

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 20.09.2017

Delivered on : 09.11.2017

CORAM

THE HONOURABLE MR.JUSTICE RAJIV SHAKDHER
and
THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

O.S.A.No.28 of 2015

1.R.Vatsala
2.G.Meera
3.Thara Shyam
4.Sarah Ram Kumar
5.Sathish Babu Subhadra : Appellants

Vs.

1.R.Krishna Kumar
2.K.Arjun : Respondents

PRAYER: Appeal filed under Order XXXVI Rule 1 of O.S. Rules read with Clause 15 of the Letters Patent Act, praying to set aside the Judgment and Decree dated 26.06.2014 passed in C.S.No.730 of 2010.

For Appellants : Mr.B.Dinesh Kumar

For Respondents : Mr.V.Balasubramanian

JUDGMENT

[Judgment of the Court was delivered by **ABDUL QUDDHOSE,J.**]

This Intra Court Appeal has been filed by the appellants against the Judgment and decree dated 26.06.2014 passed by the learned Single Judge of this Court in C.S.No.730 of 2010.

2.The appellants are the plaintiffs in the suit in C.S.No.730 of 2010, and they sought for the following reliefs in the suit:

a) To partition the suit property by metes and bounds and hand over separate possession of the plaintiff's 1/6th share each in the suit schedule property.

b)To appoint an Advocate Commissioner to divide the suit schedule property by metes and bounds and put the plaintiffs in possession of their respective 1/6th share in the suit property.

c)To direct the Advocate Commissioner to be appointed by this Court to ascertain the mesne profits from the suit schedule property and direct the defendants to pay the plaintiffs their respective 1/6th share until the plaintiff's 1/6th shares are delivered to them.

d)To declare that the partition deed under Document No.867 of 2000 alleged to have been executed on 27.11.2000 as null and void.

e)To declare that the Settlement deed in Document No.455 of 2010 dated 10.02.2010, executed by the first defendant in favour of the second defendant as null and void.

f) To direct the defendants to pay the cost of the suit.

3.The first appellant is the mother and the second to fifth appellants are her daughters. The first respondent is the son of the first appellant and the second respondent is the son of the first respondent.

4.The appellants filed the suit against the respondents for the reliefs mentioned above, claiming right over the suit schedule property as the legal heirs of late Mr.S.Ramadas, the husband of the first appellant and the father of the second to fifth appellants. The appellants claimed that each of them were entitled to 1/6th share in the suit schedule property and the remaining share fell to the first respondent / first defendant in the suit. Since, the respondents / defendants have not come forward to partition the suit schedule property after the death of Mr.S.Ramadas, the appellants filed the suit against the respondents seeking partition of the suit schedule property and for other declaratory

reliefs which included the relief of declaration to declare the partition deed dated 27.11.2000 bearing document No.867 of 2000 and settlement deed dated 10.02.2010 executed by the first respondent in favour of his son, the second respondent as null and void.

5.The plaint averments in brief are as follows:

a) The suit schedule property is land and building at New No.22, Old No.13, Manickeswari Road, Kilpauk, Chennai, measuring 7200 sq. ft in RE-Survey No.3130 of Purasawalkam Village. This property originally belonged to Mr.S.Ramadas, the husband of the first appellant and the father of the appellants 2 to 5 and the first respondent.

b)The said Ramadas, purchased the suit schedule property under sale deed dated 10.07.1955 and was in possession and enjoyment of the same as the absolute owner till his death on 06.08.1976. He died intestate leaving behind the appellants and the first respondent as his legal heirs. The appellants and the first respondent are each entitled to 1/6th share in the suit schedule property.

c)The first appellant, the mother, was residing in the property along with the first respondent. The remaining appellants are married and now settled at different places, but they used to visit and stay in the

suit schedule property along with the first appellant, whenever they come to Chennai. The first respondent was having custody of the documents of the suit schedule property and was entrusted with the same by the appellants on the firm belief that he will maintain the family house as he is the eldest and the only son of the first appellant.

d) Even though, Mr. Ramadas died as early as on 06.08.1976, the first respondent being the only son, did not come forward to partition the suit schedule property to enable all the legal heirs to get 1/6th share in the suit schedule property. The appellants in order to maintain cordial relationship with the first respondent patiently waited for the first respondent to voluntarily come forward and partition the suit schedule property. Since, the first respondent failed to partition the suit schedule property, the appellants issued a legal notice dated 10.03.2010, calling upon the first respondent to partition the suit schedule property.

e) To the shock and surprise of the appellants they received a reply dated 05.04.2010, from the first defendant informing them that there is a family arrangement signed by the appellants and followed by the registered partition deed dated 27.11.2000, executed by the appellants by which, the suit schedule property was absolutely vested with the first respondent and therefore, the appellants are not entitled to claim partition of the suit schedule property. The reply dated 05.04.2010, sent

by the first respondent also reveals that the first respondent has settled the suit schedule property in favour of his son, the second respondent under a settlement deed dated 10.02.2010. Since, the respondents rejected their claim of partition, the appellants were constrained to file a suit for partition as well as for declaration, to declare the partition deed dated 27.11.2000 and the Settlement deed dated 10.02.2010 as null and void.

6.The respondents filed a common written statement, *inter alia* stating that the appellants have relinquished their rights and interest in the suit schedule property way back in 1981, in an oral partition in favour of the first respondent and therefore, the present suit filed by the appellants after three decades is hopelessly barred by limitation. The daughters namely, the appellants 2 to 5 have not inherited the coparcenary property. The appellants have ratified the oral partition by way of family arrangement in writing on 18.08.1995 and the appellants are estopped from questioning the validity of the family arrangement and the partition deed dated 27.11.2000. The respondents have also stated that ever since 1981, after the oral partition, the revenue records stand in the name of the first respondent, who is the absolute owner of the suit schedule property since then.

I. ISSUES, EXHIBITS AND WITNESSES:

7. Based on the pleadings, the following issues were framed by the learned Single Judge:

"1. Whether the plaintiffs are entitled for partition and separate possession of 1/6th share each in the suit schedule property?

