

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON :01.11.2018

PRONOUNCED ON : 18.12.2018

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

S.A.Nos.332 & 333 of 2015

A.Mahimaidas

...

Appellant in both
the second appeals

Vs.

1.P.Parameswari
2.S.Kungleeswari

...

Respondents in both
the second appeals

Prayer :- Second Appeal has been filed under Section 100 of CPC against the Judgement and Decree dated 25.11.2014 passed in A.S.No.27 of 2014 & 44 of 2014 respectively on the file of the III Additional City Civil Court, Chennai, reversing the Judgment and Decree dated 30.08.2013 passed in O.S.No.4165 of 2007 & 1818 of 2008 respectively on the file of the III Assistant City Civil Court, Chennai.

For Appellant
in both the second
appeals

: Mrs.Chitra Sampath
Senior Counsel
for Mr.T.S.Baskaran

For Respondents
in both the second
appeals

: Mr.V.Raghavachari
for Mr.R.Munuswamy

COMMON JUDGMENT

The appellant, in both the appeals, is the plaintiff in O.S.No.4165 of 2007 and the defendant in O.S.No.1818 of 2018 on the file of the XII Assistant Judge, City Civil Court, Chennai respectively.

2.O.S.No.4165 of 2007 had been laid by the appellant against the respondents herein for the relief of declaration that the deed of cancellation dated 17.04.2007, executed by the respondents, registered as document No.1482/2007 – SRO, Periamet is illegal, unlawful, null and void and for directing the respondents to deliver the vacant possession of the suit property to him and for consequential permanent injunction restraining the respondents and their men, agents, representatives or anybody on their behalf from anyway dealing with the suit property either by way of sale, mortgage or in any other manner.

3.O.S.No.1818 of 2008 had been laid by the respondents against the appellant for the relief of declaration to declare that the alleged sale deed said to have been executed by the respondents in favour of the appellant in respect of the suit property dated 27.01.2006, registered as document No.212/2006 on the file of SRO Periamet, as void ab-initio, invalid, null and void and non-est in the eyes of law and for the relief of permanent injunction restraining the defendant or his men, servants, agents or anybody claiming through him, from and in any way interfering

with the respondents' peaceful possession and enjoyment of the suit property.

4. Inasmuch as common issues were involved in both the suits, it is seen that both the suits were jointly tried by the trial Court and accordingly, evidence has come to be recorded in O.S.No.4165 of 2007 laid by the appellant herein and in support of the appellant's case, PW1 was examined and Exs.A1 to 13 were marked and on the side of the respondents, DW1 was examined and Exs.B1 to B9 were marked.

5. On consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial Court was pleased to dismiss the suit laid by the respondents in O.S.No.1818 of 2008 and decreed the suit in favour of the appellant granting the reliefs of declaration and permanent injunction as well as the delivery of vacant possession and on the facts and circumstances of the case, directed the appellant to pay the balance sale consideration of Rs.3,00,000/- to the respondents within two months from the date of decree or to deposit the same into Court and the respondents, on receipt of the amount, had been directed to handover the vacant possession to the appellant within a month, thereafter, failing which, the appellant would be entitled to proceed against the respondents for recovery of possession by executing the decree. Impugning the judgment and decree of the trial Court, it is

found that the respondents herein had preferred the first appeals and the first appellate Court, on a consideration of the materials placed on record and the submissions made, setting aside the Judgment and Decree of the Trial Court, decreed the suit laid by the respondents in O.S.No.1818 of 2008 as prayed for and dismissed the suit laid by the appellant in O.S.No.4165 of 2007. Aggrieved over the same, the present second appeals have been laid.

6.At the time of admission of the second appeals, the following substantial questions of law were formulated for consideration in the second appeals.

"(a).Whether the learned Appellate Judge was right in reversing the well reasoned judgment of the trial Court without assigning any reason for setting aside the findings recorded by the trial Court as required by Section 96 of CPC?

(b).Whether the learned Appellate Judge was right in placing the burden of proof on the appellant in regard to the admitted execution of a registered document? and

(c).Whether the learned Appellate Judge was right in accepting the plea of non est factum when the respondents had

**not substantiated the various allegations
against their former counsel?"**

7.Considering the scope of the issues involved between the parties as regards the subject matter lying in a narrow compass, it is unnecessary to dwell into the facts of the case in detail.

8.Suffice to state that the appellant seeks the reliefs prayed for in O.S.No.4165 of 2007 on the footing that in respect of the suit property, the appellant and the respondents entered into a sale agreement on 01.12.2004, whereunder, the appellant had paid a sum of Rs.1,00,000/- as advance and it is also the case of the appellant that on 27.01.2006, the respondents had executed the sale deed in favour of the appellant in respect of the suit property when the appellant had paid another sum of Rs.2,00,000/- and it is further stated that on 25.02.2006, the deed of undertaking had been entered into between the appellant and the respondents, whereunder, on the same date, the appellant had handed over three cheques as security for the payment of the balance of Rs.3,00,000/- as agreed to and contradictory to the same, it is the case of the appellant that the respondents had chosen to execute the deed of cancellation dated 17.04.2007 as regards the sale deed dated 27.01.2006 and on coming to know about the same, it is stated by the appellant that he had issued a legal notice calling upon the respondents to rescind the deed of cancellation and despite the same, inasmuch as the respondents

had been taking steps to alienate the suit property to the third parties against the interest of the appellant in respect of the same, it is stated that the appellant had been necessitated to lay the suit for appropriate reliefs against the respondents.

9.The defence putforth by the respondents to the suit laid by the appellant as well as the case which they had projected in their suit in O.S.No.1818 of 2008 is that the respondents were in need of money and in that endeavour, when they had approached their advocate, he had introduced the appellant as his friend and apprised that the appellant would offer them money on the mortgage of the suit property and later, the respondents came to know that the appellant, in collusion with the respondents' advocate by committing fraud and deceit, had obtained a sale deed from them on 27.01.2006 in respect of the suit property under the guise of a mortgage deed without even paying any money as well as they had been duped to enter into a sale agreement in respect of the same on 01.12.2004 and also without making any payment whatsoever, a deed of undertaking had also come to be obtained from them suppressing the true facts, whereunder, the appellant had issued three cheques to their advocate assuring them to pay the loan as promised and get back the cheques and on seeing the attitude and conduct of the appellant in not keeping his assurance in paying the loan and when the respondents questioned their advocate with reference to the same, it is

stated that their advocate had returned the brief to them and also the cheques and told them to contact the appellant as regards the loan amount and on the respondents presenting the cheques for encashing the same, they have been returned dishonoured and when the respondents apprised the same to the appellant, they had been informed by the appellant that they had already executed the sale deed in respect of the suit property and also threatened them to vacate and hand over the possession of the suit property and only by way of the abovesaid facts, the respondents had come to know about the fraud and deceit played on them by the appellant and their erstwhile advocate in obtaining the sale deed fraudulently from them and they being illiterate women, unaware of the worldly affairs, having been cheated in toto, accordingly, it is stated that on advice, they had chosen to execute the deed of cancellation on 17.04.2007 and also issued a legal notice to the appellant with reference to the same and accordingly, it is stated that the appellant had laid the false suit against them in O.S.No.4165 of 2007 and hence, they had been necessitated to lay the suit against the appellant in O.S.No.1818 of 2008 as the appellant had threatened to dispossess them from the suit property based upon the void and invalid document dated 27.01.2006 obtained from them by the appellant as aforestated.

10.The appellant reiterating his case as putforth in O.S.No.4165 of 2007 resisted the suit laid by the respondents in O.S.No.1818 of 2008 and prayed for the dismissal of the said suit.

