

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 20.06.2018

PRONOUNCED ON : 16.07.2018

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

S.A.No.1703 of 2004

1. Palanisamy
2. Thangavelu
Nachimuthu (Deceased)
(Cause title accepted vide order
dated 09.07.2004 made in
CMP No.11158/04)
3. Kaliasammal ...Appellants/Defendants

Vs.

1. Marappan
2. Palanisamy
3. Rajeswari
4. Marathal (Deceased)
(R4 died. Memo is recorded. Memo dt.04.06.2018
RR 1 to 3 are recorded as LR's of the deceased
R4 Viz., Marathal vide order of Court dated
05.06.2018 made in S.A.No.1703 of 2004)
...Respondents/Plaintiffs

Prayer :- Second Appeal has been filed under Section 100 of CPC against the Judgement and Decree dated 31.12.2003 passed in A.S.No.4 of 2003 on the file of the Subordinate Court, Tiruppur, reversing the Judgment and Decree dated 30.10.2002 passed in O.S.No.467 of 1995 on the file of the District Munsif cum Judicial Magistrate Court, Palladam.

For Appellants :Mr.K.Govi Ganesan

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

JUDGMENT

Challenge in this second appeal is made to the Judgement and Decree dated 31.12.2003 passed in A.S.No.4 of 2003 on the file of the Subordinate Court, Tiruppur, reversing the Judgment and Decree dated 30.10.2002 passed in O.S.No.467 of 1995 on the file of the District Munsif cum Judicial Magistrate Court, Palladam.

2. Parties are referred to as per their rankings in the trial Court.

3. Suit for Declaration and Permanent Injunction.

4. The case of the plaintiffs, in brief, is that the first plaintiff is the absolute owner of the plaint schedule properties. He acquired the same by virtue of the sale deeds dated 31.10.1941, 15.09.1957 and 22.05.1971 and the plaint schedule properties are the self acquired properties of the first plaintiff and the first plaintiff has three sons and one daughter and his children marriage had been celebrated and the children are living separately. The defendants 1 & 2, for quite some time, requested the first plaintiff to permit them to run the quarry industries in the plaint schedule properties and the first plaintiff was constrained to oblige the request of the defendants 1 & 2 and their father in view of the blood relationship and accordingly, the defendants 1 & 2 took the first plaintiff twice to the Sub Registrar's Office, Suler and got executed some documents representing that they required some power of attorney from the first plaintiff in order to run the quarry industries and believing the representation of the defendants 1 & 2, the first plaintiff complied the request and need of the defendants 1 & 2 and while the facts remain so, for the past two months, the defendants 1 & 2 started ill-treating the first plaintiff taking advantage of his old age and gone one step further and failed to provide food and shelter to him and also proclaiming that they had got executed the several deeds from the first plaintiff with respect to the plaint schedule properties and following the same, the first plaintiff being an old aged person and totally a deaf man, fed up with the activities of the defendants 1 & 2, applied for the copies of the documents from the Sub Registrar office, Suler and on a perusal of the same, came to understand that the defendants 1 & 2 had got executed deeds of sale as well as the settlement deed from him under the guise of getting the power of attorney and the first plaintiff had executed the abovesaid three documents on different days without knowing the implications or the nature and contents of the said documents and the defendants 1 & 2 had played fraud upon him and the defendants 1 & 2 had accordingly, obtained two sale deeds and one settlement deed from him as detailed in the plaint, with reference to the plaint schedule properties viz., sale deed dated 27.08.1992, sale deed dated 15.07.1993 and settlement deed 15.07.1993 and the abovesaid documents are void as the first plaintiff had executed them without knowing the contents and implications of the said documents and without any intention of creating interest in respect of the plaint schedule properties in favour of the defendants and the abovesaid documents had not been given effect to and the defendants have no better title, interest or right in

respect of the properties comprised in the abovesaid documents and as the defendants 1 & 2 had obtained the abovesaid documents fraudulently from the first plaintiff in the guise of requiring some documents for the purpose of running the quarry industries, hence according to the first plaintiff, he has been necessitated to lay the suit for appropriate reliefs.

5. It is found that pending the suit, the first plaintiff had died and his LRs viz., his two sons, daughter and wife had been impleaded as the LRs of the deceased first plaintiff along with the third defendant, the other son and thereafter, the plaint also proceeded that the first plaintiff died on 17.07.2000 leaving behind a registered Will dated 31.10.1994 and under the Will abovestated, the first plaintiff, in a sound disposing of state of mind, bequeathed his properties absolutely in favour of the plaintiffs 2 to 4 and the third defendant and the 5th plaintiff was given right to enjoy the properties till her life time under the said Will and accordingly, the 5th plaintiff is in the possession and enjoyment of the suit properties and the plaintiffs 2 to 4 and the third defendant have become joint owners of the suit properties and accordingly, prayed for the reliefs sought for.

6. The case of the defendants, in brief, is that the suit laid by the plaintiffs is not maintainable either in law or on facts. The defendants admitted that the first plaintiff was the owner of the plaint schedule properties by virtue of his acquisition of the same on the strength of the sale deeds dated 31.10.1941, 15.09.1957 and 22.05.1971 and the first plaintiff is not in the possession and enjoyment of the plaint schedule properties. The first plaintiff had executed a registered sale deed dated 27.08.1992 in favour of the defendants and since the said purchase, it is only the defendants, who are in the possession and enjoyment of the properties comprised in the said sale deed and the relationship between the parties is admitted. It is false to state that the defendants 1 & 2 requested the first plaintiff to run the quarry industries in the suit properties and it is false to state that on that footing, the defendants 1 & 2 took the first plaintiff to the Sub Registrar's Office, Sultur and obtained the documents by misrepresentation that it is only a power of attorney deed and false to state that thereafter, the defendants 1 & 2 ill-treated the first plaintiff and failed to provide food and shelter to him and also proclaimed that they fraudulently obtained several documents as stated in the plaint. It is true that the first plaintiff was aged and it is false to state that the first plaintiff obtained the certified copies of the documents from the Sub Registrar office as put forth in the plaint, the sale deed dated 27.08.1992 has been executed by the first plaintiff in favour of the defendants for a valid consideration and out of three items of the suit properties, two items of the properties were

