM, THRISSUR TALUK.**

RFA.No. 543 of 2004 (B)

**6. REJIKUMAR, AGED 35 YEARS,
S/O.KARAPPULLY LATE KUTTAPPAN
CHOVUR VILLAGE AND DESOM, THRISSUR TALUK.**

**7. SAJITH, AGED 30 YEARS,
S/O.KARAPPULLY LATE KUTTAPPAN
CHOVUR VILLAGE AND DESOM, THRISSUR TALUK.**

**R1 & R2 BY ADV. SRI.C.A.CHACKO
R5 BY ADV. BINDU B.N.**

**THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD
ON 28/7/2015, THE COURT ON 20-08-2015 DELIVERED THE
FOLLOWING:**

bp

P.B.SURESH KUMAR, J.

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R.F.A.No.543 of 2004.

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Dated this the 20th day of August, 2015.

J U D G M E N T

The additional third defendant in O.S.No.522 of 1997 on the file of the Sub Court, Thrissur is the appellant.

2. Respondents 1 and 2 filed the suit referred to above for setting aside Ext.A2 sale deed in respect of 25 cents of the property out of the plaint schedule property and for recovery of possession of the said property with mesne profits from the defendant. The plaintiffs are the younger sisters of the defendant. The plaint schedule property was bequeathed to them and to their stepmother Parukutty by their father late Iyyer as per Ext.A2 will with a stipulation that if any one of them dies, the remaining will take the property absolutely. The case of the plaintiffs is that the

step-mother of the plaintiffs Parukutty died during 1980 and that on the death of Parukutty, the defendant approached the plaintiffs and represented that the relatives of their stepmother would attempt to get the properties of their father and to prevent the same, a document needs to be executed by them. According to the plaintiffs, on the basis of the said representation, the plaintiffs have put their signatures on 23.1.981 in Ext.A1 document prepared by the defendant under the impression that the same is executed to protect the properties of their father from the relatives of their step-mother and co-operated with the defendants to register the same. It is the case of the plaintiffs that it is only during 1989, they came to know about the bequeath made by their father in their favour from another brother Velukutty. According to them, it is only in the enquiry conducted thereafter, they came to know that Ext.A1 is a sale deed in respect of 25 cents of property obtained by them by virtue of the will executed by their father in favour

of the defendant. According to the plaintiffs, had they knew that the property in respect of which Ext.A1 document was executed is a property owned by them, they would not have executed a document in the nature of Ext.A1. It is also his case that, they have not received any consideration for executing Ext.A1 sale deed. According to the plaintiffs, the property covered by Ext.A1 sale deed was worth more than Rs.25,000/- at the time of execution of Ext.A1 document and what is recorded therein is that the defendant has paid a sum of Rs 3000/- to the plaintiffs by way of sale consideration.

3. The defendant resisted the suit by filing a written statement. In the written statement, he contended, among others, that Ext.A1 sale deed has been executed by the plaintiffs knowing fully well about the nature of the document and that they have received adequate consideration for the transaction as well. According to the defendant, long before the death of the father of the

plaintiffs, they were given away in marriage and they executed Ext.A1 sale deed in favour of the defendant as they were residing with their husbands. It was also contended by the defendant that at the time of execution of Ext.A1 document, the husbands of the plaintiffs were very much available in station and the sale consideration of the document was made use of by the first plaintiff for the construction of her house and the second plaintiff for sending her husband to Libya. The defendant had further contended that the suit is barred by limitation. The averments in the plaint that the plaintiffs were not aware of the nature of Ext.A1 and the contents of the same, were categorically denied in the written statement filed by the defendant.

4. The defendant died during the pendency of the suit and on his death, his wife and children were impleaded as additional defendants 2 to 6 in the suit.

5. When the suit came up for trial, plaintiffs

gave evidence as PWs.1 and 2 and the wife of the defendant gave evidence as DW1.