11.Based on the pleadings set out by the appellant both in O.S.Nos.4165 of 2007 and 1818 of 2008, it is seen that he had been endeavouring to sustain his case on the footing that the respondents, with full knowledge of the several transactions, entered into between the parties inter se and only to defeat him and cause hardship, they had taken the plea that they are not aware about the transactions entered into between the parties and accordingly, it is stated that the respondents are fully aware and conscious of the several transactions, which had taken place between the parties, accordingly, in that direction, it had been pleaded by the appellant that the respondents knew Tamil language and they having admitted the execution of the documents in question, would have known the contents thereof and it is stated that the husband of the first respondent had signed as a witness to the sale agreement dated 01.12.2004 and he had informed the contents of the said document to the respondents and only on coming to know of the same, the respondents had signed the abovesaid sale agreement and similarly, he had also pleaded that the first respondent's father-in-law signed as a witness to the sale deed dated 27.01.2006 and he had also apprised the contents of the said document to the respondents and further, the

respondents had also knowledge about the contents of the same through the first respondent's husband and it is further stated that the third document entered into between the parties viz., the deed of undertaking having been written in Tamil language, the respondents had full knowledge of the same and accordingly, it is the case of the appellant that all the abovesaid three documents relied upon by the appellant for sustaining his case had been entered into and executed by the respondents with full knowledge of the contents thereto and in such view of the matter, the respondents cannot be allowed to feign and plead innocence and also denied their plea that they had also been duped and cheated by the appellant and their erstwhile advocate as putforth by them and in such view of the matter, the appellant's counsel would contend vehemently that the first appellate Court had erred in shifting the burden upon the appellant to prove the validity of the three documents abovestated on the part of the appellant, failing to direct the respondents to establish their pleas with reference to the same, inasmuch as they had admitted that the abovesaid three documents contained their signatures and in such view of the matter, it is contended vehemently on her behalf, on that score alone, the judgment and decree of the first appellate Court requires reversal.

12.Per contra, it is argued by the respondents' counsel that when admittedly, the respondents are illiterate women and unknown of the worldly affairs and the respondents having pleaded fraud and non-est factum and the appellant also having failed to establish that the respondents had executed the three documents relied upon by him knowing the contents thereof and furthermore, the appellant having failed to establish that any consideration flowed through the abovesaid three documents as putforth by him and accordingly, it is his contention that the first appellate Court has rightly placed the entire burden only upon the appellant to establish that there is no fraud or misrepresentation on his part in obtaining the abovesaid three documents in his favour and therefore, according to him, the trial Court had erred in placing the burden upon the respondents instead of the appellant and in such view of the matter, it is his contention that the second appeals preferred by the appellant do not deserve any acceptance and liable to be thrown out.

13.On the plea of fraud and non-est factum, the respondents' counsel relied upon the decisions reported in **(1990) 1 LW 475 (Sakkarathayammal and 3 others Vs. Shanmugavel Chettiar and 7 others), (1992) 2 LW 209 (K.Varadhan Vs. Pattammal (died) and four others), (1993) 1 LW 466 (Chidambaram Pillai and 3 others Vs. Muthammal and another), (1999) 2 CTC 275 (Thirumalai Vadivu Ammal (died) and 4 others Vs.Muthammal and another),**

(2000) 2 CTC 486 (Minr Palanivelu and 2 others Vs. Sadasiva Padayachi (died) and 7 others) and 2009 (1) CTC 426 (A.Anthony Pushpam Ammal Vs. Rev.Mother Superior, St.Joseph's Leprosy Home, Arokiapuram, Tuticorin and another).

14.In the decision reported in **(1990) 1 LW 475 (Sakkarathayammal and 3 others Vs. Shanmugavel Chettiar and 7 others)**, the principles of doctrine of non-est factum and the burden of proof with reference to the same etc., had been discussed and held in the following manner:

"Limitation Act, Arts. 91 and 59, Contract, Fraud – Specific Relief Act, S.32, and Doctrine of non est factum, principle of – Setting aside of a transaction which is void not being necessary, limitation period is not applicable – Inapplicability of Art.91 when a document is ab initio void – Scope of Art.59.

Mistaken belief or an inducement by misrepresentation – Plea of non est factum – Applicability.

Contract – Non est factum, plea of – See Limitation Act, Arts.91 and 59, etc.

Contract – Void and voidable transactions, distinction between – See Limitation Act, Arts. 91 and 59, etc.

Fraud – See Limitation Act, Arts. 91 & 59 etc.

Specific Relief Act, S.32 – See Limitation Act, Arts. 91 and 59 etc.

As stated in 1953 Madras 611 when a deed of one character is executed on a representation that it was of a different character, then it is void and inoperative. Such a document need not be set aside under Art.91 of the Limitation Act. In this case, the facts and circumstances clearly show that there was a misrepresentation relating to the character of the document Ex.B1.

66 L.W.304 = 1953 Mad.611; - Relied on. 1976 S.C.163; 1963 S.C.1279; and 1980-2-M.LJ.398; - Referred to

In this case, required facts and circumstances relating to fraud are found in written statement. Hence, sufficient particulars had been made available in the pleadings, and the plaintiff has not shown as to in what manner and in regard to what particulars he had been at a handicap in knowing the defence put forth by defendants.

If the transaction is a voidable transaction,

there would be need to set it aside, but if it is a void transaction, there is no need to institute a proceeding to declare it as void, but he can simply avoid it.

1962 Orissa 130; - Referred to.

S.32 of the Specific Relief Act itself states that if anyone who is faced with a void or voidable instrument apprehends that it may cause him serious injury, he may sue to have it adjudged as void or voidable. Art. 91 of the Limitation Act of 1908, prescribes a period of three years for cancellation of a document which is voidable, and it does not apply where the document was ab initio void, because such documents do not require to be set aside in law. Art.59 of the Limitation Act, 1963 prescribes a period of three years from the time when the facts entitling the plaintiff to have the instrument cancelled, first becomes known to him. Therefore, this section cannot be relied upon to claim that, unless a suit is filed to declare a document as void, the executant cannot avoid it, when it is ab initio void as had happened to Ex.B1.

If a party has been misled in executing a deed or signing a document essentially different from that which he intended to execute or sign, he can plead non est factum in an action against him and the deed or writing is completely void in whomsoever's hands it may come. It is invalid not merely on the ground of fraud, where fraud exists, but on the

ground that the mind of the sig nor did not accompany the signature; in other words, that he never intended to sign, and therefore, in contemplation of law never did sign the contract to which his name is appended.

1869 L.R 4 C.P. 704 at 711: Referred to.

15. Similarly, in the decision reported in **(1992) 2 LW 209 (K.Varadhan Vs. Pattammal (died) and four others)**, the onus had been held to be directed to placed upon the opponent party, when an illiterate woman takes the plea of non est factum that there has been no undue influence, threat, misrepresentation etc., and not on the illiterate woman to prove the abovesaid factors and the principles concerning the same had been outlined as follows:

"Contract Act, Ss.15 to 18 and Evidence Act, Ss.101 and 102, - Non est factum – suit by a woman alleging that she was illiterate and that the defendant has played fraud upon her and exercised undue influence, misrepresentation and coercion

Onus upon the defendant to show that there has been no fraud, undue influence or coercion, not on the plaintiff to prove the misrepresentation or fraud.

Non est factum, principle of – Applicability.

Evidence Act, Ss.101 and 102 – Transaction by illiterate woman – Suit by her for declaration, etc.- Principle of non est factum – Applicability – Onus of proof not on plaintiff, but on defendant to prove that there was no misrepresentation, fraud, etc.- See Contract Act Ss.15 to 18 and Non est factum, principle of.

Courts in India have on the rule of evidence enshrined in Ss.101 and 102 in Chapter 7 of the Evidence Act, particularly in cases of women in India who in some parts and some communities are pardanashin and in most parts of the country illiterate, for the reason that they transact their business generally through malefolk only, men always dominated women, this being the curse that always surrounded womenfolk even though law recognised their independent rights, they failed invariably in exercising such rights, accepted that onus lies upon the defendant to show that there has been no fraud, undue influence or coercion in the transaction.

Held:

The single judge on the original side was right in holding that the Court will not ask the plaintiff to prove the allegation, but demand from the defendant to disprove the allegation of misrepresentation and fraud. The learned single judge, has taken the correct view of the law on the fact that the 1st plaintiff is an illiterate woman who merely affixed her thumb impression. She is a woman who possibly could not act without help.

One could easily, since the plaintiff alleged representation and fraud, ask her to prove the misrepresentation and fraud. But not in a case where she being an illiterate and unaware of the contents signed the document. Unless fully and faithfully informed about the contents, she cannot be asked to bring evidence to prove her case.

