



A.S.No.560 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 31.10.2022

Pronounced on : 17.11.2022

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI
and

THE HONOURABLE MR.JUSTICE SUNDER MOHAN

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S.Shanmuga Sundaram

...Appellant

Versus

1.S.Mohan,
2.Padmini

... Respondents

PRAYER : First Appeal is filed under Section 96 of C.P.C., against the Judgment and Decree dated 23.02.2018 made in O.S.No.81 of 2008 on the file of the IV Additional District Court, Erode at Bhavani.

For Appellant : Mr.S.Parthasarathy
Senior Counsel
for Mr.P.Sivakumar

For R1 : Mr.R.Thiyagarajan
for Mr.P.R.Balasubramanian

For R2 : Mr.K.S.Kaviarasan



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J U D G M E N T

(Judgment of the Court was delivered by SUNDER MOHAN,J.)

The unsuccessful plaintiff in a suit for partition has challenged the Judgment in O.S.No.81 of 2008 dated 05.03.2008 passed by IV Additional District Judge, Erode in the above appeal.

2.The brief facts leading to the filing on the above appeal are as follows:

(a)The first respondent is the brother of the appellant, the second respondent is his sister. The appellant filed a suit for partition, claiming partition of the suit schedule properties which consists of four items.

(b) The averments in the plaint are that the appellant and the respondents are children of one late K.Sengodan. On 25.03.1964, a partition deed was effected between late Mr.K.Sengodan, his elder brother Mr.K.Muthusamy and their father Mr.Kandappagounder. In the partition, a property was allotted to Mr.K.Sengodan which is the first item of the suit schedule property. The suit properties are joint family properties. The appellant and the respondents are entitled to a share. The appellant is entitled to 4/9th share and the first respondent is entitled to 4/9th share and second respondent is entitled to 1/9 share. On 03.04.2008, the appellant



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issued a notice through counsel demanding partition of the properties. The first

respondent issued a reply notice containing false allegations and stated that their father Mr.Sengodan had executed a Settlement Deed on 21.05.2007 in his favour. The said Settlement Deed is not true, valid, genuine, and not executed by the father voluntarily while he was in a sound disposing state of mind. The first respondent had obtained the Settlement Deed by fraud, undue influence and coercion. It may even be a forged document. The father of the appellant and the respondents was aged about 90 years. At the time of his death he was sick and he had poor eye sight. He died within 36 days from the date of Settlement Deed. There is no reason to disinherit the appellant and the second respondent in respect of a valuable property in Chennai. The first respondent had undue influence over the deceased Mr.Sengodan as he was staying with him. The Settlement Deed is void. The first respondent cannot derive any title under the said Settlement Deed. That apart the second item of the suit schedule property is not the self acquired property of late Mr.Sengodan. He had purchased the property from out of the income from the joint family properties. Therefore, the appellant prayed for partition of the suit property.

(c) The first respondent filed a written statement stating that the suit was not



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maintainable. The 1st respondent admitted that the partition took place in the year 1964 and the 1st item of suit schedule property was allotted to the share of Mr.K.Sengodan. Late Mr.Sengodan was admitted in K.H.M. Hospital, Anna Nagar one week prior to his death. The first respondent denied that the Settlement Deed was executed under undue influence, coercion and fraud. He further stated that the Settlement Deed dated 21.05.2007 is true and a genuine document. Mr.Sengodan was aged about 88 years at the time of his death and was in sound state of health and mind. The second item of suit schedule property was a self acquired property of late Mr.Sengodan. He did not indulge in any agricultural activities and was employed in Government Service since 1950. He had purchased the second item of the suit schedule property from and out of his earnings as a Government Servant. It was the self acquired property of Mr.Sengodan. The Settlement Deed was executed on 21.05.2007 and was accepted and acted upon immediately. The appellant never visited his father since 1993. After the death of the father, a sum of Rs.6.5 lakhs lying in the bank was divided between the appellant and the respondents. The first respondent has no objection in dividing the item Nos.1, 3 and 4 of the suit schedule properties, Item No.2 is the property which was conveyed to him by way of Settlement Deed.