2. Whether, the plaintiffs are entitled to Mesne profits of 1/6th share each till delivery of possession of their respective shares in the suit property?

3. Whether partition deed dated 27.11.2000 is null and void and not binding upon the plaintiffs?

4. Whether the plaintiffs are not entitled to declaration that the settlement deed dated 10.02.2010 executed by the first defendant in favour of the second defendant is null and void, and not binding upon the plaintiffs?

5. Whether the defendants are not in a fiduciary position and in the position of trust and confidence and Vice-Versa the plaintiffs are therefore barred in law from claiming any ouster from the suit schedule property?

6. Whether the suit is barred by limitation as contended by the defendants?

7. Whether the suit is not maintainable for not having sought the relief of setting aside the release deed dated 18.08.1995 when the said family arrangement is void ab-initio?

8. Whether the suit property is a joint family property of the late Mr.S.Ramadas, and whether the provision of Hindu Succession Act applies to the case?"

8. In the trial, three witnesses were examined and seven exhibits were marked on the side of the appellants. The first respondent examined himself as the defendant's witness and nine exhibits were marked on the side of the respondents. The learned Single Judge, after considering the pleadings, deposition, exhibits marked in the deposition and the submissions on both sides, dismissed the suit filed by the appellants on 26.06.2014. Aggrieved by the dismissal of the suit, the appellants have preferred this Intra-Court appeal.

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II. Submissions of the Learned Counsels:

9. Mr.B.Dinesh Kumar, learned counsel for the appellants made the following submissions:

a) Even though, the learned Single Judge has dismissed the suit, Issue No.7 & 8 were held in favour of the appellants. The learned Single Judge has given a finding that the family arrangement dated 18.08.1985

by the first respondent has not been proved in the manner known to law. Therefore, the said finding has now become final as it has not been challenged by the first respondent by filing a separate appeal or cross objection, in the present appeal.

b) The first appellant being the mother and the second to fifth appellants being the sisters of the first respondent, due to their fiduciary relationship with the first respondent, had full confidence with the first respondent and they believed that he will administer the suit schedule property to the benefit and satisfaction of the appellants and this was the reason for allowing the first respondent to have custody of the original title deeds pertaining to the suit schedule property with him. In fact, the first appellant was living with the first respondent till 2009 and only due to his ill-treatment, the first appellant had to leave the house and stay with her daughters, namely, the second to the fifth appellants in turn. The appellants suspected the deceitfulness of depriving legitimate entitlement of their share in the suit schedule property only when the first appellant was illtreated and the remaining appellants were not allowed to stay in the house along with the first respondent's family, from the year 2010 onwards.

c) The appellants therefore, issued legal notice dated 10.03.2010 marked as Ex. B.2 during the trial, calling upon the first respondent to

partition the suit schedule property by metes and bounds and allot 1/6th share to each of the appellants and produce statement of accounts for the rents collected out of the suit schedule property and pay 1/6th share each within fifteen days from the date of receipt of the notice. The respondents sent a reply dated 05.04.2010, which is marked as Ex.B.3 and to the shock and surprise of the appellants they were informed in the reply that pursuant to the alleged family arrangement dated 18.08.1995, followed by the registered partition deed dated 27.11.2000, the suit schedule property was vested with the first respondent as the absolute owner, who then executed the settlement deed dated 10.02.2010, of the suit schedule property in favour of his son, the second respondent.

d) The appellants deny the execution of family arrangement dated 18.08.1995 and the partition deed dated 27.11.2000 and came to know about the fraud played upon them by the first respondent by getting the documents executed in his favour only after the receipt of the reply dated 05.04.2010 sent by the respondents. Therefore, from the date of knowledge, ie., on 05.04.2010, the suit filed by the appellants seeking for partition and other declaratory reliefs is well within the period of limitation.

e) The appellants have been cheated and evidence has been recorded to that effect that they were misled and cheated by the first respondent in executing the alleged partition deed which was not the document they intended to execute. Fraud has been played upon the appellants and the circumstances which led to the execution of the documents will have to be considered. Being cheated and misled into signing the documents, the appellants have duly established in trial that they have been cheated and misled by the first respondent into executing the alleged Partition Deed dated 27.11.2000, registered as Document No.867 of 2000. The presumption that the person executing a document is aware of the contents is a result of the application of the General Rule of evidence and is not an absolute one and the rule has exception to it.

f) The appellants had absolute confidence with the first respondent and all of them were having cordial relationship till 2009. Further, excepting for the first appellant, the remaining appellants are married and settled outside Chennai and two of them were also living abroad. Having full confidence with the first respondent, the appellants permitted him to administer the suit schedule property and to have custody of the original documents. All these surrounding factors ought to have been given due consideration by the learned Single Judge before dismissing the suit filed by the appellants. The intention of the appellants in the

signed documents is a mis-representation, as to the character and class of the document in question as distinguished from its contents invalidates such documents. The appellants had entrusted signed blank papers to the first respondent for administering the suit schedule property in their absence which has been misused by the first respondent. The provision of Section 111 of the Indian Evidence Act r/w. Section 16 (3) of the Indian Contract Act, if applied will invalidate the family arrangements dated 18.08.1995 and the partition deed dated 27.11.2000.

g) The family arrangement dated 18.03.1995 and the partition deed dated 27.11.2000 and the contents there of are also against the defence taken by the respondents. It is a case of the respondents that the appellants have relinquished their rights in the year 1981 by way of oral partition, reduced into writing in the year 1995 and confirmed by the registration of the partition deed in the year 2000 is totally contradictory to the averments contained in the alleged partition deed. The said document claims about a family fund of Rs.10,00,000/-, wherein each of the appellants have been given Rs. 2,00,000/-, towards their share and the suit schedule property valued at Rs.1,04,00,000/- is exclusively allotted to the share of the first respondent. The recitals to the partition deed dated 27.11.2000 also alleges that all the parties are not in joint enjoyment of the family property and it is only by way of the

partition deed dated 27.11.2000, it is getting separated and the first respondent hence forth shall be entitled to effect mutation of records. The first respondent has taken a contradictory stand in his defence, when the contents of the alleged partition deed is different from what the first respondent alleges when the appellants state that they have no knowledge of its contents. Hence, the partition deed dated 27.11.2000 is void.