On the face of the above, the court had no hesitation in holding that the onus lay upon the defendant-appellant to show that the 1st plaintiff fully knew about the contents of the document of sale and that her story that she was made to believe that she was executing a deed of mortgage when she executed the

document is not true. The defendant-appellant failed to discharge the onus in this behalf and the evidence positively proved that the sale was hit by the doctrine of non est factum.

1871 A.C.1004 at 1016 (Lord Reid, Viscount Dilhorna, Lord Wilberforce) – Relied on. Judgment of Mohan,J. Affirmed on appeal.”

16. Similarly, in the decision reported in ***(1993) 1 LW 466 (Chidambaram Pillai and 3 others Vs. Muthammal and another)***, the discharge of the burden of proof when the plea of non est factum had been raised, the Court had discussed the scope of the same and directed that the same should be determined based upon the pleadings put forth by the respective parties and accordingly, outlined the same as follows:

"Contract Act, Ss.16 and 17, Undue Influence, Fraud, Pleadings, Burden of Proof, and Evidence Act, Ss.101 and 102 – Suit by a woman for cancelling a deed of settlement executed by her in favour of her brothers daughter on the ground of exercise of fraud, undue influence and misrepresentation by her niece and niece's husband.

Pardanashin woman, who is – Origin and development of law, as to, traced.

Discharge of the initial onus – Effect of S.16, Contract Act.

Principle of non est factum, applicability of.

Plea of undue influence – Duty of court to scrutinise pleadings and to consider (i) relationship between donor and donee (ii) whether donee has used that position to obtain unfair advantage and whether it is an unconscionable transaction – Burden of proof – Scope.

Contract – Principle of non est factum, applicability of – See Contract Act, Ss.16 and 17.etc.

Fraud/undue Influence – See Contract Act, Ss.16 and 17.

Pleadings – Burden of proof – See Contract Act, Ss.16 and 17 Evidence Act, Ss.101 and 102 – Burden of proof – See Contract Act, Ss.16 and 17.

This appeal arose out of a suit for cancellation of a deed of settlement on the ground that the defendants/respondents (1st defendant being plaintiff's brother's daughter and the 2nd defendant, being her husband)

misrepresented to the plaintiff that she was executing only a power of attorney for collecting arrears of rent from the tenants and that respondents exercised undue influence and fraudulently got the said document executed on the above misrepresentation. The defendants/respondents denied the plea of misrepresentation, undue influence and fraud, denied that there were any arrears due from the tenants and stated that there was no necessity to execute a power of attorney. They came out with a positive case that the 1st defendant/1st respondent was brought up by the plaintiff, that the plaintiff gave her in marriage to the 2nd defendant/2nd respondent and met the marriage expenses, that plaintiff executed the settlement deed knowing fully that she was transferring her interest in the property to 1st defendant /1st respondent etc. The trial court held that there was no misrepresentation, fraud or undue influence in the execution of deed of settlement as alleged by the plaintiff. The plaintiff appealed to the High Court, and her appeal was dismissed by Abdul Hadi, J. This L.P.Appeal was preferred by her heirs and legal representatives who were brought on record after her death against the said judgment.

Held:

A section of womenfolk in view of the

social conditions of the times are presumed to have imperfect knowledge of the world, as the Supreme Court has said in the case of Mst.Kharbuja Kher AIR 1963 S.C. 1203. They are presumed to have imperfect knowledge of the world, as, by the pardah system, they are practically excluded from social intercourse and communion with the outside world. The origin is traced to the Indian social usages and the general rules of English law which protect persons whose disability disabilities make them dependent upon or subject them to the influence of others, even though nothing in the nature of deception or coercion may have occurred, applicable to such section of women. In the words of Lords Sumner, which have been quoted with approval by the Supreme Court in the case of Mst.Kharbuja Kher:- "This is part of the law relating to personal capacity to make binding transfers or settlements of property of any kind." It is due to this imperfection of the knowledge of the world that the law throws round such women a special cloak of protection which demands that the burden of proof shall in such a case rest, not with those who attack, but with those who found upon the deed, and the proof must go so far as to show affirmatively and conclusively that the deed was not only executed by, but was explained to, and was really understood by the grantor. In such case, it must also, of course, be

established that the deed was not signed under duress, but arose from the free and independent will of the grantor.

***Madhavakrishnan V.Sami 1980-2-M.L.J.398 (D.B.-S.Padmanabhan,J.):
K.Varadhan V. Pattammal 1992-2-L.W.209 (D.B.-Mishra,J.);
Farid-un-Nissa V.Muktar Ahmad AIR 1925 P.C.294 = 52 I.A.342 = 47 All.703;
Mst.Kharbuja Kher V.Jangbahadur Rai and others AIR 1963 S.C.1203;
Fayvar-Ud-Din V.Kutab-Ud-Din AIR 1929 Lucknow 309;
Buzloor Raheem V.Shamsoonnisa Begum 8 W.R.3;
Smt.Patal Bala Debi V.Santimoy Majumdar AIR 1956 Calcutta 175
Mr.Rodges V.Delhi and London Bank Ltd.; (1892) 27 I.A.168 = 23 All.137; 27 I.A.168 (P.C);
Smt.Patal Bala Debi V.Santimoy Majumdar AIR 1956 Calcutta 575;
Kanwarani Madna Vati V.Raghunath Singh AIR 1976 H.P.41;
1965 Allahabad Law Journal 1080;
AIR 1977 Allahabad 36;
AIR 1958 Orissa 62;
AIR 1982 Orissa 178;
AIR 1966 Patna 110;
23 MLJ 210; and
AIR 1940 P.C.134 = 52 L.W.448;- Referred to.***

A pardanashin may not be illiterate, but she still may be ignorant in the sense that she has an imperfect knowledge of the world, and she is practically excluded from social intercourse and communion with the outside world. Her ignorance is the course of a social usage that womenfolk depend upon malefolk

for transaction of their business with the outside world. Thus, not all women, but only those who are practically excluded from social intercourse and communion with the outside world fall in this category.

We find ourselves in complete agreement with the view that the special cloak of protection applied to pardanashin woman has to be applied to illiterate women as well.

It is possible to say that the special protection as the Courts have described this rule, is a modification of rule of non est factum properly woven and wherever needed chistled to suit the Indian conditions. Since in the instant case, we are concerned with a woman who is an illiterate, we are in no need to say anything further.

We have seen that on occasions courts have used the word 'onus' in lieu of 'burden', and in certain circumstances, it is made to appear as if the Courts treated this rule of burden of proof only as a rule of onus of proof. This impression one gets only when one views the Authorities superficially. S.16 of the Indian Contract Act particularly deals with the requirement of evidence and the onus in this behalf in a case in a case in which undue influence is alleged. It can be seen from the

language of this section that the court has to ask the person who has founded his claim upon a document to prove that the grant was not obtained by undue influence only when the initial onus is discharged by the person who alleges undue influence, and that there has been such relations existing between the parties that one of the parties was in a position to dominate the will of the other and could use the position to obtain an unfair advantage.

***AIR 1937 P.C.274 = 170 I.C.423; and
AIR 1972 Madras 336; - Referred to;***

The Court trying a case of undue influence must consider two things to start with, viz., (1) are the relations between the donor and donee such

that the donee is in a position to dominate the will of the donor and (ii) has the donee used that position to obtain an unfair advantage over the donor? Upon the determination of these issues, a third point emerges, which is that of the onus probandi. If the transaction appears to be unconscionable, then, the burden of proof that the contract was not induced by undue influence, is to be upon the person; who was in a position to dominate the will of the other.