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(d) The second respondent herein who is the sister of the appellant and the 1st respondent filed a written statement stating that it is false to state that the father had executed the settlement deed in favour of the first respondent. The Settlement Deed has been created by the first respondent to grab the second item of suit schedule property. The document is fabricated. The property is the ancestral property because it was purchased out of income derived from joint family properties and therefore, the father had no right to execute the Settlement Deed. She therefore submitted that she is entitled to 1/3rd share in all the items of the suit schedule property.

(e) The appellant filed a reply statement denying the averments made in the written statements of the respondents. Broadly, the appellant reiterated the averments made in the plaint. According to appellant, their father Mr.Sengodan had purchased the property from and out of the income earned from the first item of the suit schedule property which was a joint family property. The properties were joint family properties and hence available for partition. The appellant's father was not healthy and he was not in the sound disposing state of mind when the alleged Settlement Deed was allegedly executed. Settlement Deed is not a



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genuine document. He also stated that the second respondent was given in marriage in the year 1972 and had given 80 sovereigns of gold and two lakhs as dowry

2.The Trial Court framed the following issues: -.

“1.Whether the plaintiff is entitled to partition as prayed for?

2.To what other relief?

Additional Issues framed on 25.11.2016

1.Whether the suit 1st item of the property is a self acquired property of the deceased K.Sengodan and whether he has right to execute settlement deed in respect of the 2nd item of the property?”

3.Before the Trial Court, the appellant/plaintiff examined P.W.1 to P.W.5 and marked Exs.A.1 to A.8. The first respondent examined D.W.1 to D.W.2 and marked Ex.B.1 to Ex.B13. The Report of the Handwriting expert was marked as Ex.C.1

4.As regards Issue No.1, the trial court found that the appellant and the respondents are each entitled to 1/3rd share in the first item of the suit schedule property. The Trial Court found that the appellant and the second respondent herein are not entitled to share in the second item of the suit schedule property.



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The Trial Court dismissed the suit in respect of items 3 and 4 of the suit schedule property as it found that there is no evidence to show that it was available for partition. As regards the Additional Issue, the Trial Court found that the second item of suit schedule property is a self-acquired property of the deceased Mr.Sengodan and the Settlement Deed has been proved in accordance with law. The Settlement Deed is valid and executed in favour of the first respondent herein.

5.The appellant has preferred the above appeal aggrieved by the Judgment of the Trial Court.

6.Mr.S.Parthasarathy, the learned Senior Counsel for the appellant submitted

(a) that the appellant was not aggrieved with the finding of the Trial Court in respect of item No.I of suit schedule property . The learned Senior Counsel did not press his claim with regard to item 3 and 4 of the suit schedule property as well. The thrust of his submission was only with regard to Item 2 of the suit schedule property (hereafter referred to as the “disputed property”) which is valuable. The learned Senior Counsel submitted that the property was purchased out of the income derived from the joint family property namely item 1 of the suit schedule property and hence the disputed property is a joint family property. Their



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father Mr.Sengodan had no right to execute the Settlement Deed.

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(b). The learned Senior Counsel submitted that even assuming that the disputed property was the self-acquired property of late Mr.Sengodan, the property is available for partition. The alleged settlement deed dated 21.05.2007 executed in favour of first respondent is not true, valid and genuine and it was not executed by the father voluntarily. It is the case of the appellant that the settlement deed was a forged document and he had stated so in the evidence. In any event, the Settlement Deed was not accepted by the first respondent during the lifetime of the father and hence the gift is void as per Section 122 of Transfer of Property Act. The learned Senior Counsel took us through the evidence of D.W.2, the first respondent herein and his admission that he was not aware of the Settlement Deed till he retired and the retirement took place only after the death of the father.