h) The learned Single Judge, failed to take note of the fact that in the reply notice, dated 05.04.2010, there is no mention about the Power of Attorney alleged to have been executed by the fourth and fifth appellants in favour of their mother, the first appellant. The alleged partition deed dated 27.11.2000, Ex.B.4 also does not disclose any details about the Power of Attorney. In fact, the appellants in their rejoinder dated 16.06.2010 to the reply dated 05.04.2010 have categorically denied the execution of the documents mentioned in the reply dated 05.04.2010, Ex.B.3. In paragraph 16 of the plaint, it has been specifically stated that, no such power exists giving the first appellant any right to execute any partition deed or release their respective rights over the disputed property and neither the first appellant is aware of any such power given to her nor the fourth and fifth appellants who were living abroad ever knew of any such Power of Attorney executed by them.

i) In the written statement, there is no specific denial of this contention and it is completely silent as to the alleged execution of Power of attorney. A case not pleaded cannot be made out by evidence. The respondents ought not to have been permitted to travel beyond their pleadings. It would be pertinent to point out that P.W.2., has not even been questioned about her knowledge regarding the alleged Power of Attorney executed by her or about the alleged share being allotted to her in terms of money and material. Further, Ex.D.3 is an unregistered power of attorney and there shall be no right to transfer immovable property worth more than Rs.100/- under Section 17 of the Registration Act.

j) Further, Ex.D3 is an unregistered power of attorney and there shall be no right to transfer immovable property worth more than Rs.100/- under Section 17 of the Registration Act. Therefore, the learned single Judge has wrongly applied Section 85 of the Indian Evidence Act and held that there is a presumption that Ex.D3, the unregistered power of attorney has been validly executed. In the judgment referred by the trial Court reported in **2005 (15) SCC 678, (Renganayakamma Vs. Prakash)**, it had been held that "one of the sisters who wanted a share in the property has been paid a sum of Rs.40,000/- and she had executed a deed of relinquishment. The said fact is not denied." There is an admission that "each of the sisters have been given one rupee and

signatures were obtained on partition deed on 05.06.1983". This judgment will not be applicable to the case on hand when the appellants herein were not even aware of the nature of the document to be a partition deed, but have been misled and cheated and signatures obtained under the pretext of executing a bond for obtaining electricity connection and not a single penny has been received by the appellants for its execution.

k) The observation of the learned Single Judge that it is common knowledge that for the purpose of getting three phase electricity connection a "No objection letter" from the co-owners was sufficient and the statement that the appellants did not have knowledge about the contents and their execution of the Partition Deed dated 27.11.2000, cannot be believed is erroneous. Regulation No.5 (7) (b) of the Tamil Nadu Electricity Supply Code, insists only a no objection certificate or an Indemnity Bond.

l) The learned Single Judge, while deciding the point of limitation has contradicted the finding given in Issue No.7. It would be pertinent to note that the first respondent in the reply notice dated 05.04.2010 had admitted that the suit property was an absolute self acquired property of late Mr.S.Ramadas and that all the appellants and the first respondent have inherited the said property by way of succession. Then

all the appellants and the first respondent are in the position of co-sharers and co-owners and there cannot be any adverse possession unless ouster is pleaded and proved in accordance with law. Apart from all these facts and circumstances, the first respondent in the partition deed dated 27.11.2000 has specifically stated that all the appellants and the first respondent are entitled for the respective share in the property and further specifically states that in so far as the suit schedule property is concerned, the first respondent shall be the sole and exclusive owner and he will be in possession and enjoyment of the same as absolute owner by virtue of the said partition deed. The alleged partition deed is dated 27.11.2000 and the suit has been filed on 19.08.2010, within twelve years from that date. Therefore, the question of ouster for adverse possession does not arise.

m) The appellants immediately on their knowledge of the fraud played upon them after going through the reply notice, have immediately filed the above suit which is well within time. Further more, the appellants became aware of the execution of family arrangement dated 18.03.1995 and the partition deed dated 27.11.2000 only on receipt of the reply dated 05.04.2010, from the first respondent. Having filed a suit on 19.08.2010, the suit is filed well within the period of limitation. In fact, the first respondent has himself admitted during his cross examination that the demand for partition arose only 2 ½ years

back ie., in the year 2009 and therefore, a suit filed on 19.08.2010 is well within time. The appellants have specifically denied their knowledge about the execution of the partition deed. The burden therefore shifts on the respondents to prove the contents of the documents to be true and its due execution by examining at least one of the attesting witnesses in order to prove the attestation and execution as contemplated under Section 68 of the Indian Evidence Act, which the respondents failed.

n) The mother of the first respondent, namely, the appellant herein has examined herself in the witness box as P.W.2, denying the execution of documents and payment whereas the evidence of D.W.1 repeatedly states that it is his wife who is well aware of the relevant facts. However, the respondents have not chosen to examine her which is vital but not taken note of by the learned Trial Court. The appellants have proved by way of oral and documentary evidence that they have been cheated, misled and made to sign a document without knowing its contents taking undue advantage of the first respondents position and the contents of the alleged partition deed dated 27.11.2000 and the consideration claimed thereunder as to the payment of Rs.2,00,000/- to each of the appellants totalling Rs.10,00,000/- were not actually given and also not proved by the respondents as given and therefore such illegally created document needs to be declared as null and void and the

consequential settlement deed also needs to be declared as null and void and the appellants should be entitled for partition of their respective 1/6th share in the suit schedule property along with the mesne profits.

o) The first respondent being deaf and dumb, had a compassion of the appellants but at no point of time, did they forego and relinquish their right over the only property left by Mr.S.Ramadas. The first respondent is gainfully employed, married and has a son whereas the son of the second appellant Mr.Jayanth, is a special child with disabilities of 100% deaf and dumb and mental retardation and always needs a third person's assistance to help him do his basic needs even to attend his natural calls. Therefore, there was no question of relinquishing the appellant's right over the suit property in favour of the first respondent alone because of his disabilities.