AIR 1963 S.C.1279;

**AIR 1967 S.C.878;
Halsbury's Laws of England, 3rd Edn.Vol.17;
Para 673, Article 1298;
AIR 1978 Madras 361; (D.B.- Ramaprasada
Rao,J.);
38 M.L.J.349 = 11 L.W.455 (P.C._ - Referred to.**

We have dilated to the rule of initial burden of proof in the case where allegations of undue influence on fraud are made and the principles that are borne in mind before the rule of onus probandi is applied. We have adverted to this aspect of the law for the purpose of keeping the distinction as to the law of burden of proof in the case of pardanashin and illiterate woman or the case where the rule of non est factum is applied, and a case otherwise falling in the category of cases of undue influence and fraud, in which the initial burden has to be discharged by the person making the allegations before the onus probandi is applied. In the former case, there is no burden of proof upon a woman, who alleges that she was ignorant of the character and the contents of the documents, for the reason of illiteracy or she being a pardanashin woman. It has to be presumed in such a case that she could have transferred her rights to the other only for the reason of fraud or undue influence. In the latter case, the burden shall be upon the person alleging undue influence and fraud. The onus will shift only when there is a clear pleading in this behalf with necessary

particulars and the initial onus is discharged.

Held:

On facts: It is a case, in our opinion, of an illiterate woman moving the Court alleging that she acted only on the basis of the representations of the defendants when she put her thumb impression on the document the impugned settlement deed in the presence of the Sub Registrar. It is a case of an illiterate woman thus seeking the protection of law as she executed the document without knowing its true character and contents. Learned single judge has fallen in error in seeking any further pleadings and/or proof of undue influence and fraud from her. The burden in this behalf is upon the defendants. The impugned judgment for the said reason has to be set aside."

17. In the decision reported in ***(1999) 2 CTC 275 (Thirumalai Vadivu Ammal (died) and 4 others Vs. Muthammal and another)***, the principles with reference to the doctrine of non est factum and the burden of proof in connection with the same has been reiterated as follows:

"Contract Act, 1872, Section 18 - Misrepresentation as to nature of document executed - Suit to set aside settlement deed - Plaintiff a widow and an old lady without children - plaintiffs an uneducated person -

Plaint property leased out to third party – Lessee not paying lease amount – Plaintiff's niece and her spouse requesting for execution of deed of power of Attorney so as to recovery arrears of lease amount and to manage plaint property on behalf of plaintiff – Deed executed – Lease amount not recovered even thereafter – plaintiff later learnt that deed executed by her was actually a settlement deed settling plaint property on plaintiff's niece and her spouse and not a power of Attorney document as was represented to her – Document not read over to plaintiff by Sub-Registrar – Stamp papers bearing different dates issued by different vendors in different places – Evidence on record established that settlement deed was result of fraud played by plaintiff's niece and her husband – suit filed by plaintiff against her niece and her spouse for setting aside settlement deed – Originally suit was dismissed and appeal preferred to High Court was also dismissed – On letters patent Appeal Division Bench remanded case to Appellate Court for fresh consideration – On appropriate appreciation of evidence it was held that plaintiff was ignorant of contents of document and hence execution of such document was not intended and she never intended to sign any settlement deed – Settlement deed in favour of plaintiff's niece and her spouse was declared void – Doctrine of non est factum relied upon

to set aside settlement deed.

Doctrine of non est factum – Plaintiff executed document which she never intended to sign – Representation that she is executing a power of attorney deed whereas actually it was a deed of settlement – Plaintiff was illiterate person – Mind did not accompany plaintiff's thumb impression and signature, settlement deed was declared void – Doctrine of non est factum comes into play.”

18. In the decision reported in **(2000) 2 CTC 486 (Minr Palanivelu and 2 others Vs. Sadasiva Padayachi (died) and 7 others)**, the principles of non est factum and the burden of proof with reference to the same, on whom lies has been brought out in the following manner:

Maxims – principles of non est factum – Principles relating to non est factum is applicable to illiterate women also – Person pleading non est factum should not only prove that he is illiterate person and should also prove that circumstances indicate positively that he was made to believe that nature and contents of documents were different from one that was actually executed – It should be proved that mind did not accompany signature – illiterate woman executed two documents thinking that one was mortgage deed and other was lease deed – Documents were actually sale

deeds and sale consideration was very low – Circumstances disclosed that illiterate woman had earlier borrowed money on mortgage from one purchaser – Illiterate woman had discharged her burden of proof.

Evidence Act, 1872, Sections 101 to 103 – Burden of proof – Executants of sale deeds by illiterate woman pleading principle of non est factum – Illiterate woman deposing that mind did not accompany her signature and that she thought that she was executing mortgage deed and lease deed – Sale consideration found to be low – Burden is heavier on one who wants to establish validity of document.”

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"15.From the very nature of the pleadings of 4th defendant, it is seen that her defence is one of fraud and non-est factum. It is settled proposition of law, that the principle relating to non-est factum which was made applicable to case where' fraud and non-est factum is alleged, the burden is heavier only on the person who wants to establish the validity of document and in the present case, the Appellate Court had chosen to throw the burden on the wrong side. While considering the burden of proof in cases of non-est factum in Kharbuja Kuer V. Jangbahadur Rai and others AIR 1963 S.C.1203, the Supreme Court had clearly laid down that the burden of proof

was on the defendant who wanted to sustain the document. The same view was expressed by the Division Bench in the earlier ruling cited above in Chidambaram Pillai and others V.Muthamma and another, 1993(1) L.W.466.

19. Similarly, in the decision reported in **2009 (1) CTC 426 (A. Anthony Pushpam Ammal Vs. Rev. Mother Superior, St. Joseph's Leprosy Home, Arokiapuram, Tuticorin and another)**, also it has been held that when the plea of non est factum is taken, the entire burden lies upon the opponent party and not on the party, who had taken the abovesaid plea, particularly, giving leverage to illiterate women with reference to the same and the same had been outlined as follows:

" Evidence Act, 1872 (1 of 1872), Sections 101 to 104 – Burden of proof – Plea of non-est factum – When plea of non-est factum is taken by plaintiff, entire burden lies on defendant to prove that there is no misrepresentation or fraud – In case of illiterate person, entire burden lies on person who relies upon particular document to prove that same has been read and explained to such illiterate person."

.....

Held: From the conjoint reading of the decisions accited by the learned counsel

appearing for the appellant/second plaintiff, the Court can easily ken that if the plea of non-est factum has been taken on the side of the plaintiff, the entire burden lies upon the defendant to prove that there is no misrepresentation or fraud and further it is made clear to the Court that in a case of undue influence, the Court has to carefully look into the relationship between the parties and also the position of one party so as to obtain unfair advantage and further it is also made clear to the Court that in a case of illiterate person, the entire burden lies upon the person who relies upon a particular document to prove that the same has been ready and explained to such illiterate person."

20. Admittedly, the suit property belongs to the respondents. Now, according to the appellant, in respect of the suit property, the respondents had entered into the sale agreement with him on 01.12.2004, whereunder, it is his case that the respondents had agreed to convey the suit property to him for a sale consideration of Rs.6,00,000/- and accordingly, he had paid a sum of Rs.1,00,000/- on the date of the sale agreement i.e. on 01.12.2004 and the abovesaid document has come to be marked as Ex.A1 and on a perusal of Ex.A1, it is seen that the appellant had agreed to pay the balance sale consideration of Rs.5,00,000/- to the respondents within one month and

obtain the sale deed from the respondents and it is further seen that at the time of the sale agreement abovestated, a lis had been pending in O.S.No.6313 of 2001 between the respondents and others and accordingly, it is stated that the sale deed should be executed within one month subject to the decision in respect of the suit property after the disposal of the abovesaid suit and thereby, it is seen that following Ex.A1 sale agreement, the possession of the suit property had not been handed over to the appellant. Therefore, the appellant has proceeded with his case only based upon the sale agreement dated 01.12.2004 and as above seen, it has been specifically pleaded by him that the sale consideration thereunder had been fixed at Rs.6,00,000/- and that, he had paid a sum of Rs.1,00,000/- on the date of the sale agreement. However, quite contrary to his case, during the course of his evidence, the appellant examined as PW1 has admitted that he knew the erstwhile advocate of the respondents viz., one Natanaraj and it has been also admitted by him that the said Natanaraj had been conducting the case of the respondents at the relevant point of time and also admitted that the sale agreement Ex.A1 had been prepared only by the respondents' advocate and would state that he had paid the advance sum of Rs.1,00,000/- 15 days prior to 01.12.2004 and with reference to the same, he had not obtained any receipt from the respondents and according to him, the parties had agreed as regards the sale transaction at a park in Egmore and further, would also state that he does not remember, from where, he had taken