(c). The first respondent had not examined the attestors of the Settlement Deed and hence, the Settlement Deed has not been proved by the first respondent. The learned trial Judge had committed an error in accepting the evidence of D.W.3 who was not subjected to cross examination. The learned Judge had eschewed evidence of P.W.5 as he had not subjected himself for cross examination. But he had applied a different yardstick, so far as the D.W.3 is concerned. The evidence



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of D.W.3 who was a witness to the Settlement Deed ought to have been eschewed

because he was also not available for cross examinations. From the judgment it could be seen that, the Trial Court had granted adjournment for cross examination since the appellant's counsel sought time to examine him along with the scribe of the Settlement Deed. The case was adjourned and the D.W.3 did not turn up for cross examination. The learned Trial Judge having found that the first respondent did not give any reason as to why D.W.3 did not turn up for cross examination ought not to have accepted the evidence of D.W.3 and held against the appellant. The first respondent had therefore not proved the Settlement Deed in terms of Section 68 of the Evidence Act.

(d) The father of the appellant and the respondents was very old and died within 30 days of the execution of the Settlement Deed. Hence, the burden lies on the first respondent to prove good faith in the transaction as he was in a position of confidence as per Section 111 of Evidence Act. The first respondent has not established good faith in the transaction and hence has not discharged his burden as per the law. The learned Senior Counsel prayed for allowing the appeal. In support of his contention he relied upon the following decisions:



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(i) Krishna Mohan Kul alias Nani vs. Pratima Maity and others reported
in **(2004) 9 SCC 468**

“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 the 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



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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.”

(ii) *Rosammal Issethenammal Fernandez (Dead) by LRs & others vs. Joosa Mariyan Fernandez and others* reported in (2007) 7 SCC 189.

“8. The judgment records the pleadings to the following effect:

"Gift Deed No. 1763/73 and Settlement Deed No.1764/73 were brought into existence fraudulently without the knowledge and consent of Jaius Mariyan Fernandez. On the date of the alleged execution of the abovesaid two documents Jaius Mariyan Fernandez was confined to bed due to paralysis. At that time he was not in a position to execute any document. In executing the documents Defendants 1 and 2 forged the signature of their father after



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influencing the Sub-Registrar."

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9. The aforesaid pleading leaves no room of doubt about denial of execution of the said documents. The pleading records that Defendants 1 and 2 forged the signature of their father after influencing the Sub-Registrar. The denial cannot be more strong than what is recorded here. Once when there is denial made by the plaintiff, it cannot be doubted that the proviso will not be attracted. The main part of Section 68 of the Indian Evidence Act puts an obligation on the party tendering any document that unless at least one attesting witness has been called for proving such execution the same shall not be used in evidence."

(iii) ***K.Laxmanan vs Thekkayil Padmini and others*** reported in (2009) 1 SCC 354.

"23. Moreover, no attempt was made by the appellant to prove and establish the mental and physical condition of the testator at the time of execution. Rather the respondent has proved that Chathu, the father of the appellant, at the time of the alleged execution of the deed of will was 82 years of age and he was suffering from serious physical ailments and was not mentally in a good state of mind."

...

"30. The legality and the validity of the said deed of gift was under challenge in the trial for which the parties have led evidence and therefore in the present case the proviso to Section 68 of the Act



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does not become operative and functional. In such cases, the document has to be proved in terms of Section 68 of the Act. In this regard, we may appropriately refer to a decision of this Court in Rosammal Issetheenammal Fernandez. Vs. Joosa Mariyan Fernandez wherein it was held as under: (SCC pp. 191 & 192, paras 7 & 11)

7. In considering this question, whether there is any denial or not, it should not be casually considered as such finding has very important bearing on the admissibility of a document which has important bearing on the rights of both the parties..... It must also take into consideration the pleadings of the parties which has not been done in this case. Pleading is the first stage where a party takes up its stand in respect of facts which they plead.

11. Under the proviso to Section 68 the obligation to produce at least one attesting witness stands withdrawn if the execution of any such document, not being a will which is registered, is not specifically denied. Therefore, everything hinges on the recording of this fact of such denial.

If there is no specific denial, the proviso comes into play but if there is denial, the proviso will not apply.”

(iv)Subhra Mukherjee and another vs. Bharat Coking Coal Ltd., and others reported in **(2000) 3 SCC 312**

“12. There can be no dispute that a person who attacks a transaction as sham, bogus and fictitious must prove the same. But a plain reading of Question 1 discloses that it is in two parts; the first part says “whether the transaction in question is a bona fide and genuine



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one” which has to be proved by the appellants. It is only when this has been done that the respondent has to dislodge it by proving that it is a sham and fictitious transaction. When the circumstances of the case and the intrinsic evidence on record clearly point out that the transaction is not bona fide and genuine, it is unnecessary for the Court to find out whether the respondent has led any evidence to show that the transaction is sham, bogus or fictitious.”