10. The learned counsel for the appellants relied upon the following judgments in support of his submissions:

a) **CDJ 2010 SC 311**, for the purpose of explaining the nature of fiduciary relationship.

b) **CDJ 2003 SC 824**, holding that in case of fiduciary relationship, the burden of proving the absence of fraud, misappropriation is upon the

person in the dominating position. He has to prove that there was fair play in the transaction and that the transaction is genuine and *bonafide*.

c) **CDJ 1990 SC 345**, involving a case of fraudulent misrepresentation as to the character of the document executed by the executant and not merely as to its contents or as to its legal effect. The executant never intended to sign what she did sign. She never intended to enter into the contract to which she unknowingly became a party. Her mind did not accompany her thumb impressions. The alleged document was therefore declared null and void and it was a case involving U.P. Consolidation of Holdings Act, 1953.

d) **CDJ 1967 Calcutta High Court, 123**, wherein the signatory did not understand the contents of the document in which she has signed. The document was declared void.

e) **CDJ 2012 MHC 3629**, holding that the contention of the learned counsel for the petitioner that registration of power of attorney is optional and also cannot be accepted though it is not disputed that unregistered power of attorney is valid but where the attorney has the right to transfer the immovable property worth more than Rs.100/-, then it is compulsorily required to be registered. The person holding unregistered power of attorney has no right to transfer the immovable property worth more than Rs.100/-.

11. Per contra, Mr.V.Balasubramanian, learned counsel for the respondents made the following submissions:

a) The decision to transfer the only property to the first respondent was the unanimous decision of the appellants after the demise of Mr.S.Ramadas, culminated in the execution and registration of partition deed dated 27.11.2000, to clear the way for the enjoyment of the suit schedule property by the first respondent, the only son, who is also handicapped.

b) The findings of the learned Single Judge is based on sound principles of law and requires no interference. A conjoint reading of Sections 28, 30 and 32 of the Registration Act clearly establish that the partition deed dated 27.11.2000 has been properly executed and registered and is a valid document. Section 28 requires registration at the office of the Sub Registrar in whose jurisdiction the property is situated. Section 30 empowers that the District Registrar, who controls the Sub Registrar can receive any document for registration. Section 32 requires that the document should be presented by a person executing it and admit execution of the same. In the case on hand, the first appellant presents the document before the District Registrar and admits her execution, which is a solemn function contemplated under the Registration Act. The appellants have also not disputed their respective

signatures in the documents and therefore, the execution and registration of the partition deed dated 27.11.2000 has been proved in favour of the first respondent.

c) In support of his stand, the learned counsel relied upon a decision of the Privy Council reported in **ILR 34 Allahabad Page 331, (Jumbo Prasad Vs. Aftab Ali Khan)** a decision of the privy council.

d) In the light of limitation, a period of three years is prescribed under Article 59 of the limitation Act to seek cancellation of an instrument. The family arrangement dated 18.03.1995 and the partition deed dated 27.11.2000 is challenged in the suit. The appellants claim ignorance of those two documents even though, they are all educated and well settled in life. Except appellants 4 & 5, who gave power of attorney to the first appellant to sign and execute the family arrangement, all the remaining appellants are signatories to the deed of family arrangement and the partition deed dated 27.11.2000. The registered power of attorney executed by the fifth appellant which is duly notarized, makes it clear that they have authorized their mother, the first appellant to execute a partition deed dated 27.11.2000 on their behalf. The registered partition deed dated 27.11.2000 is preceded by oral partition effected in 1981, transferring the only house property in favour of the first respondent, who is handicapped and after the oral partition,

the revenue records have also been mutated in the name of the first respondent followed by an unregistered family arrangement dated 18.08.1995 and a registered partition deed dated 27.11.2000.

e) By virtue of the said documents, the first respondent is the exclusive owner of the suit schedule property. Section 85 of the Indian Evidence Act deals with power of attorney executed before the notary and not registered. A plain reading of Section 85 makes it clear that the document duly notarized and the notary public affixing its signature on all papers is valid unless the contrary is proved. Section 68 of the Indian Evidence Act requires proof of the execution of the documents in which the attestation is mandatory. Except testamentary disposition like Will and deed of mortgage which requires proof by examining the attestors, no other registered document need proof by examining any attestors. Section 114 (e) of the Indian Evidence Act reads as (Court may presume the existence of such facts that judicial and official acts have been regularly performed).

f) He also relied upon a decision of the Hon'ble Supreme Court reported in **2008 (15) SCC 678 (Ranganayagamma Vs. K.S.Prakash)**, on similar case decided the law after considering earlier rulings which is similar to the facts of the present case, where a similar document, a partition deed executed in the year 1947 was challenged in

the year 1992. The parties there claimed ignorance of the contents. The Supreme Court rejected the contention of the sisters and held that the documents executed before the registering authority is valid and cannot be questioned after the period of limitation.

III. POINTS FOR CONSIDERATION IN THIS APPEAL:

a) Whether the learned Single Judge was correct in holding that the Suit C.S.No.730 of 2010 filed by the appellants is barred by the law of limitation.

b) Whether the learned Single Judge was correct in holding that the partition deed dated 27.11.2000 is valid despite holding that the family arrangement dated 18.08.1995 has not been proved by the first respondent.

c) Whether without establishing payment of Rs.2 lakhs to each of the appellants which is the consideration under the partition deed dated 27.11.2000 for the exchange of the Suit schedule property to the first respondent, the learned Single Judge was correct in holding that the partition deed dated 27.11.2000 is valid.

d)Whether the oral and documentary evidence available on record is sufficient for the learned Single Judge to hold that the partition deed dated 27.11.2000 and the settlement deed dated 10.02.2010 is valid.

e)Whether the first respondent exercised his undue influence over the appellants by fabricating the family arrangement dated 18.08.1995 and the partition deed dated 27.11.2000.

f)Whether the learned Single Judge was correct in holding that the power of attorney executed by the appellants 4 and 5 in favour of their mother the first appellant herein is valid even though one of the power of attorney is an unregistered one and the notary public was not examined as a witness.

g)Whether the partition deed dated 27.11.2000 and settlement deed 10.02.2010 has to be declared as null and void and consequently, appellants entitled for partition of their respective 1/6th share in the Suit schedule property.