the said amount for paying to the respondents and though he would claim that he was having sufficient amount in his account, the document pointing to the same had not been produced by him and accordingly, it is found that he has given a go by to his case of the payment of Rs.1,00,000/- to the respondents on the date of the sale agreement, marked as Ex.A1, and he would project a case as if he had paid the advance sum of Rs.1,00,000/- 15 days prior to Ex.A1 agreement, if that be so, necessary recitals pointing to the same would have been recorded in Ex.A1. As per Ex.A1 sale agreement, the sum of Rs.1,00,000/- had been advanced on the date of the sale agreement. When the appellant has putforth a case during the course of his evidence that he had paid the said sum 15 days prior to Ex.A1 and the respondents had totally disputed any payment of consideration by the appellant to them at any point of time, as rightly putforth, one would have expected the appellant to place necessary proof, evidencing his alleged payment of Rs.1,00,000/- based upon Ex.A1 agreement to the respondents, however for accepting the same, Ex.A1 alone cannot be taken into consideration, inasmuch as the averments contained therein had been given a go-by by the appellant during the course of his evidence and as abovenoted, he has only deposed that the sum of Rs.1,00,000/- had been paid 15 days prior to Ex.A1, when in particular the respondents had totally disputed the payment of any amount under Ex.A1 or prior to the same, the appellant for sustaining his case should have placed acceptable and reliable

materials to hold that he had paid a sum of Rs.1,00,000/- 15 days prior to Ex.A1 as testified by him. However, when there is no proof adduced by the appellant with reference to the same and when the abovesaid case of the appellant cannot be sustained based upon Ex.A1 as the said document has been ignored by the appellant during the course of his testimony by stating that the advance amount had been paid 15 days prior to the same, in such view of the matter, as rightly put forth by the respondents' counsel based upon the abovesaid inconsistent case and evidence of the appellant himself, one could visualise the falsity of the appellant's case as regards the sale agreement projected by him for obtaining the reliefs prayed for against the respondents.

21. When under Ex.A1 agreement, it is the case of the appellant that the parties had agreed for the sale consideration to be fixed at Rs.6,00,000/-, quite inconsistent to the abovesaid case, the appellant would plead that he had thereafter obtained a sale deed from the respondents concerning the suit property on 27.01.2006 and according to the appellant, the respondents had executed the sale deed abovestated to him by receiving a sum of Rs.2,00,000/- but they have demanded the entire sale consideration from him and however, executed the said conveyance in his favour and the abovesaid sale deed has come to be marked as Ex.A2. The respondents had disputed the payment of any sum by the appellant, under Ex.A2 also. On a perusal of Ex.A2, quite

inconsistent to Ex.A1, the sale consideration under Ex.A2 had been recited as Rs.4,63,500/-, when according to the appellant, the sale consideration had been fixed by the parties at Rs.6,00,000/- under Ex.A1 sale agreement, it does not stand to reason as to how come the parties had reduced the sale consideration to Rs.4,63,500/- by way of Ex.A2 sale transaction and accordingly, proceeded with the execution of the sale deed as putforth by the appellant. The theory projected by the appellant, that the abovesaid sale consideration had been fixed taking into consideration the guideline value also cannot be easily countenanced, when according to the appellant, only following Ex.A1 sale agreement, the sale deed had come to be executed in his favour. Naturally, if really, the parties had entered into a sale agreement concerning the sale of the property as putforth, the recitals in the sale deed would be similar to the sale agreement Ex.A1 and on the other hand, the sale consideration itself is found to be different in both the documents and in such view of the matter, it is seen that a strong suspicion arises as regards the case of the appellant that the respondents had executed the sale deed in his favour in respect of the suit property for a sum of Rs.4,63,500/-. If really, Ex.A2 sale deed had emanated following Ex.A1 sale agreement, necessary recitals as regards Ex.A1 would have been incorporated in Ex.A2 sale deed. However, nothing has been whispered as regards Ex.A1 sale agreement in Ex.A2 sale deed and it had been admitted by the appellant during the course of his evidence that there is no reference at

all about Ex.A1 agreement in Ex.A2 sale deed. Similarly, there is no recital in Ex.A2 that the appellant had paid a sum of Rs.1,00,000/- as advance on the date of Ex.A1 sale agreement or paid the abovesaid sum 15 days prior to Ex.A1 sale agreement as putforth during the course of evidence. On the other hand, a new case had been projected by the appellant that on the date of the sale deed Ex.A2, he had paid a sum of Rs.2,00,000/- to the respondents and that the respondents had agreed to hand over the possession of the suit property on receiving the balance sum from him at the time of handing over the possession. If that be the case of the appellant, it is seen that the balance sale consideration would be only at Rs.2,63,500/-. As abovenoted, nothing has been recited in Ex.A2 as regards the payment of Rs.1,00,000/- said to have been paid as advance by the appellant to the respondents under Ex.A1 or 15 days prior to Ex.A1. A reading of Ex.A2 sale deed would only go to show that the appellant had paid a sum of Rs.2,00,000/- to the respondents on various dates, which had been appropriated by the vendors towards advance. When there is nothing mentioned about Ex.A1 sale deed in Ex.A2 and when Ex.A2 recites that the sum of Rs.2,00,000/- had been paid towards the sale consideration on various dates and the balance sale consideration of Rs.2,63,500/- had also been recited to have been paid at the time of the registration of the sale deed, quite inconsistent to the abovesaid case of the appellant, he would state that by way of the payment of Rs.2,00,000/- as recited in Ex.A2, according to him, he, in

toto had paid a sum of Rs.3,00,000/- to the respondents. However, when as abovenoted, the payment of Rs.1,00,000/- is alleged to have been made by way of Ex.A1 sale agreement is conspicuously absent in Ex.A2 sale deed and Ex.A2 recites as if the payment of Rs.2,00,000/- had been made in parts on various dates by the appellant to the respondents, as rightly putforth, complete inconsistency is found in the case projected by the appellant as regards the sale deed said to have been executed by the respondents in his favour in respect of the suit property. Further, even with reference to the payment of consideration under Ex.A2 sale deed, the appellant has given a go-by to the recitals contained in the document during the course of his evidence. In this connection, the appellant, during the course of evidence, would state that the document Ex.A2 recites as if the sum of Rs.2,00,000/- had been paid to the respondents on various dates. However, admittedly he had not obtained any receipt from the respondents as regards the said payment alleged to have made on various dates. On the other hand, a reading of the plaint of the appellant would go to show that he had putforth a case that the respondents had received a sum of Rs.2,00,000/- on the date of the execution of the sale deed and agreed to take the remaining amount at the time of handing over the vacant possession. But even the abovesaid case has been given a go-by by the appellant during the course of evidence and he would state that the averments putforth by him in his suit that he had paid a sum of Rs.2,00,000/- on the date of the sale deed

is not correct. When as abovenoted, there is nothing averred as regards Ex.A1 sale agreement in Ex.A2 sale deed and the appellant has miserably failed to establish the payment of Rs.1,00,000/- under Ex.A1 sale deed or 15 days prior to the same as above discussed, the appellant cannot be allowed to plead or putforth the case that inclusive of the alleged payment of Rs.2,00,000/- mentioned under Ex.A2 sale deed, he had in toto paid a sum of Rs.3,00,000/- to the respondents when in particular that is not the case projected by the appellant in Ex.A2 sale deed as above pointed out and when the respondents had also disputed the payment of any sum under Ex.A2 sale deed, it is for the appellant to establish the payment of Rs.2,00,000/- as recited in Ex.A2 sale deed. Ex.A2 recites as if the sum of Rs.2,00,000/- had been paid in piecemeal on various dates to the respondents. If really, any such payment had been tendered on various dates, as a prudent person, the appellant would have obtained the necessary receipts from the respondents in evidence thereof to sustain his case. On the other hand, he would admit that he has not obtained any receipt from the respondents. In such view of the matter, when the case projected by the appellant by way of Exs.A1 and A2 are found to be inconsistent and contradictory to each other as regards the payments mentioned thereunder and when according to Ex.A1 sale agreement, the sale consideration had been fixed at Rs.6,00,000/-, however, when according to Ex.A2 sale deed, the sale consideration had been fixed at Rs.4,63,500/- and when with reference to

the abovesaid inconsistencies, there is no proper explanation on the part of the appellant and when Ex.A1 is conspicuously not mentioned in Ex.A2 sale deed and when the payment of Rs.2,00,000/- mentioned in Ex.A2 sale deed on various dates is not supported and proved by the appellant by producing necessary documents, it is seen that the case of the appellant that he had paid a sum of Rs.2,00,000/- in piece meal on various dates to the respondents cannot be given any credence and the mere fact that the respondents had agreed to the execution of the sale deed by itself would not in any manner advance the case of the appellant.