7.Mr.R.Thiagarajan, learned counsel representing Mr.P.R.Balasubramanian for the first respondent submitted that the suit for partition is not maintainable in respect of the disputed property as it was not available for partition. The appellant has not prayed for a declaration that the Settlement Deed is void. In the absence of the same, any challenge made to a Settlement Deed cannot be accepted as there is no plea and foundation in that regard.

(b)The learned counsel submitted that in any event the disputed property is the self-acquired property of late Mr.Sengodan and hence he had absolute right to execute the Settlement Deed. The appellant had not established that it was a joint family property. Late Mr.Sengodan was in Government service and earning a salary. He did not indulge in agricultural activities and hence, there is no question of deriving any income from agriculture. The property was purchased by raising a



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loan which was discharged by late Mr.K.Sengodan from his salary.

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(c)The appellant had not specifically denied the execution of the Settlement Deed and has vaguely stated that the Settlement Deed was not executed voluntarily in a sound disposing state of mind. The appellant had alleged that the first respondent had either played fraud or got the document executed by undue influence or coercion. This is a vague and general denial and it is not a specific denial.

(d) The Settlement Deed was a registered document and there is a presumption in favour of the registered document that it is genuine. In view of its registration proviso to Section 68 of Indian Evidence Act would be applicable as there was no “specific denial”as regards the Settlement Deed.

(e)Allegation with regard to fraud, coercion and undue influence are very vague. Order VI Rule 4 of CPC requires that the averments relating to fraud, coercion have to be supported with particulars and details which are necessary for the defendants to answer or rebut. The father of the appellant and the respondents worked as Deputy Commissioner of Labour and after retirement practiced as lawyer. He is not an illiterate person who would be influenced by the first



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respondent. The scribe of the document was a lawyer with whom the appellant's father was associated. In such circumstances the allegations with regard to fraud and undue influence cannot be countenanced.

(f) The learned counsel further submitted that as per Section 31 of the Specific Relief Act where there is an apprehension that an instrument if left outstanding may cause injury, the person against whom the instrument is void or voidable has to sue to have it adjudged as void or voidable. In the absence of such prayer in the suit, the suit for partition cannot be entertained.

(g). The Settlement Deed was accepted by the first respondent and even assuming there are minor inconsistencies in his evidence that cannot be the sole basis for holding that the gift deed was not accepted by him.

(h) The learned counsel for the first respondent prayed for dismissal of appeal. In support of his contention he relied upon the following Judgments:-

(i) ***Bishundeo Narain and another v. Seogeni Rai*** and others reported in ***A.I.R 1951 S.C 280***.

“25. It is also to be observed that no proper particulars have been



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furnished. Now if there is one rule which is better established than any other, it is that in cases of fraud, undue influence and coercion, the parties pleading it must set forth full particulars and the case can only be decided on the particulars as laid. There can be no departure from them in evidence. General allegations are insufficient even to amount to an averment of fraud of which any Ct. ought to take notice, however strong the language in which they are couched may be and the same applies to undue influence and coercion. See O. 6, R. 4, Civil P. C.

(ii) Pannalal and another vs. Kisanlal and others reported in ***A.I.R.(3a)1952 Nagpur 84***

“13.The privy Council has held that in a case of undue influence the party pleading it must first set out that the person who is said to exercise the undue influence was in fact in a position to dominate the other party’s will and must set out how that was so. Then only does the second question rise, namely whether he in fact exercised his influence to the detriment of the person complaining. The first position is not set out here in the present case. All that is said is:

When the plaintiff No.2 was very ill he (plaintiff No.1) felt extremely helpless and Viswanath (defendant No.3) taking advantage of his position of dominance over him to sign the petition of compromise.”.

This does not explain how Vishwanath came to be a position to dominate the other man’s Will.”



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(iii) *Ladli Prashad Jaiswal vs. The Karnal Distillery Co.Ltd., Karnal and others* reported in AIR1963 S.C 1279.