obtained by the defendants by the registered sale deeds dated 27.08.1992 and 15.07.1993 and the third item of the properties was settled in favour of the defendants by the first plaintiff by way of the settlement deed dated 15.07.1993 and it is false to state that the first plaintiff had executed the abovesaid documents without knowing their contents and implications and it is false to state that they were not executed as per the wish of the first plaintiff and hence they are invalid documents. It is false to state that the abovesaid documents had not come into effect and on the other hand, ever since the execution of the abovesaid sale deeds and the settlement deed, it is only the defendants, who are in the possession and enjoyment of the plaint schedule properties and the suit is barred by limitation and it is false to state that the defendants have cheated the first plaintiff during his old age and on the other hand, the first plaintiff was hale and healthy at the time of executing the abovesaid documents and he had executed the same after fully knowing the contents therein. In fact, the plaintiffs 2 & 3 had laid the civil suit in O.S.No.476 of 1992 on the file of the Subordinate Court, Tiruppur against the first plaintiff and the third defendant claiming that the suit properties are the ancestral properties and they have share in the same and the said suit was dismissed for non-prosecution and no steps had been taken to restore the same. It is false to contend that the first plaintiff had executed a registered Will on 31.10.1994 and as per the averments of the plaint, the first plaintiff was aged and he was deaf and dumb and while he was in such a state of health, it is unbelievable that he would have executed any such Will and if any such Will is in the custody of the plaintiffs, it would be a forged document obtained by misrepresentation, threat and coercion and the abovesaid Will is not legally enforceable and there is no cause of action for the suit and the suit therefore is liable to be dismissed.

7. In support of the plaintiffs' case, PWs1 & 2 were examined and Exs.A1 to A15 were marked. On the side of the defendants, DW1 was examined and Exs.B1 to B10 were marked.

8. On a 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. On appeal, the first appellate Court, on an appreciation of the materials placed on record, was pleased to set aside the judgment and decree of the trial Court and by way of allowing the appeal preferred by the plaintiffs 2 to 4, decreed the suit as prayed for. Impugning the same, the present second appeal has been preferred.

9. At the time of admission of the second appeal, the following substantial questions of law were formulated for consideration:

" (i). Whether the lower appellate court has committed an error of law in throwing the burden on the defendants to establish that the contents of Exs.A4 to A6 were read over and explained to the executant when it is the plaintiffs who have come to the court alleging that Exs.A4 to A6 are void and they were executed by the first plaintiff due to the fraud played upon him by the defendants 2 and 3 when admittedly Exs.A4 to A6 being registered documents a legal presumption is raised to the effect that the Registering Authority had explained the contents of Exs.A4 to A6 to the executant (1st plaintiff)?

(ii). Is it not the burden of the plaintiffs to prove the allegation of fraud levelled against the defendants 2 and 3 in the execution of Exs.A4 to A6?

(iii). Whether the non consideration of Exs.B4 and B5 which proves the possession and the effect of execution of Exs.A4 to A6 by the lower appellate court is fatal to the case?"

10. The relationship between the parties is not in dispute. It is found that the suit had been originally laid by the deceased first plaintiff Marudha Gounder against the defendants 1 to 3 for the reliefs of declaration and permanent injunction in respect of the plaint schedule properties. Pending suit, the first plaintiff having died, his LRs had been brought on record as the plaintiffs 2 to 5. It is found that the plaintiffs 2 & 3 and the third defendant are the sons of the deceased first plaintiff and the 4th plaintiff is the daughter and the 5th plaintiff is the wife of the deceased first plaintiff and the defendants 1 & 2 are the sons of the 3rd defendant and grandsons of the deceased first plaintiff. It is also not in dispute that the properties originally belonged to the deceased first plaintiff.

11. Materials placed on record go to disclose that the deceased first plaintiff had executed two sale deeds and one settlement deed in favour of the defendants in respect of the plaint schedule properties dated 27.08.1992, 15.07.1993 and 15.07.1993 respectively and according to the plaintiffs, the abovesaid documents had come to be obtained by the defendants 1 & 2 from the deceased first plaintiff by misrepresenting that they required some power of attorney from the first plaintiff in

order to run the quarry industries in the plaint schedule properties and accordingly, the first plaintiff, without knowing the contents and implications of the documents sought to be obtained by the defendants 1 & 2, had executed the documents at the Sub Registrar's Office, Sulur and only thereafter, according to the plaintiffs, on the conduct of the defendants 1 & 2 having become hostile, it is stated that the deceased first plaintiff on obtaining the copies of the documents he had executed in favour of the defendants and perusing the same, came to know that the defendants 1 & 2 played fraud upon him in obtaining the abovesaid sale deeds and the settlement deed and thus, according to the plaintiffs, the abovesaid documents had come to be obtained by committing misrepresentation and fraud on the part of the defendants 1 & 2, in particular, misusing the old age of the deceased first plaintiff and accordingly, it is contended that the abovesaid documents are not valid documents and not binding upon the deceased first plaintiff or as the case may be, the plaintiffs and accordingly, it is their case that the abovesaid documents had not been acted upon and hence, the need for the reliefs prayed for.