22.Now, under Ex.A2 sale deed, the sale consideration had been fixed at Rs.4,63,500/-. A reading of the recitals found in Ex.A2 sale deed would go to show that apart from Rs.2,00,000/- said to have been given by the appellant to the respondents on various dates, the document also recites as if the balance sum of Rs.2,63,500/- had been paid by the appellant to the respondents at the time of the registration of the said document. However, the appellant has admitted during the course of his evidence that there is no reference in Ex.A2 sale deed that the balance sum of Rs.2,63,500/- had been tendered by him to the respondents in the presence of the Sub Registrar at the time of the registration. If really, any such sum had been paid by the appellant to the respondents as putforth, necessary endorsements would have been made by the registrar concerned in the document at the time of the registration of the

same. Therefore, even the case of the appellant that a sum of Rs.2,63,500/- had been paid on the date of the registration of the document also falls to the ground.

23.Further, a reading of Ex.A2 would go to show that the appellant had taken the possession of the property from the respondents. However, even the abovesaid case of the appellant, had been given a go-by during the course of evidence as well as in his pleadings and according to the appellant, though a pucca sale deed had been secured from the respondents in respect of the suit property by way of Ex.A2, it is his case that the parties thereafter also had chosen to execute the deed of undertaking on 25.02.2006 marked as Ex.A4, whereunder, the appellant had agreed to pay a sum of Rs.3,00,000/- towards the balance sale consideration for getting the possession of the property. If the case of the appellant as putforth in Ex.A2 is true, it is seen that by way of the said document itself, he had taken the possession of the suit property. On the other hand, quite inconsistent to the abovesaid case, he would also plead that Ex.A4 deed of undertaking had been entered into between the parties for handing over the possession of the suit property on payment of the balance sum of Rs.3,00,000/-. However, as abovenoted, Ex.A2 recites as if the entire sale consideration had been tendered by the appellant to the respondents as recited therein. However, as above discussed, there is no proof pointing to the same on the side of the

appellant. On a perusal of Ex.A4 deed of undertaking, it is seen that there is no reference at all about the sale agreement Ex.A1 in the said document other than the recital that the parties had agreed to fix the sale consideration in respect of the suit property at Rs.6,00,000/- but in Ex.A2 sale deed, the sale consideration had been fixed at Rs.4,63,500/-. In Ex.A4, deed of undertaking, there is no reference about the payment of Rs.1,00,000/- by the appellant to the respondents under Ex.A1 agreement or 15 days prior to the same as above discussed and also nothing has been averred in Ex.A4 deed of undertaking that the appellant had paid a sum of Rs.2,00,000/- in piece meal on various dates to the respondents as mentioned in Ex.A2 sale deed. On the other hand, nothing at all has been mentioned about Ex.A1 sale agreement or Ex.A2 sale deed in the deed of undertaking marked as Ex.A4. When according to the appellant, the respondents had received the entire sale consideration as recited in Ex.A2 and handed over the possession to him, it does not stand to reason as to why even thereafter, he had endeavoured to take a deed of undertaking from the respondents as if the sale consideration is only Rs.6,00,000/- and that, he had paid only a sum of Rs.3,00,000/- and not the entire sale consideration as mentioned in Ex.A2 sale deed. If the abovesaid case of the appellant based on Ex.A4 is to be taken as a true case, automatically, Ex.A2 goes out and it is seen that quite inconsistent to the recitals contained in Ex.A2 sale deed, the appellant has putforth recitals in Ex.A4 deed of undertaking as if the

entire sale consideration had not been paid to the respondents by the appellant and still, a sum of Rs.3,00,000/- remains to be paid. According to Ex.A4, the appellant had agreed to pay the balance sum of Rs.3,00,000/- at the time of handing over the possession of the suit property. As abovenoted, Ex.A2 recites as if the possession had been handed over to the appellant by the respondents. Therefore, the case of the appellant that to instil confidence on the part of the respondents, the deed of undertaking had come to be executed between them and further to reiterate the above factor, he had also handed over three blank cheques to the respondents each for a sum of Rs.1,00,000/-, as such, cannot be countenanced. If really, the appellant from the inception had been always ready and willing to complete the sale transaction based on Ex.A1 sale agreement said to have been entered into between the parties concerned, as to why three different transactions quite inconsistent to each other had been projected and relied upon by the appellant for claiming title to the suit property has not been satisfactorily explained in any manner. When as per Ex.A2, the appellant pleads that he has obtained the title deed to the suit property, it does not stand to reason as to why even thereafter, he had chosen to enter into a deed of undertaking with the respondents in respect of the suit property has not been properly explained and when the recitals contained in Exs.A1 & A2, A4 are found to be not consistent and on the other hand, found to be varying in all aspects and when the appellant has miserably failed to

establish his alleged payment of Rs.1,00,000/- based upon Ex.A1 sale agreement or 15 days prior to the same, his alleged payment of Rs.2,00,000/- based upon Ex.A2 sale deed in piece meal on various dates as above discussed and quiet inconsistent to the case putforth by him, when Ex.A2 sale deed recites that the respondents had received the entire sale consideration, he had come forward with a new case as if even thereafter, the parties had agreed to enter into a deed of undertaking as regards the handing over the possession of the suit property and on the other hand, when Ex.A2 recites as if the possession had been handed over to the appellant by the respondents, a strong suspicion arises as regards the execution, validity and binding nature of Ex.A1 sale agreement as well as Ex.A2 sale deed and Ex.A4 deed of undertaking and accordingly, as putforth by the respondents inasmuch as the appellant in collusion with the erstwhile advocate of the respondents had brought about the various documents with a view to defraud and cheat the respondents and thereby, deprive them of the suit property, accordingly, seems to have secured the documents by committing fraud on them on misrepresentation as if they are taking only security document by way of mortgage for handing over the money to the respondents and in the guise of the same, appear to have taken the sale agreement, the sale deed and thereafter, the deed of undertaking without disclosing the contents thereof to the respondents by taking advantage of their illiteracy, they being ignorant womenfolk without any education. In

such view of the matter, it is found that as rightly putforth by the respondents' counsel, on a reading of the case projected by the appellant, the inconsistent evidence adduced by him with reference to the same and the unreliable and contradictory recitals found in Exs.A1, 2 and 4 vis-a-vis the oral evidence adduced by the appellant with reference to the same would only go to expose that, right from the inception, the appellant had been scheming one way or the other and colluded and acted hand in glove with the erstwhile advocate of the respondents with the sole aim of grabbing the suit property from the respondents without payment of any sum to them whatsoever.