“The doctrine of undue influence under the common law was evolved by the Courts in England for granting protection against transactions procured by the exercise of insidious forms of influence spiritual and temporal. The doctrine applies to acts of bounty as well as to other transactions in which one party by exercising his position of dominance obtains an unfair advantage over another. The Indian Contract Act is founded substantially on the rules of English common law. The first sub-section of S. 16 of the Contract Act lays down the principle in general terms. By sub-sec. (2) a presumption arises that a person shall be deemed to be in a position to dominate the will of another if the conditions set therein are fulfilled, Sub section (3) lays down the conditions for raising a rebuttable presumption that a transaction is procured by the exercise of undue influence. The reason for the rule in the third sub-section is that a person who has obtained an advantage over another by dominating his will may also remain in a position to suppress the requisite evidence in support of the plea of undue influence.

A transaction may be vitiated on account of undue influence where the relations between the parties are such that one of them is in a position to dominate the will of the other and he uses his position to obtain an unfair advantage over him ordinarily to be



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established by the person seeking to avoid the transaction: he has to prove that the other party to a transaction was in a position to dominate his will and that the other party had obtained an unfair advantage by using that position.

Clause (2) lays down a special presumption that a person is deemed to be in a position to dominate the will of another where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other or 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. Where it is proved that a person is in a position to dominate the will of another (such proof being furnished either by evidence or by the presumption arising under sub-sec. (2) and he enters into a transaction with that other person which on the face of it or on the evidence adduced, appears to be unconscionable the burden of proving that the transaction was not induced by undue influence lies upon the person in a position to dominate the will of the other. But sub- sec.(3) has manifestly a limited application: the presumption will only arise if it is established by evidence that the party who had obtained the benefit of a transaction was in a position to dominate the will of the other and that the transaction is shown to be unconscionable. If either of these two conditions is not fulfilled the presumption of undue influence will not arise and burden will not shift.”



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(iv) ***Union of India vs. M/s,Chaturbhai M.Patel and Co.*** reported in ***(1976) 1 SCC 747.***

“7. The High Court has carefully considered the various circumstances relied upon by the appellant and has held that they are not at all conclusive to prove the case of fraud. It is well settled that fraud like any other charge of a criminal offence whether made in civil or criminal proceedings, must be established beyond reasonable doubt: per Lord Atkin in *A. L. N. Narayanan Chettyar v. Official Assignee, High Court, Rangoon*'. However suspicious may be the circumstances, however strange the coincidences, and however grave the doubt, suspicion alone can never take the place of proof. In our normal life we are sometimes faced with unexplained phenomenon and strange coincidences, for, as it is said. truth is stranger than fiction. In these circumstances, therefore, after going through the judgment of the High Court we are satisfied that the appellant has not been able to make out a case of fraud as found by the High Court. As such the High Court was fully justified in negating the plea of fraud and in decreeing the suit of the plaintiff.

(v) ***Surendra Kumar vs. Nathula*** reported in ***AIR 2001 SCC 2040.***

“On a plain reading of the proviso, it is manifest that a registered deed of gift can be received in evidence without examining one of the attestors if the person who has executed the deed of gift has not specifically denied its execution. In the present case, the



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donor Chand Bai has specifically admitted execution of the deed of gift in favour of the appellant. Therefore, the lower appellate Court was in error in holding that the deed of gift has not been duly proved since one of the attestors has not been examined as witness. Indeed the certified copy of the registered deed of gift was produced in the trial Court along with an application filed by the plaintiff in the previous suit, Suit No. 69/70(4/76) that the same may be called for. The trial Court, being satisfied about the reason for non-production of the original document, marked the certified copy of the deed of gift as Exhibit-3.

(vi) Govindbhai Chhotabhai Patel and others vs. Patel RamanbhaiMathurbhai reported in **(2020) 16 SCC 255.**

34. In the abovesaid case, the plaintiff claimed natural succession whereas the defendant relied upon gift deed. In the aforesaid judgments, it has been held as a matter of fact that there was specific denial of execution of gift deed But in the present case, the appellants came out with the plea of forgery and fabrication of the gift deed which is based on different allegations and proof than the proof of document attested.