12. Per contra, it is the case of the defendants that the first plaintiff, on his own volition, had executed the abovesaid documents in favour of the defendants knowing the contents and the nature and the implications of the documents, which, he had executed in favour of the defendants and the documents had been registered duly at the Sub-Registrar's Office and therefore, it is their case that the pleas put forth by the plaintiffs that the defendants 1 & 2, by committing misrepresentation, fraud etc., had obtained the said documents from the deceased first plaintiff by exploiting his old age is false and further, according to the defendants, the abovesaid documents executed by the first plaintiff were acted upon and accordingly, it is only the defendants, who are in the possession and enjoyment of the suit properties and hence, according to them, the plaintiffs are not entitled to seek the reliefs sought for.

13. As above seen, pending the suit, the first plaintiff had died. Thereafter, the other plaintiffs had been brought on record. Thereafter, it is found that the plea had been taken by the plaintiffs that the first plaintiff, during his life time in a sound and disposing state of mind, left behind a Will dated 31.10.1994 bequeathing the suit properties in favour of the plaintiffs and the third defendant and given life enjoyment in favour of the 5th plaintiff, his wife and thus, according to the plaintiffs, by virtue of the abovesaid Will, the suit properties also belonged to the plaintiffs 2 to 4 jointly and accordingly, reiterated the reliefs sought for in the plaint.

14. The defendants have challenged the validity of the Will dated 31.10.1994 projected by the plaintiffs and according to them, the abovesaid Will is not a true document and by projecting such a claim, according to the defendants, they have taken inconsistent stand as regards the health, mental set and endeavours of the deceased first plaintiff and further, according to the defendants, the abovesaid Will is a forged document obtained by misrepresentation, threat and coercion and hence, the Will is not legally enforceable.

15. The trial Court had disbelieved the plaintiffs' case and resultantly, dismissed the plaintiffs' suit on the footing that the plaintiffs have miserably failed to establish that the documents involved in the matter, as abovestated, had been obtained by the defendants by committing misrepresentation, fraud etc., as put forth by them and accordingly, on the basis of the abovesaid determination, negatived the reliefs sought for by the plaintiffs. The first appellate Court holding that the burden is only upon the defendants to establish that the abovesaid documents involved in the matter are truly executed by the first plaintiff knowing the contents and the implications of the same and accordingly, it is the determination of the first appellate Court that the defendants had secured the abovesaid documents by exploiting the old age and the other shortcomings of the deceased first plaintiff and thereby holding that the defendants have failed to discharge the burden placed upon them as abovestated, set aside the judgement and decree of the trial Court and granted the reliefs as prayed for by the plaintiffs.

16. The only and main point that is focussed in the second appeal is as to whether the first appellate Court is right in shifting the burden on the defendants to establish the truth and genuineness of the documents involved in the matter viz., Exs.A4 to A6 as determined by it. When admittedly the documents Exs.A4 to A6 being the registered documents, the legal presumption is raised to the effect that the contents of the documents had been explained to the executant as per law and the registration aspects of the documents had been duly performed and the burden is only resting upon the plaintiffs to prove the allegations of fraud, misrepresentation etc., against the defendants in the execution of the abovesaid documents and thus, it is contended that the first appellate Court has erroneously shifted the burden of proof on the wrong persons viz., the defendants and thereby, reversed the well considered and reasoned judgment and decree of the trial Court.

17. On a perusal of the plaint averments, it is found that nowhere, it has been stated therein that the defendants 1 & 2 or the defendants as the case may be, had been exercising full control over the deceased first plaintiff and accordingly, the deceased first plaintiff was in a humble position of acting only

as per their directives reposing complete confidence upon them and accordingly, the defendants, using the abovesaid influence, had unduly obtained the documents Exs.A4 to A6 from the deceased first plaintiff. On the other hand, the plaint reads that the defendants 1 & 2 by representing that they required power of attorney document from the first plaintiff, purely on that representation, took him to the Sub-Registrar's office and obtained the various documents and it is stated that the first plaintiff, without knowing the contents and the nature of the documents, had obliged the request of the defendants 1 & 2 and only thereafter, on obtaining the copies of the documents, the first plaintiff came to understand about the fraud committed by the defendants 1 & 2 in obtaining the sale deeds and the settlement deed from him relied upon as Exs.A4 to A6 and accordingly, it is contended that the first plaintiff had been necessitated to lay the suit for appropriate reliefs.

18. Thus, it is found that as the plaint reads, there is no averment contained therein as such that the defendants 1 & 2 or for the matter, the defendants have been holding any authority over the deceased first plaintiff and were in a position to dominate their will with reference to all his opinions and decisions and thereby, they had misused the said position and obtained the documents involved in the matter. Thus, it is found that the ingredients of undue influence as defined under Section 16 of the Indian Contract Act 1872, having not been pleaded in the plaint in specific and when it is found that there is no fiduciary relationship between the deceased first plaintiff and the defendants 1 & 2 or the defendants as the case may be and as above seen, there is no plea in the plaint that the defendants were in a commanding position and accordingly, dominating the will of the deceased first plaintiff, had used that position, to their unfair advantage, it is thus found that there is no question of the exercise of any undue influence on the part of the defendants in obtaining the documents in question from the deceased first plaintiff and on the other hand, as above stated, even as per the averments made by the deceased first plaintiff in the original plaint, the defendants 1 & 2 had obtained the documents from him in question only by misrepresentation and after obtaining the copies of the documents, he had come to know that the defendants 1 & 2 had committed fraud upon him in obtaining the documents by misrepresentation. In addition to that, nowhere it is pleaded by the deceased first plaintiff that his illiteracy has been exploited by the defendants in securing the documents in question and that on account of his illiteracy, he was unable to know the nature and contents of the registered documents executed by him.