6. The court below found that the suit is not barred by limitation. The court also found that Ext.A1 sale deed is vitiated by fraud and misrepresentation. Consequently, the suit was decreed setting aside Ext.A1 sale deed and permitting the plaintiffs to recover possession of the property covered by Ext.A1 sale deed. A decree of permanent prohibitory injunction restraining the additional defendants for committing any acts of waste in the property was also granted. The additional third defendant is aggrieved by the said decision of the court below.

7. Heard the learned counsel for the appellant, the additional third defendant and the learned counsel for respondents 1 and 2, the plaintiffs.

8. The learned counsel for the appellant vehemently contended relying on the averments in the plaint that the suit is barred by limitation. According to the

learned counsel, though Ext.A1 sale deed was executed as early as on 23.1.1981, the suit was filed only in the year 1989 and that therefore, the same is barred by limitation. It was contended by the learned counsel that going by the provisions contained in Article 59 of the Limitation Act, a suit of the instant nature should be filed within three years from the date on which the facts entitling the plaintiffs to have the instrument set aside became known to him. According to the learned counsel, the averments in the plaint would indicate that the plaintiffs were aware of the document on the date of execution of Ext.A1 document itself and that the suit filed in the year 1989 is therefore barred by limitation. On the merits, it is strenuously argued by the learned counsel for the appellant that other than the oral evidence tendered by the plaintiffs, there is nothing on record to infer that Ext.A1 sale deed is vitiated by fraud and misrepresentation. He had specifically contended that in so far as Ext.A1 is a registered document, the registration

being an official act, there is a presumption of genuineness attached to the document and that the plaintiffs have not adduced any evidence to rebut the said presumption.

9. As regards the plea of limitation, as noticed above, Article 59 of the Limitation Act is the relevant Article. Going by Article 59, the suit of this nature is to be instituted within three years from the date when the facts entitling the plaintiffs to have the instruments set aside become known to the plaintiffs. In paragraph 6 of the plaint, it is stated by the plaintiffs that on the death of their step-mother Parukutty, the defendant who is their elder brother and the only educated person in the family, represented to them that the relatives of their stepmother would attempt to get the properties of their father and to prevent the same, a document needs to be executed in respect of the properties held by their father. It is also stated by them in the said paragraph that it is on the basis of the said representation, they signed on Ext.A1 document and did all that was

necessary to get the said document registered. It is specifically stated by the plaintiffs in paragraph 6 that at the time of registration of the document, they were not aware of the contents of the document as they were not informed of the same by their brother. They also stated that had they been informed about the contents of Ext.A1 document, they would not have signed and registered the document. In paragraph 7 of the plaint, they have stated that they have informed about the execution and registration of Ext.A1 document to their respective husband. According to them, since they were not aware of the contents of Ext.A1 document, there was no reason for them to suspect the defendant at that point of time. It is also stated by them in paragraph 7 of the plaint that it is only on 5.2.1985, they came to know from their brother Velukutty that the property covered by Ext.A1 sale deed was a property given to them by their father by virtue of the terms of the will executed by him and what was executed by them in favour of the

defendant was a sale deed in respect of the same.

10. The issue whether a suit is barred by limitation or not is to be ascertained from the pleadings in the plaint. If what is stated by the plaintiffs in paragraph 7 of the plaint that they came to know about the nature and contents of Ext.A1 only on 5.2.1989 from their brother Velukutty is correct, the suit is within time. The contention is that the plaintiffs have admitted in the plaint itself that they informed about the document to their husbands on the date of execution of the document itself and therefore, the cause of action for the suit arose in their favour on the date of execution of the document itself and the suit instituted beyond three years from the date of the execution of Ext.A1 document is barred. I am unable to accept the said contention. As noticed above, it is specifically and categorically stated by the plaintiffs in paragraph 7 of the plaint that they came to know about the contents of Ext.A1 document only on 5.2.1989 from their brother Velukutty. A

close reading of the averments in the plaint indicates that what is stated by the plaintiffs in the plaint as informed to their husbands is regarding the execution of the document as directed by their brother to protect the properties of their father from the relatives of their stepmother. As such, it cannot be said that the plaintiffs have admitted that they were aware of Ext.A1 document on the date of its execution itself.