35. Order & Rule 4 of the Code of Civil Procedure, 1908 warrants that in all cases in which allegation of any misrepresentation, fraud, breach of treat wilful default, or undue influence, the necessary particulars are required to be stated in the pleadings.

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39. *In Kannan Nambiar v. Narayani Amma, the Division Bench of the Kerala High Court was considering a suit filed by daughter of a donee claiming share in the property. The gift deed was admitted in evidence without any objection. The Court held that specific denial of execution of gift is an unambiguous and categorical statement that the donor did not execute the document. The Court held as under: (SCC Online Ker paras 14-15 & 18)*

"14. Ab initio we have to examine whether there is any specific denial of the execution of the document, in the pleadings Before considering whether there is specific denial we have to consider what is the exact requirement demanded when the proviso enjoins a specific denial. "Specific" means with exactness, precision in a definite manner (see Webster's 3rd New International Dictionary). It is clear, that something more is required to connote specific denial in juxtaposition to general denial. See Dashrath Prasad Bajooram v. LallosinghSanmansingh

15. We think that specific denial of execution of gift is an unambiguous and categorical statement that the donor did not execute the document. It means not only that the denial must be in express terms but that it should be unqualified, manifest and explicit. It should be certain and definite denial of execution. What has to be specifically denied is the execution of the document. Other contentions not necessarily and distinctly referring to the execution of the document by the alleged executant cannot be gathered, for the denial contemplated in the proviso.

18. The question which elicited the above answer gives a clear understanding of the case of the defendants as they understood their case Defendants have no case that no document was executed by



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Anandan Nambiar. Their case is that the document is not valid because it had been executed under circumstances which would render the document invalid. There is no specific denial of the execution of the document. The respondents can seek the aid of the proviso to Section 68 of the Evidence Act. No defect in not calling an attesting witness to prove the document. We do not think that we can ignore Ex.A-1 gift deed on the ground that not attesting witness has been called for, for providing the gift deed.”

(vii) *Jamila Begum v. Shami Mohd.*, reported in (2019) 2 SCC 727 63 : 2018 SCC OnLine SC 2813 at page 734

16. Sale deed dated 21-12-1970 in favour of Jamila Begum is a registered document and the registration of the sale deed reinforces valid execution of the sale deed. A registered document carries with it a presumption that it was validly executed. It is for the party challenging the genuineness of the transaction to show that the transaction is not valid in law. In Prem Singh v. Birbal [Prem Singh v. Birbal, (2006) 5 SCC 353], it was held as under: (SCC pp. 360-61, para 27)

“27. There is a presumption that a registered document is validly executed. A registered document, therefore, prima facie would be valid in law. The onus of proof, thus, would be on a person who leads evidence to rebut the presumption. In the instant case, Respondent 1 has not been able to rebut the said presumption.”

The above judgment in Prem Singh case [Prem Singh v. Birbal, (2006) 5 SCC 353] has been referred to in Vishwanath Bapurao



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Sabale v. Shalinibai Nagappa Sabale [Vishwanath Bapurao Sabale v.

Shalinibai Nagappa Sabale, (2009) 12 SCC 101 : (2009) 4 SCC (Civ) 646] .

8. In reply, S.Parthasarathy, learned Senior Counsel for the appellant would submit that the allegations with regard to the fraud, undue influence and coercion cannot be construed in a straight jacket formula.

(a) The learned Senior Counsel relied upon Judgment of the Honourable Apex Court in ***Ramesh B.Desai and others vs. Bipin Vadilal Mehta and others*** reported in ***(2006) 5 SCC 638***.

22. Undoubtedly, Order 6 Rule 4 CPC requires that complete particulars of fraud shall be stated in the pleadings. The particulars of alleged fraud which are required to be stated in the plaint, will depend upon the facts each particular case and no abstract principle can be laid down in this regard. Where some transaction of money takes place to which A. B parties and payment is made by cheques, in normal circumstances party "X" may not get knowledge of the said transaction unless he about it by someone who has knowledge of the transaction opportunity to see the accounts of the parties concerned in the Back a case an



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assertion by 'X' that he got no knowledge of the transaction when took place and that he came to know about it subsequently h proceedings in court cannot be said to be insufficient pleading on the purpose of Order 6 Rule 4 CPC In such a case X can only plead that he got no knowledge of the transaction and nothing more. Having regard to the circumstances of the case, we are of the opinion that the High was in error in holding that there was no proper pleading of fraud.”