24.If the appellant's case as regards the sale conveyance of the suit property to him by the respondents by way of Ex.A2 sale deed is true and if really he had been **bonafide** in his approach and endeavoured to pay the promised sum to the respondents, at least, to buttress his claim, he should have endeavoured to pay the sum promised to the respondents at the time of the execution of Ex.A4 deed of undertaking. Even therein, as per the case of the appellant, he had not paid the sum of Rs.3,00,000/- to the respondents. On the other hand, he would only state that to show his bonafides, he had handed over three blank cheques to them for a sum of Rs.1,00,000/- each. As to why, he had not endeavoured to pay the balance sum of Rs.3,00,000/- to the parties on the said date, has not been properly explained. According to the appellant, he had taken the

possession of the property following Ex.A2 and quite inconsistent to the same, to state that for taking the possession of the property, the parties had entered into the deed of undertaking subsequent to Ex.A2 cannot be accepted in any manner and when the recitals contained in Exs.A2 and A4 are found to be varying in all aspects and when the appellant had failed to establish the payment of any sum by way of Ex.A1 and by way of Ex.A2, in all, it is seen that the appellant had connived to cheat the respondents taking advantage of their illiteracy and thereby, had created the various documents projected by him and laid a false suit. The truth had come to be exposed following the endeavour of the respondents to encash the cheques presented by the appellant by way of Ex.A4, the said cheques have been dishonoured, the respondents realizing their unenviable position and that they had been cheated by the appellant, accordingly, is found to have approached their advocate and their advocate having returned their brief to them and directing them to approach the appellant for proceeding further and when the respondents had approached the appellant and the appellant had apprised them that they had already executed the sale deed in respect of the suit property in his favour marked as Ex.A2, only thereafter the respondents had come to know about the developments, whereby, they had been cheated of the suit property accordingly, it is seen that they had chosen to execute the deed of cancellation of the alleged sale deed marked as Ex.A2.

25.Further, the deed of undertaking marked as Ex.A4 is also found to be false, unreliable and totally inconsistent to the case projected by the appellant by way of Ex.A2. When Ex.A2 is being relied upon by the appellant for sustaining title to the suit property and when Ex.A2 is found to have been executed by the respondents in toto to the appellant in respect of the suit property and the document also recites as if the possession of the suit property had been handed over to the appellant, quite inconsistent to the said case as well as the case projected by the appellant from the inception by way of Exs.A1 & A2, in Ex.A4 deed of undertaking, according to the appellant, a recital has been incorporated in the said document that in the event of the failure of the appellant to pay the balance sum, he is entitled to take the possession of half of the suit property in the light of the payment of Rs.3,00,000/- said to have been paid by him earlier. When according to the appellant, he had taken the valid sale conveyance of the entire suit property from the respondents by way of Ex.A2, the new development which had been mentioned in Ex.A4 deed of undertaking that the appellant would be well entitled to take the possession of the half of the suit property in the event of his failure to pay the balance sum, goes to the root of the matter and the same would only expose that the appellant had been hellbent upon to grab the suit property one way or the other, by way of inconsistent pleas in the documents created by him and accordingly, it is found that inasmuch as the appellant had not paid any sum to the respondents either under

Ex.A1 or under Ex.A2 or not genuinely assured them to pay the balance sum of Rs.3,00,000/- as recited under Ex.A4, it is found that somehow or the other, with a view to grab the suit property, at least a portion of the suit property, it is found that the appellant had obtained the deed of undertaking also from the respondents taking advantage of their illiteracy.

26. Not only that a new case has also been projected by the appellant during the course of his evidence as if the second respondent had approached the appellant separately pleading that inasmuch as she is not married and that her sister would deceive her, accordingly, it is his case that she had tendered Rs.3,00,000/- to him requesting him to arrange another property for her and accordingly, it is pleaded that on that premise, he had entered into the deed of undertaking marked as Ex.A4. If that be the case, necessary recitals pointing to the same would have been incorporated in Ex.A4. But Ex.A4 is found to have been obtained from both the respondents as if both had agreed to part with the possession of the property to the appellant on the payment of Rs.3,00,000/-. It is also to be noted that the blank cheques had been handed over to the respondents together as recited in Ex.A4 document. Therefore, as rightly put forth by the respondents, the appellant had also endeavoured to create a split amongst the respondents taking advantage of the illiteracy and tricked them in the execution of the deed of

undertaking and on the other hand, when the recitals contained in Ex.A4 do not vouchsafe his abovesaid case in any manner, it is found in toto that the appellant had been developing his false case one way or the other without proper pleas and accordingly, it is found that considering the total variations in the documents projected by him as well as in his evidence as above discussed, it is found that the appellant is unable to place a clear and true case for obtaining the reliefs sought for.

27.As seen from the evidence of the appellant, it is found that it is he who had prepared the sale deed marked as Ex.A2. Further, it is also noted that only at his instance, he had brought about the sale agreement Ex.A1 also marked in the case. Accordingly, following the same, it is found that he had also chosen to create the deed of undertaking marked as Ex.A4. In such circumstances, merely because Ex.A1 had been attested by the first respondent's husband or Ex.A2 had been attested the first respondent's father-in-law etc., they all would not in any manner be useful to sustain the case of the appellant. In this connection, the appellant examined as PW1, during the course of his evidence, has admitted that the respondents had studied only upto 8th standard and he had learnt about the respondents having studied only upto 6th standard and that the respondents do not know to read or write English and also further admitted that there is no recital contained in Ex.A1 that the contents thereof were read over to the respondents in Tamil and thereby,

the respondents knowing the contents thereof, had signed and executed the said document and further, admitted that he does not know the educational background of the first respondent's husband and also does not know whether he knew to read and write English and know that he would sign in English and also would state that he does not know whether the first respondent's husband does not know to read and write English and admitted that it is he, who had written the sale deed Ex.A2 and such being the evidence of the appellant as rightly putforth, merely because, the first respondent's husband or her father-in- law had attested the documents concerned, that by itself, would not enure to the benefit of the appellant in any manner for accepting his case based upon the documents projected by him.

28.The appellant's counsel contended that the respondents had not endeavoured to examine their advocate to sustain their pleas and also not taken any steps against their advocate for having cheated them as putforth by them and accordingly, they having admitted the signing and the execution of the documents projected by the appellant, that by itself would be sufficient proof of their knowledge of the contents of the said documents and in such view of the matter, it is her contention that the first appellate Court had erred in rejecting the appellant's case. However, when in the light of the above discussions, the documents projected by the appellant marked as Exs.A1, A2 and A4 are found to be not consistent

with each other and totally varying with each other in all aspects both as regards the payment of the sum as recited therein as well as qua the delivery of the possession of the property and quite inconsistent to the abovesaid recitals, the appellant had tendered evidence as regards the alleged payment of the sums mentioned in the said documents, furthermore, when there is no proof or materials worth acceptance placed on the part of the appellant evidencing the same and furthermore, when the appellant is found to have endeavoured to create a split amongst the respondents with a view to grab the portion of the suit property one way or the other, quite inconsistent to the case projected by him and with reference to the abovestated case of the appellant, there is no plea or material worth acceptance and when the appellant has failed to establish the alleged payment of sums as recited in Exs.A1 and A2 or Ex.A4 and the alleged payment of the sums mentioned in the abovesaid documents and the evidence tendered are found to be totally inconsistent and varying with each other and the alleged payments inter se are not found to be consistent as above discussed and when as contended by the appellant's counsel the respondents are not liable to discharge the burden of proof particularly, in the light of their defence of fraud and non-est factum, by taking into consideration the principles of law governing the abovesaid pleas and the discharge of the burden of proof rests only on the part of the appellant, as above pointed out, in such view of the matter, it is seen that the trial Court has totally erred in placing the

burden of proof on the respondents instead of the appellant and thereby, erroneously granted the reliefs in favour of the appellant and rejected the respondents' lis.

29.As regards the proposition of law, that if really there had been any payment of the balance sale consideration, at the time of the registration of the document Ex.A2, as putforth by the appellant, has any semblance of truth, the Registrar concerned would have made the necessary endorsement with reference to the same as per law as above discussed and however, when the document Ex.A2 does not contain any such endorsement of the Registrar concerned, the abovesaid case of the appellant as projected through Ex.A2 sale deed also cannot be relied upon and in this connection, a usual reference may be also made to the decision reported in **(1996) 2 MLJ 267 (Ramasami Vs. Krishnasami Alias Krishnan)**.

30.Furthermore, when the documents Exs.A1 and A2 do not contain any reference as to the contents thereof had been read over to the respondents and the respondents only after knowing the contents thereof or the implication thereof had signed or executed the said documents merely because the first respondent's husband, and her father-in-law had attested the said documents, that by itself would not, impute knowledge on the part of the appellant as regards the contents of the same and the

mere attestation would not impute the knowledge of the contents of the document either on the part of the attestors or the executants thereof, in this connection the respondents' counsel would rely upon the authority reported in **(2003) 1 LW 818 (K.A.Selvanachi and another vs. Dr.S.R.Sekar and another)**.