19. In the light of the above position, the argument put forth by the senior counsel appearing for the plaintiffs that the defendants 1 & 2 had been wielding undue influence over the deceased first plaintiff on account of the relationship existing between them and thereby, misusing the said position, had secured the documents in question from the deceased first plaintiff and therefore, in such view of the matter, according to her and as formulated and determined by the first appellate Court, the burden is only upon the defendants to establish that no such undue influence had been exercised by them over the deceased first plaintiff in obtaining the documents in question and in this connection, it is also put forth by her that the defendants 1 & 2 had exploited the old age, illiteracy and the infirmities of the physique of the deceased first plaintiff and therefore, it is her contention that the plaintiffs are entitled to obtain the reliefs sought for and in this connection, heavy reliance is placed upon the decisions by her reported in (2004) 9 Supreme Court Cases 468 (Krishna Mohan Kul Alias Nani Charan kul and another Vs. Pratima Maity and others), 1993-1-L.W.466 (Chidambaram Pillai and 3 others V. Muthammal and another), (1992) 2 LW 209 (K.Varadhan Vs. Pattammal (died) and four others) and 1998 (1) MLJ 209 (Selvaru Kounder Vs. Sahadeva Kounder).

20. The plea has been made in the plaint that the deceased first plaintiff was an aged person and totally a deaf man and accordingly, on that premise, it is contended by the Senior counsel for the plaintiffs that taking advantage of the abovesaid frailty and weakness of the deceased first plaintiff and his illiteracy also, the documents, in question, had come to be obtained by the defendants and therefore, the burden lies only upon the defendants to discharge the true nature of the documents in question as put forth by them and therefore, it has to be seen whether the abovesaid conditions existed and they by themselves would be sufficient to shift the burden on the shoulders of the defendants. No doubt, it is found that at the time of the execution of the documents in question, the deceased first plaintiff was aged about 87 years. However, the contention that he was a totally deaf man, is not even projected by the plaintiffs during the course of their evidence and as rightly put forth, from the evidence adduced by the plaintiffs through the mouth of PWs 1 & 2, it is found that the deceased first plaintiff was only short of hearing and not a totally deaf person and accordingly, merely because there is slight impairment in his hearing, that by itself could not be taken that he was completely deaf as alleged in the plaint. As far as physical and mental condition of the deceased is concerned, though it is found that the deceased was aged 87 years at the relevant point of time, but, at that point of time, it is found that it is not even the case of the plaintiffs that he was weak, sickly and impaired and his mental faculties affected on account

of old age and he was depending upon others qua his daily chores and accordingly, it is found that though the deceased first plaintiff was an aged person, however as far as his health is concerned, it is found that he was getting on well and maintaining himself independently without depending upon the others and accordingly, it is found that he was in a position to take decision on his own and not indecisive due to old age as sought to be projected by the plaintiffs and as above noted, there is no plea put forth in the plaint that the deceased first plaintiff was under the control and influence of the defendants 1 & 2 or the defendants as the case may be and acting only at their directives and such being the position, considering the abovesaid physical and mental condition of the deceased first plaintiff, it has to be seen whether on whose shoulder the burden would lie to establish the genuineness of the documents in question. The documents in question as abovestated are found to be executed on 27.08.1992 and 15.07.1993 and it is found that even with reference to the time gap between the abovesaid set of documents, it is found that nearly one year after the execution of the sale deed dated 27.08.1992, the other sale deed dated 15.07.1993 and the settlement deed dated 15.07.1993 had come to be executed. That apart, on a perusal of the settlement deed marked as Ex.A4, it is found that by way of the said document, life interest had been created in favour of the deceased first plaintiff and his wife and only thereafter, the vested remainder was given to the settles. It is found that it is not as if the defendants 1 & 2 had been allowed to take the entire properties completely away from the deceased first plaintiff at one stroke as sought to be projected and on the other hand, by way of executing the abovesaid settlement, the deceased first plaintiff has reserved the life time enjoyment with reference to the property settled on him and his wife during their life time. On the question as to whether the deceased first plaintiff would have been in a position to execute the document in question without knowing the contents and the nature of the same as abovestated, the materials placed on record do not show that the deceased first plaintiff was a frail and weak person and his mental faculties had been affected due to the old age factor and thereby, was not in a position to understand the implication and significance of the acts performed by him. On the other hand, even as per the case of the plaintiffs, it is seen that inasmuch as the deceased first plaintiff was maintaining good health and was in sound and disposing state of mind, at all times, till his death, it is found that it is seen that the plaintiffs have projected a case that the deceased first plaintiff had on 31.10.1994 executed a will on his own volition in a sound and disposing state of mind bequeathing his properties in favour of the plaintiffs and the third defendant. The abovesaid Will has come to be marked as Ex.A15 and therefore, when it is found that Ex.A15 had come to be executed nearly one year / two years after the documents in question and when as per the case of the

plaintiffs themselves, the deceased first plaintiff was in a fit state of mind and good health and capable of executing the Will on his own volition and with complete mental alertness and faculties and such being the position of his physique and accordingly, it is found that the physical and mental faculties of the deceased first plaintiff would have been very much strong at the time of execution of the documents in question. Such being the position, to say that the deceased first plaintiff was very weak, deaf, etc., and not in a position to understand the implication and consequences of his acts etc., two years prior to the execution of the will Ex.A15 as such cannot be believed and accepted and the resultant position would be, when the deceased first plaintiff was in a sound and disposing state of mind during October, 1994, it is found that he would have been in a more fit and strong condition, both physically and mentally during 1992 and 1993 and hence, the documents in question cannot be stated to be executed by him without knowing the nature and effects of the same. Accordingly, it is found that when as per the case of the plaintiffs that the deceased first plaintiff was acting on his own in all his endeavours and accordingly, not even pleaded that the deceased first plaintiff was under the active confidence of the defendants or the defendants 1 & 2 or all the defendants were exercising or wielding control and influence on him in all his acts, in such view of the matter, to say that the deceased first plaintiff on the representation of the defendants 1 & 2, who are his grand sons that they needed some power of attorney from him and on that basis, had proceeded to the Sub-Registrar's Office and executed the documents in question without knowing the nature and contents of the documents as such cannot be believed and accepted in any manner. As rightly put forth by the defendants, all the documents in question are registered documents and accordingly, when it is found that the nature and contents of the documents would have been explained to the deceased first plaintiff by the registering authority at the time of the registration, the presumption available under Section 114 of the Evidence Act would come to operate and accordingly, it is seen that when the presumption could be raised that all the official acts had been regularly performed, the person, who is challenging the same should rebut the said presumption. Accordingly, it is found that from the materials available on record, the deceased first plaintiff was healthy and maintaining stable mental equilibrium and a man of independent action, who would know the consequences of the same and to say that he had acted to the dictum of the defendants 1 & 2 blindly and particularly, when at the relevant point of time, there is no material to hold that the defendants 1 & 2 or the defendants, as the case may be, were wielding undue control and influence over him and as above seen, there is no plea with reference to the same in the plaint and when even as per the case of the plaintiffs that it is only the deceased first plaintiff, who suo