IV. FINDINGS:

After having carefully considered the pleadings, deposition and submissions made by the learned counsel on both sides, we observe the following:-

a) Even though the appellants have not disputed their signatures in the family arrangement dated 18.08.1995 and the partition deed dated 27.11.2000 which are the subject matter of challenge in the suit, they have categorically stated that they never executed the family arrangement dated 18.08.1995 and the partition deed dated 27.11.2000. In the pleadings and deposition, they have stated that blank papers signed by them were misused by the first respondent for the purpose of executing the documents which are the subject matter of challenge in the suit.

b) The respondents have pleaded in their written statement as well as in their deposition that ever since 1981, the first respondent is in possession and enjoyment of the suit property as the absolute owner through an oral partition between the appellants and the first respondent. But the oral partition in the year 1981 has not been established before the trial Court. Further, there is contradiction between the family arrangement dated 18.08.1995 and the partition deed dated 27.11.2000. The learned single Judge has given a clear finding that the family arrangement dated 18.08.1995 is not proved by the first respondent. As against the said finding, the first respondent has not preferred any appeal nor has he filed any cross objection in the present appeal. The said finding has now become final. The learned single Judge declared the ownership of the suit property in favour of the first

respondent only based upon the partition deed dated 27.11.2000. In fact, the partition deed dated 27.11.2000 traces the title of the first respondent only from the family arrangement dated 18.08.1995 which has not been proved by the first respondent before the learned single Judge. In the recitals to the partition deed dated 27.11.2000, it is stated that prior to the execution of the partition deed, the appellants and the first respondent were the absolute owners of the suit property which contradicts the pleading of the first respondent in his written statement that he was in possession and enjoyment of the suit property ever since 1981 by virtue of oral partition and a subsequent family arrangement dated 18.08.1995 followed by the registered partition deed dated 27.11.2000.

(c) The first appellant being the aged mother and the remaining appellants being her only daughters have been totally excluded in getting a share in the suit property by the first respondent under the partition deed dated 27.11.2000.

(d) Admittedly, the daughters of the first appellant are well educated and they can read, write and understand English in which language, the documents which are the subject matter of challenge in the suit have been executed. The mother, the first appellant has also admitted in her cross examination that she can read and understand

English to some extent. In the plaint as well as in their deposition, the appellants have stated that the first respondent obtained signatures on blank papers for the purpose of obtaining three-phase electricity service connection for the suit property. Being literate persons, it is hard to believe that the appellants would have executed the family arrangement on 18.08.1995 and the partition deed dated 27.11.2000 and the statements contained therein contradict each other. Furthermore, the learned single Judge has given a clear finding that the family arrangement dated 18.08.1995 has not been proved by the first respondent which finding has now become final.

(e) Admittedly, as seen from the deposition, the appellants and the first respondent were having cordial relationship upto the year 2009. The respondents have also not produced any other document excepting for the family arrangement dated 18.08.1995 which has not been proved before the learned single Judge and the partition deed dated 27.11.2000 to establish that even prior to the reply dated 05.04.2010 sent by the first respondent to the legal notice, the appellants were aware of the execution of the family arrangement dated 18.08.1995 as well as the partition deed dated 27.11.2000. According to the appellants, they became aware of the alleged family arrangement dated 18.08.1995 and the partition deed dated 27.11.2000 only through the reply dated 05.04.2010 sent by the first respondent. The suit for partition and

declaration to declare the partition deed dated 27.11.2000 and the settlement deed dated 10.02.2010 in favour of the second respondent as null and void was filed by the appellants on 19.08.2010 (i.e) within three years from 05.04.2010 being the date of the reply sent by the first respondent.

(f)The suit property is situated in a prime locality at Chennai and is a valuable property. It is the only immovable property left behind by the deceased Mr.S.Ramadas who died on 06.08.1976. Under normal circumstances, it is hard to believe that the remaining legal heirs would have released their shares absolutely in a valuable property without equal consideration in favour of one co-owner alone.

(g)Whatever may be the disadvantageous position, the other legal heir in whose favour the property was released is facing, it is hard to believe that a valuable property like that of the suit property has been released only in favour of one co-owner alone. In the instant case, the mother who is an aged lady and her daughters under the alleged partition deed dated 27.11.2000 have released absolutely their shares in the suit property in favour of the first respondent alone which is hard to believe.

(h)Admittedly, as seen from the reply dated 05.04.2010 sent by the first respondent, the appellants and the first respondent were having cordial relationship upto the year 2009. Despite the cordial relationship by virtue of the alleged family arrangement, dated 18.08.1995 and the partition deed dated 27.11.2000, the appellants have released their shares in the suit property in favour of the first respondent which is unbelievable.

(i)The partition deed dated 27.11.2000 states that there was a family fund of Rs.10 lakhs out of which the appellants were given Rs.2 lakhs each towards their share in exchange of the suit schedule property in favour of the first respondent which is admittedly valued at Rs.1,04,00,000/-.

(j)The appellants have pleaded in the plaint that they have not received a single penny from the first respondent for the purpose of executing the partition deed dated 27.11.2000 and have alleged that the partition deed is a fabricated document and the payment of Rs.2 lakhs each to the appellants is far-fetched, false, baseless, imaginary, exaggerated and misleading, without any iota of truth.