(b) The learned Senior Counsel submitted that since the appellant was not a party to the Settlement Deed, there is no necessity for him to challenge the Settlement Deed before seeking partition. The prayer for setting aside will arise only when a person suing to invalidate the document is a party to the instrument. The learned Senior Counsel relied upon the Judgment of the Single Judge of this Court in ***S.A. 69 of 2014 and M.P.No.1 of 2014 (R.Shanmugam Vs. R.Pangajam and others)*** dated 16.09.2019.

“On the second question of law Mr.N.Manokaran, would submit that once a person seeks partition claiming to be a co-sharer denying the testamentary or non-testamentary instrument said to have been executed by predecessor In interest, it is for the person who sets up title under that instrument to prove that instrument in accordance with law The prayer for setting aside the document is not required. The legal heirs can contend that the said document is not true and genuine and seek partition.



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The prayer for setting aside will arise only when a person suing to invalidate the document is party to the instrument. If the person suing is not a party to the instrument, then such person need not seek to set aside or cancel the instrument before WEB COPY seeking partition.”

(c) This Judgment was followed by the Division Bench of this Court in ***A.S.No.226 of 2013 and M.P.No.1 of 2013 (A.Suresh vs. Minor.Pavishna and others)*** dated 19.03.2001

“13. In reply, learned counsel for first respondent submitted that when a document is void-ab-initio, it is not necessary to seek for a decree for setting aside the document He relied on the ruling reported in (2006) 5 SCC 353 (Prem Singh and others. Birbal and others) and unreported judgment of this Court in S.A.No.69 of 2014 (R.Shanmugam ..vs. R.Pangajam and others) in this regard. The relevant portions in (2006) 5 SCC 353 cited above are extracted hereunder:-

“15. Section 31 of the Specific Relief Act 1963 thus refers to both ward and voidable document I provides for a discretionary relief

16. When a document is valid no question arises of its cancellation When a document is void ab initio a decree for setting aside the same would not be necessary as the same is non-est in the eve of law as it would be a



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nullity.”

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9. We have heard the learned senior counsel for the appellant and the learned counsel for the respondents and perused the documents and evidence on record.

10. The points that arise for consideration in the above appeal as follows:

(i) *Whether the partition suit in respect of the disputed property is maintainable in the absence of prayer challenging the settlement deed in favour of the first respondent?*

(ii) *Whether the first respondent has proved the settlement deed in accordance with law?*

Point (i)

11. The learned counsel for the first respondent submitted that the suit for partition is not maintainable since, the disputed property is not available for partition. The learned counsel submitted that unless the settlement deed is declared to be void or voidable in terms of Section 31 of Specific Relief Act the suit for partition is not maintainable. On the other hand, the learned Senior Counsel for the appellant submitted that the prayer for declaration would arise only if the appellant was a party to the document. He relied upon the judgment of



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the Division Bench of this Court in *A.S.No.226 of 2013* dated 19.03.2021

A.Suresh vs. Minor Pravishna and others to show that the prayer for setting aside document will arise only when a person suing to invalidate the document is a party to the instrument. If the person suing is not a party to the instrument then such a person need not seek to set aside or cancel the instrument before seeking partition. The Judgment of the Division Bench of this Court has quoted with approval, the Judgment of the learned Single Judge in S.A.No.691 of 2014 *R.Shanmugan vs. R.Rangarajan*. The relevant portions of the Judgment of the learned single Judge and that of the Division Bench has already been extracted by us. Since the observation of the learned Judge has been quoted with approval by the coordinate bench of this Court, we are in respectful agreement with the said view. Hence, we hold that the appellant need not have specifically prayed for setting aside the settlement Deed while seeking partition. Hence, point (i) is answered in favour of the appellant.