motu had obtained the copies of the documents and came to know about the alleged fraud committed by the defendants in securing the documents in question, it is found that the deceased first plaintiff is not a novice, who would act to the tunes of others as now sought to be projected and on the other hand, it is found that he is a person, who is capable of taking a definite decision on his own and such being the position, his firm character and his health and mental condition at that point of time being found to be very very good and stable as above discussed, it is seen that merely on the footing that the deceased was an aged person by itself would not permit the plaintiffs to shift the burden on the defendants to prove the genuineness of the documents in question and on the other hand, the plaintiffs having admitted the execution of the documents and they having pleaded only misrepresentation and fraud alleged to have been committed by the defendants, it is only the plaintiffs, who have to establish the said facts for obtaining the reliefs sought for and in such view of the matter, it is found that the first appellate Court had erred in shifting the burden on the defendants to establish the genuineness of the documents in question.

21. However, the learned senior counsel appearing for the defendants pointing to the evidence of DW1 adduced during the course of cross examination at one place that the deceased first plaintiff would do whatever he says and pointing to the abovesaid piece of evidence contended that the deceased first plaintiff was under the undue influence and control of the defendants 1 & 2 and therefore, the burden of proof only lies upon the defendants to establish the genuineness of the documents in question. The evidence of a witness should be read in toto and not in piecemeal. When it is not even the case of the plaintiffs as above adverted to, that the deceased first plaintiff was acting as per the directives of the defendants 1 & 2 in all his activities or the defendants as the case may be had been wielding control and influence over him and the deceased first plaintiff would only do what ever they would dictate, necessary pleas with reference to the same being conspicuously absent in the plaint particularly the concept of undue influence on the part of the defendants as defined under Section 16 of the Indian Contract Act, on the other hand, when the plea of misrepresentation, fraud alone had been pleaded and as above stated, there is no plea of about any exercise of undue influence by the defendants on the deceased first plaintiff and there has been no plea of fiduciary relationship between the parties in question other than the close blood relationship, it is found that the abovesaid piece of evidence adduced by DW1 would not in any manner advance the plaintiffs case, when the plaintiffs themselves have not pleaded that the deceased first plaintiff was under the control and influence of the defendants 1 & 2 or the defendants as the case may be. If that be so, as

rightly put forth by the defendants' counsel, the deceased first plaintiff, who had instituted the suit would have made necessary pleas in the plaint. That apart, if really the deceased first plaintiff was under the full control and influence of the defendants as put forth by the plaintiffs, the deceased first plaintiff would not have ventured to execute the will Ex.A15 on his own without the knowledge and advice of the defendants and when it is the case of the plaintiffs themselves that the deceased first plaintiff had executed the Will in a sound and disposing state of mind on 31.10.1994 independently on his own, to say that he was under the influence and control of the defendants during 1992 or 1993 as such, cannot be accepted and countenanced.

22. It is found that the above piece of evidence on the part of DW1 would not in any manner enure to the benefit of the plaintiffs as the plaintiffs themselves have not pleaded that the defendants had obtained the documents in question by exercising undue influence on the deceased first plaintiff as defined and outlined under Section 16 of the Indian Evidence Act. As above seen, the deceased first plaintiff was not shown to be unhealthy or weak and thereby was under the active confidence of the defendants. On the other hand, it is found that though the deceased first plaintiff was an aged person, he is found to be a man capable of taking independent decisions and acting on his own and to say that such a man had executed the documents in question without knowing the contents and nature of the same is unbelievable.

23. In this connection, apropos of the decision relied upon by the defendants' counsel reported in (2004) 9 Supreme Court Cases 468 (Krishna Mohan Kul Alias Nani Charan Kul and Another Vs. Pratima Maity and others), it is found that on facts, the document impugned in the said case had been executed by an illiterate person aged 106 years at the time of the execution of the deed in question and that apart, the said aged person was a paralytic and not in a proper physical and mental state and practically bedridden and on the abovesaid facts and circumstances of the said case, the apex Court held that it is for the person, who had obtained the deed in question, who has to establish the genuineness of the said document and accordingly, in that context held that the onus of proof lies on the beneficiary of the document in question as regards the execution of the document in accordance with law and in such view of the matter, by way of the above said decision, it cannot be contended that the onus of proof lies only on the person, who had obtained the benefits of the document in question in all cases as such cannot be accepted. That apart, even in the said decision, the apex Court has only postulated the principles of law governing the above issue in the following manner.