(k)The first respondent has also admitted in his cross examination that he does not know whether the money was paid to the appellants

prior or after the date of execution of partition deed dated 27.11.2000 and that his wife only knows about it. The respondents have also not examined the wife of the first respondent to establish the payment of Rs.2 lakhs to each of the appellants which is the consideration for the partition deed dated 27.11.2000. As per the recitals contained in the partition deed dated 27.11.2000, the first respondent has also not established by way of oral and documentary evidence that the family fund of Rs.10 lakhs was available which was utilised to pay Rs.2 lakhs each to the appellants towards their share in exchange for the suit schedule property in favour of the first respondent absolutely. Therefore, the consideration of Rs.2 lakhs paid to each of the appellants has not been established during the trial. Further, the partition deed dated 27.11.2000 was not executed out of natural love and affection and therefore, the payment of Rs.2 lakhs to each of the appellants under the partition deed will have to be established. Having made a categorical statement in the plaint and in their oral evidence, that the appellants have not received the sum of Rs.2 lakhs each which is the alleged consideration for the execution of the partition deed and that the respondents have misused blank signed papers, the burden of proof lies on the side of the first respondent to establish that Rs.2 lakhs was paid to each of the appellants which they have miserably failed as the first respondent has himself admitted during his cross examination that he has not paid the sum of Rs.2 lakhs to each of the appellants. Further, the

respondents have also not established either through oral or documentary evidence the existence of a family fund of Rs.10 lakhs from and out of which the alleged Rs.2 lakhs was paid to each of the appellants.

(I) Assuming, the payment of Rs.2 lakhs to each of the appellants was paid by the first respondent, the consideration is grossly inadequate when compared to the undisputed market value of Rs.1,04,00,000/- for the suit schedule property fixed under the partition deed dated 27.11.2000 which is the subject matter of challenge in the suit. The first appellant, being the 82 year old mother and the remaining appellants being the sisters of the first respondent have been deprived of a share by the first respondent in the only immovable property left behind by Late.Mr.Ramdoss. It is hard to believe that a son will deprive his aged mother from getting a share in the only immovable property left behind by his father Late.Mr.Ramdoss that too when the alleged partition deed is not executed out of natural love and affection but executed for a grossly inadequate consideration of Rs.2 lakhs paid to each of the appellants in exchange of the suit schedule property which is valued at Rs.1,04,00,000/- as on the date of the partition deed dated 27.11.2000. The evidence available on record would clearly indicate that the first respondent has misused the confidence reposed on him by the appellants by utilising the blank signed papers and getting the partition

deed dated 27.11.2000 executed. This will lead to the conclusion that the first respondent has played fraud upon the appellants by misusing his relationship with the appellants and getting a partition deed executed by which the appellants were deprived of a share in the suit schedule property.

(m) In the reply dated 05.04.2010 issued by the first respondent, there is no mention about the power of attorney alleged to have been executed by the appellants 4 and 5 in favour of their mother, the first appellant. The alleged partition deed dated 27.11.2000 (Ex.P.4) also does not disclose any details about the power of attorney. In fact, the appellants in their rejoinder dated 16.06.2010 to the reply dated 05.04.2010 have categorically denied the execution of the documents mentioned in the reply dated 05.04.2010 (Ex.P.3).

(n) In paragraph 16 of the plaint, it has been specifically stated that no such power exists giving the first appellant any right to execute any partition deed or release their respective rights over the suit schedule property and further in her deposition, the first appellant has stated that she is not aware of the execution of any power of attorney in her favour by the appellants 4 and 5. In the deposition on the side of the appellants, it is also stated that the appellants 4 and 5 who were living abroad did not know the execution of power of attorney in favour of the first appellant.

(o) In the written statement, there is no specific denial for the contention that no power of attorney was executed by the appellants 4 and 5 in favour of the first appellant. Furthermore, Ex.D3 is an unregistered power of attorney and notary public who has attested Ex.D3 was also not examined as a witness. The notary public Mr.V.Hariharan in whose presence, Ex.D.3 was allegedly executed by the fifth appellant is the relative of the appellants and the respondents but he was not examined as a witness.

(p) Even though the first respondent is deaf and dumb, he is gainfully employed, married and has a son who is the second respondent. The son of the second appellant Mr.S.Jayanth is a special child with disabilities of 100% deaf and dumb and mental retardation and always needs a third person's assistance to help him to his basic needs even to attend his natural calls is also not disputed by the first respondent either in the pleadings or in his oral evidence.

(q) The appellants have pleaded in the plaint that the memorandum of family arrangement dated 18.08.1995 and the partition deed dated 27.11.2000 are fabricated documents which are invalid and any such fraudulent document created by the first respondent will not curtail the rights of the appellants as there was no such document of partition executed by the appellants in favour of the first respondent. They have

also alleged that the first respondent has misused the fiduciary relationship they are having with him by getting documents executed without their knowledge.

V. CONCLUSIONS:

From the observations recorded by us in the aforementioned paragraphs, we have arrived at the following conclusions:-

(a)The recitals contained in the family arrangement dated 18.08.1995 and partition deed dated 27.11.2000 under which the first respondent claims ownership of the suit property contradicts each other.

(b)The learned single Judge having given a clear finding that the family arrangement dated 18.08.1995 is not proved by the first respondent ought not to have declared that the partition deed dated 27.11.2000 is a valid document since under the partition deed dated 27.11.2000, the first respondent has derived his title over the suit property only from the family arrangement dated 18.08.1995.

(c)The first respondent has also not proved the oral partition in his favour over the suit schedule property in the year 1981. Excepting for the production of the family arrangement dated 18.08.1995 which has been declared as not proved by the learned single Judge and the

partition deed dated 27.11.2000 which contradicts the recitals contained in the family arrangement dated 18.08.1995, the first respondent has not produced any other document to establish his exclusive ownership over the suit schedule property. The first respondent cannot approbate and reprobate his statements while claiming his exclusive ownership rights over the suit schedule property.