11. As regards the vitiating circumstances, I must point out at once that Ext.A2 will was executed by the father of the plaintiffs as early as on 23.10.1961. The father died in the year 1974 after about 14 years. As per the terms of Ext.A2 will, the property covered by Ext.A1 sale deed was set apart not only for the plaintiffs, but also for their step-mother Parukutty with a provision that in the event of the death of any one of them, the remaining would take the property as their absolute property. In the light of the said circumstances, the case of the plaintiffs that their

deceased father did not inform the plaintiffs about the bequeath made in their favour in respect of the property covered by Ext.A1 is probable. The plaintiffs are rustic illiterate village women. The fact that the defendant was the only educated person in the family is not in dispute. The step-mother of the plaintiffs died during the year 1980. The case of the plaintiffs is that on the death of the step-mother, their elder brother informed them that if some document is not executed in respect of the properties held by their father, the relatives of their step-mother would attempt to get the properties cannot also be ruled out as improbable. Likewise, it is also possible that rustic illiterate village women like the plaintiffs would sign documents believing the statement of their elder educated brother. I have perused the oral evidence tendered by PWs.1 and 2 and on a careful reading of the said evidence, the impression which I got is that what they say is the truth. In the aforesaid circumstances, I concur with the findings

rendered by the trial court that the plaintiffs were not aware of the nature of Ext.A1 document which was executed by them on 23.1.1981 and that the said document is therefore vitiated by fraud and misrepresentation.

12. As regards the contentions of the learned counsel for the appellant that the plaintiffs have not established that the document sought to be set aside is vitiated by fraud and misrepresentation and that they have not adduced any evidence to rebut the presumptions in favour of the due execution of Ext.A1 document, I must point out that, on the facts of the present case, the plaintiffs have no burden to prove that Ext.A1 document is vitiated by fraud and misrepresentation. It is beyond dispute that as far as the transaction evidenced by Ext.A1 is concerned, there is a question as to good faith between the parties of which one stands to the other in a position of active confidence. As such, in the light of the provisions contained in Section 111 of the Evidence Act, the burden of proving

the good faith of the transaction is on the party who is in the position of the active confidence. In this context, it is relevant to quote a passage from the decision of the Apex Court in ***Krishna Mohan Kul v. Pratima Maity*** (AIR 2003 SC 4351);

“12. As has been pointed out by the High Court, the first Appellate Court totally ignored the relevant materials and recorded a completely erroneous finding that there was no material regarding age of the executant when the document in question itself indicated the age. The Court was dealing with a case where an old, ailing illiterate person was stated to be the executant and no witness was examined to prove the execution of the deed or putting of the thumb impression. It has been rightly noticed by the High Court that the Courts below have wrongly placed onus to prove execution of the deed by Dasu Charan Kul on the plaintiffs. There was challenge by the plaintiffs to validity of the deed. The onus to prove the validity of the deed of settlement was on defendant No. 1. When fraud, misrepresentation 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, 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 upon 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 a 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 or 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 other have been held to fall within the rule. The Section requires that the party on whom the burden 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 voluntay 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."

Apart from the oral testimony of the wife of the deceased defendant, there is no evidence on the side of the defendant to prove the absence of fraud and misrepresentation in this case. The absence of fraud and misrepresentation should have been proved by the defendant by showing that there was a fair play in the transaction. The facts and circumstances brought out in evidence do not indicate that there was a fair play in the transaction evidenced by Ext.A1. To quote an instance, the recital in Ext.A1 is only that a sum of Rs.3,000/- has been paid by the defendant to the plaintiffs by way of consideration for the transaction. Though the plaintiffs specifically averred in the plaint that the

property was worth more than Rs.25, 000/- at the time of execution of Ext.A1, the defendants have not adduced any evidence to prove the value of the property at the time of execution of Ext.A1.

In the said circumstances, I do not find any merits in the appeal and the same is, accordingly, dismissed. All the interlocutory applications in the appeal are closed.

Sd/-
P.B.SURESH KUMAR,
(JUDGE)

Kvs/-

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PA TO JUDGE.