" When fraud,

misrepresentation or undue influence is alleged by a party in a suit, normally, the burden is on him to prove such fraud, undue influence or misrepresentation. But, when a person is in a fiduciary relationship with another and the latter is in a position of active confidence the burden of proving the absence of fraud, misrepresentation or undue influence is upon the person in the dominating position, and he has to prove that there was fair play in the transaction and that the apparent is the real, in other words, that the transaction is genuine and bona fide. In such a case the burden of proving the good faith of the transaction is thrown upon the dominant party, that is to say, the party who is in a position of active confidence. A person standing in a fiduciary relation to another has a duty to protect the interest given to his care and the Court watches with jealousy all transactions between such persons so that the protector may not use his influence or the confidence to his advantage. When the party complaining shows such relation, the law presumes everything against the transaction and the onus is cast upon the person holding the position of confidence or trust to show that the transaction is perfectly fair and reasonable, that no advantage has been taken of his position. This principle has been ingrained in Section 111 of the Indian Evidence Act, 1872 (in short the 'Evidence Act'). The rule here laid down is in accordance with a principle long acknowledged and administered in Courts of Equity in England and America. This principle is that he who bargains in a matter of advantage with a person who places confidence in him is bound to show that a proper and reasonable use has been made of that confidence. The transaction is not necessarily void ipso facto, nor is it necessary for those who impeach it to establish that there has been fraud or imposition, but the burden of establishing its perfect fairness, adequacy and equity is cast upon the person in whom the confidence has been reposed. The rule

applies equally to all persons standing in confidential relations with each other. Agents, trustees, executors, administrators, auctioneers, and others have been held to fall within the rule. The Section requires that the party on whom the burden of proof is laid should have been in a position of active confidence. Where fraud is alleged, the rule has been clearly established in England that in the case of a stranger equity will not set aside a voluntary deed or donation, however, improvident it may be, if it be free from the imputation of fraud, surprise, undue influence and spontaneously executed or made by the donor with his eyes open. Where an active, confidential, or fiduciary relation exists between the parties, there the burden of proof is on the donee or those claiming through him. It has further been laid down that where a person gains a great advantage over another by a voluntary instrument, the burden of proof is thrown upon the person receiving the benefit and he is under the necessity of showing that the transaction is fair and honest."

24. As per the principles of law outlined above, it is found that only when it is pleaded and complained that the person, who had the benefit of the documents in question was in a position of active confidence in view of the fiduciary relationship between him and the executant of the documents in question and thereby, was in a dominating position to exercise undue control over him, in such circumstances, the apex Court had held that the burden of establishing the genuineness of the documents lies on the beneficiary of the documents in question and thus, it is found that when in the case at hand, it is found that the deceased first plaintiff was not acting under the control or undue influence of the defendants and the plaintiffs have not even pleaded anything about the same in the plaint other than misrepresentation and fraud and when considering the strong physical and mental health of the deceased first plaintiff at the relevant point of time as above discussed, when he is found to be a man, who is capable taking independent decisions on his own and would not sway or act as per the directives of others to say that such a person i.e. the deceased first plaintiff had executed the documents in question without knowing the nature and contents of the same as such cannot be accepted in any manner.

25. In the decision reported in 1993-1-L.W.466 (Chidambaram Pillai and 3 others V. Muthammal and another), it is the case of a woman from whom the deed in question had been obtained by misrepresentation, fraud, and undue influence by her own niece and niece's husband. In that context, the Court had held that the burden is only upon the niece and her husband to establish the genuineness of the documents in question. While discussing the issue, particularly, the burden to be placed upon the parties as regards the factors of undue influence and fraud, the Court has held that there is a distinction as to the law of burden of proof in the case of pardanashin and an 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. It has been held in the said position that 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 and for the reason of illiteracy or she being a pardanashin woman and in such case, it has to be presumed that she could have transferred her rights to the other only for the reason of fraud or undue influence. However, in the latter case, it has been held by the Court in the said decision that the burden shall be upon the person alleging undue influence and fraud and the onus will shift only when there is a clear pleading in this behalf with necessary particulars and the initial onus is discharged. The decision of law as above discussed and with reference to the same had been explained in the above decision as follows:

" 17.

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. The distinction in this behalf we shall indicate a bit later. Before doing so. we propose to clear ourselves through the language of Section 16 of the Indian Contract Act which particularly deals with the requirement of evidence and the onus in a case in which undue influence is alleged. Section 16 of the Contract Act reads as follows:

"16.(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 the position to obtain an unfair advantage over the other.

(2) In particular and without prejudice to the generality of the foregoing 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 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 this sub-section shall affect the provisions of Sec 110 of the Indian Evidence Act, 1872.

It can be seen from the language of this section of the Contract Act 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.

18. We have a plethora of decisions dealing with this aspect of the law that court must scrutinise pleadings to find out that a plea of undue influence has been made out and that full particulars thereof have been given before examining whether undue influence was exercised or not and that the court trying a case of undue influence must consider two things to start with, viz., (i) 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 lie upon the person, who was in a position to dominate the will of the other. We can pick up from the lot some land mark judgments as are in Lady Prasad Jaiswal v. Kamal Distillery Company Limited and Subbhos Chandra v. Ganga Prasad . In this context, one must note that a vague and general plea can never serve the purpose and satisfy the requirements of pleadings as to undue influence, for which purpose, the party pleading must plead the precise nature of the influence exercised, the manner of the use of the influence and unfair advantage obtained by the other. Certain observations in this behalf found in Halsbury's Laws of England, Third Edition, Volume 17, page 673 Article 1298, have been cited in the judgment of the Supreme Court in the case of Subbhas Chandra v. Ganga Prasad , which reads,

"Where there is no relationship is shown to exist from which undue influence is presumed, that influence must be proved.

and Article 1299, at page 674,

"There is no presumption of imposition or fraud merely because a donor is old or of weak character has also noted what is stated at pages 678 to 681 and particularly pointed out notes on page 679 which say,

"There is no presumption of undue influence in the case of a gift to a son, grandson or son-in-law, although made during the donor's illness and a few days before his death."