(d) The availability of the family fund of Rs.10 lakhs which was utilised for the payment of Rs.2 lakhs each to the appellants in exchange for the suit schedule property in favour of the first respondent absolutely has not been established by the first respondent during the trial. The appellants having discharged their initial burden of disproving the family arrangement dated 18.08.1995 and since the partition deed dated 27.11.2000 traces the title to the suit schedule property from the family arrangement dated 18.08.1995, the burden of establishing the exclusive title over the suit schedule property is on the first respondent who has not established the same.

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(e) Admittedly, the suit schedule property on the date of partition deed dated 27.11.2000 is Rs.1,04,00,000/-. There is a clear disparity and it is an unequal partition between the appellants and the first respondent. After scrutinizing the documents marked as exhibits and the deposition on both sides, we can conclude that the appellants

who are the aged mother and sisters of the first respondent have been fraudulently deprived of a share in the suit schedule property by virtue of the fabricated documents namely, the family arrangement dated 18.08.1995 and the partition deed dated 27.11.2000.

(f)The first appellant being the aged mother and the remaining appellants being her only daughters have been unfairly and fraudulently excluded from getting a share in the suit schedule property under the fabricated partition deed dated 27.11.2000. The daughters of the first appellant are well educated and they can read, write and understand English in which language the documents namely, the family arrangement dated 18.08.1995 and the partition deed dated 27.11.2000 were executed. The mother, the first appellant has also admitted in her cross examination that she can read and understand English to some extent which has not been disputed by the respondents. From the conclusions arrived at by us in the earlier paragraphs, we can infer that the first respondent has misused the signatures obtained on blank papers for the purpose of executing the family arrangement dated 18.08.1995 and the partition deed dated 27.11.2000.

(g)The appellants and the first respondent were having cordial relationship upto the year 2009. Mr.S.Ramdoss, the husband of the first appellant and the father of the remaining appellants as well as the first respondent was earlier the absolute owner of the suit schedule property. He died on 06.08.1976. The appellants and the first

respondent inherited the property from Mr.S.Ramdoss as his only legal heirs. It can be inferred that there was no necessity for the appellants to seek partition all of a sudden, that too, after a lapse of 33 years from the date of death of Mr.Ramdoss if not for the fact that the appellants and the respondents were having cordial relationship upto the year 2009 and only by the reply dated 05.04.2010 of the first respondent, the appellants were aware of the execution of the fabricated documents namely, family arrangement dated 18.08.1995 and the partition deed dated 27.11.2000. Therefore, the statement of the appellants that they were not aware of the family arrangement dated 18.08.1995 and the partition deed dated 27.11.2000 has to be believed. The respondents have not produced any other document apart from the family arrangement dated 18.08.1995 and partition deed dated 27.11.2000 to disprove the statements of the the appellants that they became aware of the alleged documents only after receipt of the reply dated 05.04.2010 sent by the first respondent to the notice dated 10.03.2010 sent by the appellants seeking partition of the suit schedule property. As rightly contended by the learned counsel for the appellants, the first respondent being the son of the first appellant and the brother of the remaining appellants used his undue influence to obtain an unfair advantage by fabricating the documents which are the subject matter of challenge in the Suit. Under Section 111 of the Indian Evidence Act, 1872, the burden of proving that the partition deed dated 27.11.2000 and the

settlement deed dated 10.02.2010 is valid, is on the first respondent who was holding a position of active confidence by the appellants at the time of execution of the said documents. Section 111 of the Indian Evidence Act reads as follows:

"Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence."

(h) The transaction is also hit by Section 16 (3) of the Indian Contract Act as the first respondent used his undue influence over the appellants by getting the documents executed in his favour. Section 16 of the Indian Contract Act reads as follows:

[S.16. 'Undue Influence' defined.]-(1) A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

(2) In particular and without prejudice to the generality of the forgoing principle, a person is deemed to be in a position to dominate the will of another-

(a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other;

or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by the reason of age, illness, or mental or bodily distress.

(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall be upon the person in a position to dominate the will of the other.

Nothing in the sub-section shall affect the provisions of section 111 of the Indian Evidence Act, 1872 (1 of 1872).

(i) The appellants became aware of the fabricated documents that is the deed of family arrangement dated 18.08.1995 and the partition deed dated 27.11.2000 only on 05.04.2010 being the date of the reply sent by the first respondent to the notice sent by the appellants seeking partition of the suit schedule property. The suit C.S.No.730 of 2010, for partition and declaration to declare the partition deed dated 27.11.2000 and the settlement deed dated 10.02.2010 in favour of the second respondent as null and void was filed by the appellants on 19.08.2010 that is within three years from 05.04.2010 being the date of reply sent by the first respondent. Hence, we conclude that the suit filed by the appellants is well within the period of limitation.

(j) From the observations recorded by us, the suit property being situated in a prime locality at Chennai and further being a very valuable property, it can be inferred that the appellants have not executed the family arrangement dated 18.08.1995 and the partition deed dated 27.11.2000 and they are fabricated documents.

(k) The power of attorney alleged to have been executed by the appellants 4 and 5 in favour of the mother has not been proved by the first respondent. In the reply dated 05.04.2010 issued by the first respondent, there is no mention about the power of attorney. Further, the alleged partition deed dated 27.11.2000 also does not disclose any details about the power of attorney and even in the rejoinder dated 16.06.2010 to the reply dated 05.04.2010, the appellants have categorically denied the execution of the documents mentioned in the reply dated 05.04.2010. Having denied the execution of the power of attorney, the first respondent ought to have examined Mr.V.Hariharan, in the trial. The notary public Mr.V.Hariharan is none other than a relative of the appellants and the first respondent. But the respondents have not examined him which will lead to the conclusion that the power of attorney executed by the appellants 4 and 5 in favour of the first appellant is a fabricated document.