31. With reference to the alleged payment of the money to the respondents by way of Exs.A1, A2 and A4, the same having not been buttressed by the appellant by placing acceptable proof as above discussed and when with reference to the alleged payment of the sums under the abovesaid documents, the recitals contained therein are found to be totally inconsistent to each other coupled with the fact that quite inconsistent to the same, the appellant had also tendered evidence in relation to the same as above pointed out and discussed, it is seen that as rightly put forth, the appellant has miserably failed to establish the payment of any sum to the respondents as regards the alleged transactions entered into between the parties. It is thus found that there has been complete prevarication of the pleadings and evidence put forth by the appellant in the case projected by him and in such view of the matter, it had been rightly rejected by the first appellate Court and in this connection, a usual reference is made to the decisions reported in **(2012) 2 LW 9 (B.Tamilselvan Vs. Balasubramanian and others)**

and **(2013) 9 Supreme Court Cases 152 (Vathsala**

Manickavasagam and others Vs. N.Ganesan and another).

Therefore, when the pleas projected by the appellant himself are found to be inconsistent to each other and the evidence tendered by the appellant in relation to the same are also found to be not in tune to the case projected and accordingly, a new and different case had been projected by the appellant at every stage of the matter, in such view of the matter, it is seen that the aim of the appellant is only to grab the suit property from the respondents taking advantage of their illiteracy and accordingly, the same had resulted in the prevarication of the pleadings and the evidence projected by the appellant in the matter.

32.The Principles of law outlined in the decisions relied upon by the respondents' counsel reported in **(2011) 4 SCC 240 (H.Siddiqui (Dead) By LRs. Vs. A. Ramalingam), (1953) 66 LW 304 (Jami Appann Vs. Jami Venkatppadu and others) and 1993-2-L.W.68 (Kolandai Vs.Arasan Servai & 3 others)** are taken into consideration and followed as applicable to the case at hand.

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33.In the light of the above discussions, the first appellate Court had rightly accepted and appreciated the plea of non-est factum and fraud projected by the respondents and thereby, rightly held that the appellant had failed to discharge the burden of proof resting upon him to substantiate the pleas putforth by him for seeking the reliefs prayed for

and in such view of the mater, the mere execution of the abovesaid documents by the respondents by itself would not enure to the benefit of the appellant and consequently, the mere fact that the respondents had failed to examine their advocate or take any action against their advocate concerned, by itself, would not be sufficient to hold that the case projected by the appellant by way of Exs.A1, A2 and A4 is true, valid and acceptable.

34.Resultantly, it is noted that the First Appellate Court has given sufficient and plausible reasons for setting aside the Judgment and Decree of the trial Court as required by law and accordingly, the substantial questions of law formulated in the second appeals are accordingly answered against the appellant and in favour of the respondents.

For the reasons aforesated, both the second appeals fail and are, accordingly, dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

18.12.2018

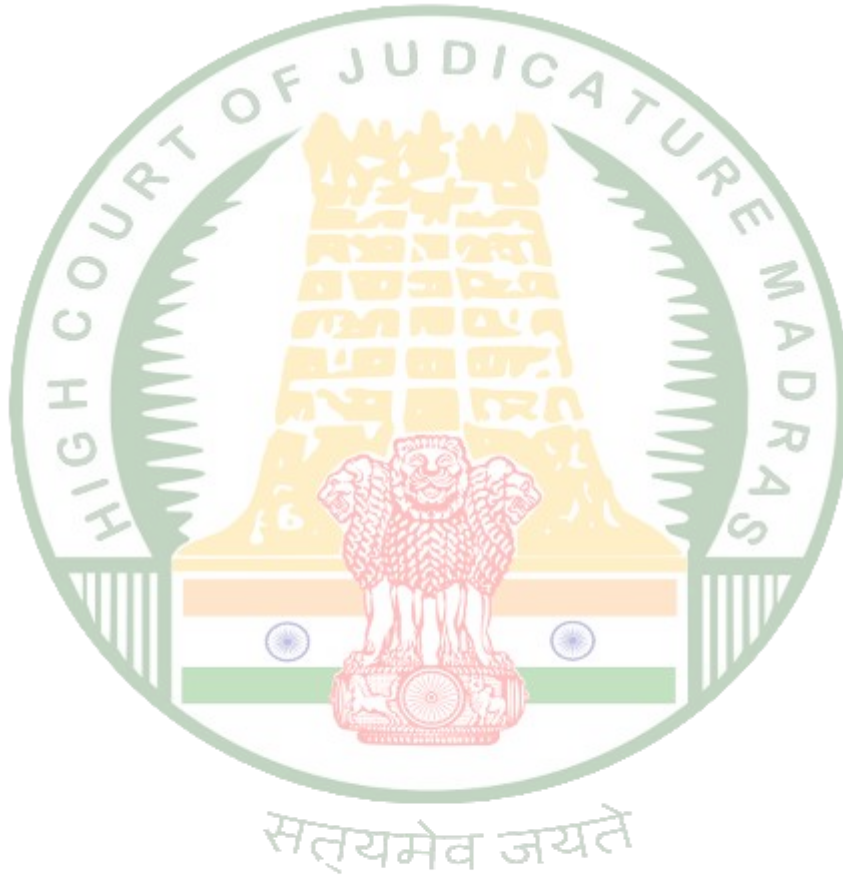
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To

1.The III Additional City Civil Court, Chennai.

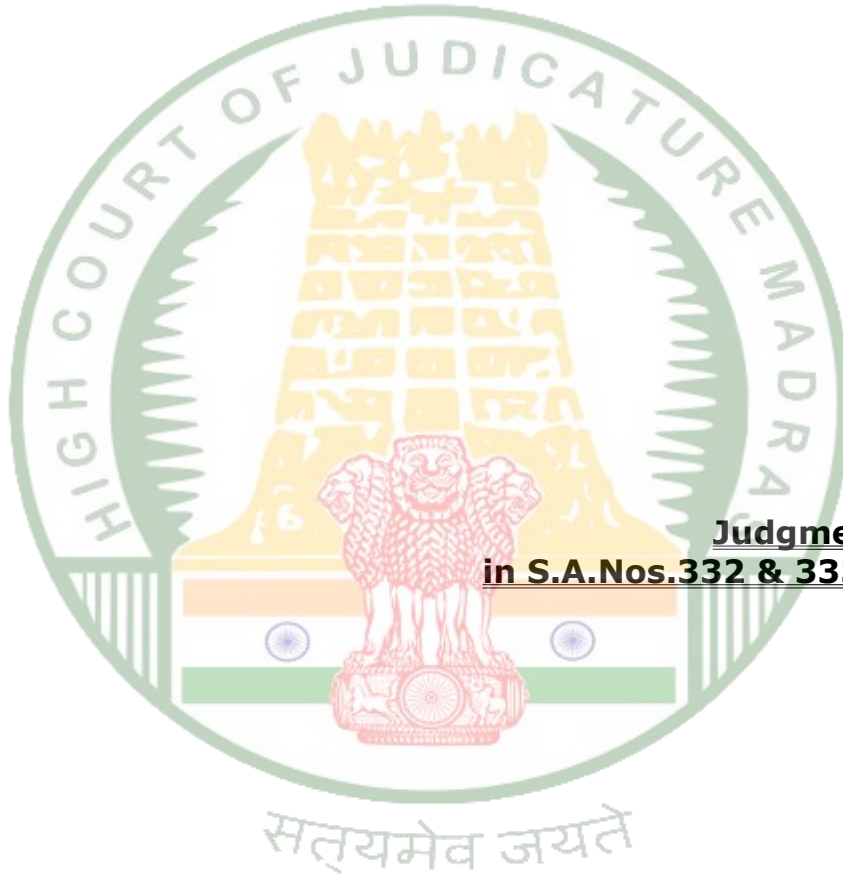
2.The III Assistant City Civil Court, Chennai.



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T.RAVINDRAN, J.

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Judgment made
in S.A.Nos.332 & 333 of 2015

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18.12.2018