A Bench of this Court in the case of P. Saraswathi v. Lakshmi, has stated this part of the law on the subject in these terms:

In a case where a litigant intends to overlook and by pass a registered document under which prima facie certain rights have become vested and under which third parties have acquired indefeasible rights, then the challenging party should be in a position to give such particulars about such undue influence which should form the basis of her complaint. The primary ground on which the plea of undue influence is founded is based on relationship. It is axiomatic that mere proof of relationship however near it may be, is not sufficient for a court to assume that one relation was in a position to dominate the will of the other. Such bonds of kinship which are universally felt should not be mistaken as

equivalent to saying that the kinsman could unduly influence the other in the circuit of such bondage. Even if any advice is given, it may be influence, but not undue influence. The tie of relationship need not necessarily be used unwisely, injudiciously and unhelpfully so as to gain an unfair advantage by the relation who is advising the other relation. Particularly in a Hindu family a widowed mother who would rather be fairly and affectionately inclined to an unmarried daughter would not make undue preferences in favour of a married one who has already been provided for and who was well set in life. The sentiment, the traditional features of a Hindu Home., the love and affection of a mother towards her natural and last child which is always in one way unless there are very extraneous circumstances to assume otherwise, should always prompt a Court to raise the reasonable presumption that any advice or influence which a parent brought to bear on his own child is not to gain an advantage for herself or to see that an unfair advantage is gained by another child of hers in preference to the challenging child. There is also one other important and salient feature which ought to be established on materials pleaded and acts established that the 'bargain is tainted by undue influence, and it is unconscionable that it could reasonably be said that the person to obtain unfair advantage for himself and so as to cause injury to the person sought relying upon his authority or aid. It is only after such particulars are made

available and a reasonable proof thereof has been given, the onus probandi would shift on the so-called 'person of domination.' Until then the burden is on the complainant to establish it is so.

In a scholarly exposition of this aspect of law, a Bench of this Court has deliberated on the doctrine of undue influence and fraud in some details in the case of Madhavakrishnan v. Sami supra. The Bench after quoting from Halsbury's Laws of England, 4th Edition, page 174 on the subject has said about the law in our country in these words:

In India, the law as to undue influence is embodied in Section 16 of the contract Act. In order to satisfy the terms of Section 16 and thereby render a contract voidable because of undue influence the following two conditions must be established by the person seeking to avoid the transaction: (1) the other party to the transaction must have been in a position to dominate his will; (2) the other party should have obtained an unfair advantage by using the position. Clause (2) of Section 16 lays down a special rule of presumption as to when a person may be deemed to be in a position to dominate the will of another. They are among others: (1) where he holds a real or apparent authority over the other; (2) where he stands in a fiduciary relation to the other; (3) where he enters into a transaction with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress. Clause (3) of Section 16 provides that 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 lie upon the person in a position to dominate the will of the other. It is necessary to state that the rule in Clause (3) of Section 16 will only be attracted when it is established that one person is in a position to dominate the will of the other and that the transaction was on the face of it unconscionable. The above position has been made clear in Lal Prasad Jaiswal v. Kama Distillery Co., Ltd. AIR 1963 SC 1279, and in Subhas Chandra v. Ganga Prasad AIR 1967 SC 878. The test has been laid down as follows in the latter decision; "The three stages for consideration of a case of undue influence were expounded in the case of Raghunath Prasad v. Sarju Prasad 46 M.L.J. 410, in the following words:

In the first place relations between the parties to each other must be such that one is in a position to dominate the will of the other. Once that position is substantiated the second stage had been reached namely, the issue whether the contract has been induced by undue influence. Upon the determination of this issue a third point emerges, which is that of the onus probandi. If the transaction appears to be unconscionable, then the burden of proving that the contract was not indeed by undue influence is to lie upon the person who was

in a position to dominate the will of the other. Error is almost sure to arise if the order of those propositions be changed. The unconscionableness of the bargains is not the first thing to be considered. The first thing to be considered is the relations of these parties. Were they such as to put one in a position to dominate the will of the other."

The learned Judge of the Supreme Court has extracted the following passage from the judgment of the Privy Council in *Poosathurai .v. Kannappa Chettiar* .

"It is a mistake (of which there are a good many traces in these proceedings) to treat undue influence as having been established by a proof of the relations of the parties having been such that the one naturally relied upon the other for advice and the other was in a position to dominate the will of the first in giving it. Upto that point, 'influence' alone has been made out. Such influence may be used wisely, judiciously, helpfully. But whether by the law of India or the Law of England, more than mere influence must be proved so as to render influence, in the language of the law 'undue.'"

19. "We have dilated to the rule of initial burden of proof in the case where allegations of undue influence or 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 and 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."

26. Accordingly, it is found that in the abovesaid decision, the document impugned having been executed by an illiterate woman and accordingly, the burden had been shifted on the beneficiary of the document to prove the genuineness of the same. No doubt, the principles adumbrated therein could also be extended to a male person i.e. an aged person provided the said aged male person was under the control and influence of the opponent party and was under their active confidence and in that situation, he had come to execute the documents in question without understanding the nature and implications of the same. As above noted, in so far as this case is concerned, the deceased first plaintiff was not in any manner under the control and influence of the defendants and when he was found to be maintaining good health and having a fit state of mind and thereby, in a position to act independently, to say that he had executed the documents without knowing the implications of the same or the contents of the same is highly unbelievable. Accordingly, it is found that the deceased first plaintiff or the plaintiffs, as the case may be, having made the plea of only misrepresentation, fraud for challenging the documents in question, as held in the abovesaid decision, the burden shall be upon the plaintiffs to establish their case of alleged misrepresentation, fraud etc., and only on the plaintiffs discharging the said burden, the onus will shift on the opponent party. Accordingly, when there is no proof worth acceptance placed by the plaintiffs to show that the documents in question had come to be brought about by the defendants by misrepresentation or by committing fraud, as rightly determined by the trial Court, the plaintiffs have miserably failed to shift the burden resting upon them to disown the documents in