(l) Even though the first respondent is deaf and dumb, he is gainfully employed, married and has a son who is the second respondent. The son of the second appellant Mr.S.Jayanth is also a special child which is not disputed by the first respondent either in the pleadings or in his oral evidence. Therefore, it can be inferred that the appellants would not have executed the family arrangement dated 18.08.1995 and partition deed dated 27.11.2000 releasing their entire right in favour of the first respondent over the only immovable property namely, the suit schedule property left behind by Mr.S.Ramadhas.

(m) As rightly contended by the learned counsel for the appellants and supported by the decisions cited by him, namely, **CDJ 2010 SC 111** and **CDJ 2003 SC 824**, only due to the fiduciary relationship between the appellants and the first respondent, the appellants issued the legal notice seeking partition only on 10.03.2010. In view of the fiduciary relationship, the first respondent has also misused the signatures of the appellants obtained on blank papers for the purpose of fabricating the documents, namely, family arrangement dated 18.08.1995 and partition deed dated 27.11.2000. The other decisions relied upon by the learned counsel for the appellants namely **CDJ 1967 Calcutta High Court, 123** and **CDJ 2012 MHC 3629** are also applicable to support the contention of the appellants as we have concluded that the partition deed dated 27.11.2000 is null and void.

(n) Since no evidence has been let in by the appellants for establishing mesne profits before the trial Court, the appellants are not entitled for the same.

(o) The Judgments namely ***ILR 34 Allahabad Page 331 (Jumbo Prasad Vs. Aftab Ali Khan)*** and ***2005 (15) SCC 678, (Renganayakamma Vs. Prakash)*** relied upon by the learned counsel for the respondents are not applicable to the facts of the present case since the learned Single Judge has given a clear finding which has now become final that the family arrangement dated 18.08.1995 has not been proved by the first respondent and the partition deed dated 27.11.2000 which derives its title from the family arrangement dated 18.08.1995 is declared null and void by us for non-payment of the consideration to the appellants under the partition deed dated 27.11.2000.

(p) In view of the above conclusions, we declare the partition deed dated 27.11.2000 registered as Document No.867 of 2010, as null and void and consequently, declare the settlement deed dated 10.02.2010 executed by the first respondent in favour of the second respondent is also null and void.

(q) In view of the reasons given by us and our conclusions referred to above, we hold that the learned single Judge ought not to have dismissed the suit C.S.No.730 of 2010 but should have passed a preliminary decree for partition allotting 1/6th share each in the suit

schedule property to the appellants as well as the first respondent and also declared that the settlement deed dated 10.02.2010 executed by the first respondent in favour of the second respondent as null and void.

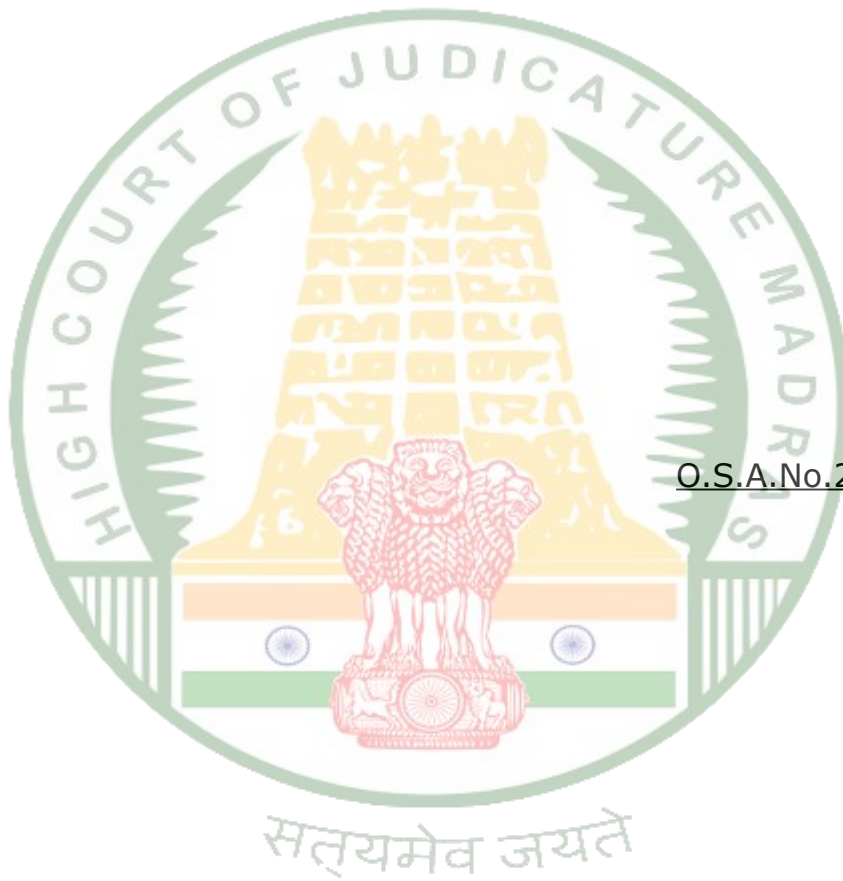
(r) In the light of the above conclusions, we partly allow the appeal with costs by setting aside the judgment and decree, dated 26.06.2014 passed by the learned single Judge in C.S.No.730 of 2010 by (a) declaring that the partition deed dated 27.11.2011 registered as Document No.867 of 2000 as null and void (b) by granting a preliminary decree for partition allotting 1/6th share each to the appellants as well as the first respondent in the suit schedule property and (c) declaring that the settlement deed dated 10.02.2010 registered as Document No.455 of 2010 dated 10.02.2010, executed by the first respondent in favour of the second respondent as null and void. In so far as the partition of the suit property by metes and bounds and handing over separate possession of the 1/6th share each to the appellants as well as the first respondent in the suit schedule property and other consequential reliefs sought for in the suit, the same will be considered by the learned single Judge in accordance with law while passing the final decree.

(R.S.A.,J) (A.Q.,J.)
09.11.2017

Index : Yes
 Internet : Yes/No
 MR

RAJIV SHAKDHER,J
and
ABDUL QUDDHOSE,J

MR



O.S.A.No.28 of 2015

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