question and when the initial onus resting upon the plaintiffs having not been discharged, the burden would not shift to the defendants and in such view of the matter, it is found that first appellate Court had erroneously straightaway shifted the burden on the part of the defendants by relying upon a decision wherein the document in question under challenge was executed by a pardanashin lady and as abvoenoted, in the category of cases of undue influence, misrepresentation, fraud etc., other than the case of pardanashin lady and an illiterate woman, the burden initially rests only upon the person alleging misrepresentation fraud etc. and only thereafter, the onus would shift to the other party and with reference to the abovesaid allegations of undue influence fraud, misrepresentation, there should be clear pleadings with necessary particulars and also proof to establish the same.

27. All the abovesaid factors having not been established by the plaintiffs and when it is found that PW1, the daughter of the deceased first plaintiff was not in the scene, when the documents in question had come to be executed, it is found that her evidence would only be hearsay with reference to the pleas put forth in the plaint and accordingly as determined by the trial Court, the first plaintiff having died, pending suit and there is no other material adduced on the part of the plaintiffs to hold that the documents in question were brought about the by the defendants committing misrepresentation, fraud as alleged, it is found that the initial burden having not been established by the plaintiffs, the burden would not shift to the defendants and in such view of the matter, the first appellate Court is found to have wrongly shifted the burden on the defendants and thereby, erred in allowing the plaintiffs' case by setting aside the judgement and decree of the trial Court.

28. Equally, in the decision reported in (1993) 1 Mad LJ 259 (K.Varadhan Vs. Pattammal (died) and four others) also, the challenge has been made to the deed in question executed by an illiterate woman and accordingly, the onus had been shifted upon the defendants in that case. In the decision reported in 1998 (1) MLJ 209 (Selvarju Kounder Vs. Sahadeva Kounder), it is a case of an old man, who had made a challenge to the deed obtained from him by his son and inasmuch as it is found that there had been pleadings made in the plaint that the said old man was under the control and influence of his only son and accordingly, the relationship between the old man /father and the son being very close and the old man himself was available to tender evidence satisfactorily and he having discharged the initial burden, accordingly, on that premise, the court on facts held that the burden shifts upon the defendant in that case to discharge the burden and considering the factual position as far as the present case is concerned, the deceased first plaintiff was not pleaded to be under the control and influence of the

defendants and on the other hand, he is projected to be a person of independent character capable of making his own decision and accordingly, even as per the case of the defendants, he had executed a Will Ex.A15 on his own in a sound and disposing state of mind, two years after the execution of the documents in question so, to say that he had been acting to the tunes of the defendants without any plea and proof pointing to the same as such can not be accepted and it is thus found that on facts the decision reported in 1998 (1) MLJ 209 (Selvarju Kounder Vs. Sahadeva Kounder), would not apply to the present case.

29. Lastly, it is found that at the time when the documents in question were executed by the deceased first plaintiff in favour of the defendants admittedly the relationship between the deceased first plaintiff and his other two sons viz., the plaintiffs 2 & 3 was not cordial and as abovenoted the plaintiffs 2 & 3 had laid a suit as against the deceased first plaintiff and the defendants seeking partition alleging the suit properties are the ancestral properties despite knowing that the suit properties are the self acquired properties of the deceased first plaintiff and accordingly, it is found that the relationship between the deceased first plaintiff and the plaintiffs 2 & 3, during the relevant period, not being smooth and pleasant, accordingly, the deceased first plaintiff in a fit state of mind, deemed it necessary to alienate/settle the suit properties belonging to him to the defendants and accordingly, also settled one item of the properties in favour of the defendants reserving life estate on him and his wife and enjoying the properties in question and in such view of the matter, it is found that the case of the plaintiffs that the defendants had by exercising fraud, misrepresentation etc., had obtained the documents in question from the deceased first plaintiff and that the first plaintiff had executed the documents in question without knowing the nature, contents or implications of the same, as such, cannot be accepted, particularly, when the abovesaid allegations are not buttressed by acceptable and reliable evidence on the part of the plaintiffs other than the evidence of PW1. When as above seen, PW1, the daughter was not in the picture at the relevant point of time and would not have been in the know of things about the execution of the documents in question by the deceased first plaintiff. The materials available on record being as such, it is found that the trial Court had correctly disbelieved the plaintiffs' case on the footing that the plaintiffs have not let in any cogent and reliable evidence to establish the allegations put forth by them in the plaint and on the other hand, it is found that the first appellate Court had set aside the well considered and reasoned judgment of the trial Court by shifting the burden on the defendants on an erroneous premise. The substantial questions of law formulated in this second appeal are, accordingly, answered against the plaintiffs and in favour of the defendants.

In conclusion, the Judgement and Decree dated 31.12.2003 passed in A.S.No.4 of 2003 on the file of the Subordinate Court, Tiruppur, are set aside and the Judgment and Decree dated 30.10.2002 passed in O.S.No.467 of 1995 on the file of the District Munsif cum Judicial Magistrate Court, Palladam, are confirmed. Accordingly, the second appeal is allowed with costs. Consequently, connected miscellaneous petition, if any, is closed.

s/d-
Assistant Registrar(CO)

True Copy

Sub-Assistant Registrar

sms
To

1. The Subordinate Judge, Tiruppur.
2. The District Munsif cum Judicial Magistrate Court, Palladam.
3. The Section Officer, V.R.Section, High Court, Madras.

+1 CC to M/s.K. Govi Ganesan, Advocate sr 4670.

S.A.No.1703 of 2004

SP(03/09/2018)



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