Point No. (ii)

12. We find that the appellant though had pleaded that the late Mr.Sengodan had no right to execute the Settlement Deed since the properties were joint family properties was not able to substantiate the said plea. We find that no evidence has been let in by the appellant to show that the disputed property was purchased



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from and out of the income derived from the joint family property of the appellant

and the respondents. It is not in dispute that late Mr.Sengodan was in Government Service and had means to purchase the disputed property. Therefore, we have no hesitation in holding that the disputed property is a self acquired property of late Mr.Sengodan.

13.It is the case of the appellant as stated in the plaint that late Mr.Sengodan had not executed the Settlement Deed in favour of the first respondent voluntarily and in a sound disposing state of mind. The relevant portion of the plaint reads as follows:

“The alleged settlement deed dated 21.5.2007 is not true valid and genuine and was not executed by the father of the plaintiff voluntarily and in a sound disposing state of mind in respect of item 2 of the suit schedule properties. In the said document should have been created by the first defendant either by the playing huge fraud on the father of the plaintiff or by undue influence or by co-ersion. It may be even a forged document.”

14.In the reply to the written statement of the first respondent, the appellant had stated that the father Mr.Sengodan was tortured without proper food, water and care and was exposed to highly worst sanitation and he was caged in a room like a prisoner. He further stated as follows: -



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“that during on 25.5.2007 was so worst and he was expected at any point of time his last breathe may occur. During the time the plaintiff was away from station at that time the alleged settlement dated 21.05.2007 was fabricated and manipulated by sheer application coercive method and fraudulent misrepresentation without disclosing the facts of the deed to the plaintiff the dying father was unaware of the happening around him and dire gloom of knowledge of anything. Hence, the alleged settlement deed dated 21.05.2007 is not true and genuine”

“Hence, the alleged settlement deed is out and out manipulated and fabricated frequently by the first respondent as his father was 90 years old very feeble and withunsound state of mind and health.”

The version in the reply is a slight improvement of the version in the plaint. Apart from using the words like fabrication, manipulation coercion, fraud and nothing has been stated as to how the fraud or coercion or mis representation happened.

15.We find from the averments in the plaint that the appellant had stated that the settlement deed is not true and valid since the father had not executed the same voluntarily in a sound disposing state of mind. The appellant had also added



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by saying that the document should have been created by either playing fraud or by undue influence or by coercion. The plaint also says that it may even be a forged document. The averments would make it clear that the appellant was not clear as to the grounds on which he is challenging the settlement deed. The tenor of the plaint as extracted earlier would show that the appellant had questioned the Settlement Deed by saying that it was not executed voluntarily in a sound state of mind and that it may have been executed by fraud or undue influence or by coercion. In these circumstances, we have to examine whether the first respondent had proved the Settlement Deed. He examined D.W.3, one of the attestors for that purpose. But D.W.3 did not appear for cross examination. We find that the trial Court ought to have eschewed the evidence of D.W.3 as it had done in the case of P.W.5. The approach of the Trial Court in our view is erroneous particularly as it found that, it was the 1st respondent who failed to produce the witness for cross examination. After having found that the first respondent failed to produce the witness, the learned Judge ought not to have accepted the evidence of D.W.3 who was one of the attestors to the Settlement Deed. Therefore, we are of the view that the evidence of D.W.3 has to be eschewed from consideration. The first respondent hence has not examined the Attestors to the document, the settlement deed.



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16. The question would be whether the first respondent has proved the settlement deed and he is entitled to invoke the Proviso to Section 68 of Indian Evidence Act since the Settlement Deed was a registered document.

The Proviso to Section 68 reads as follows:-

“68. Proof of execution of document required by law to be attested.—If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence: 1[Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.”

As to what is 'specific denial' came up for consideration before the Hon'ble Supreme Court in **(2020) 16 SCC 255**. We have already extracted the relevant portion of the Judgment earlier. The Hon'ble Court had quoted with the approval of the Judgment of the Nagpur High Court reported in **AIR 1951 Nagpur 343**



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and the Judgment of the Kerala High Court reported in **1984 SCC Kerala 174** in

Kannan Nambiar vs Narayani ammal. The Nagpur High Court had made a distinction between a mere general denial and specific denial. In view of the language of the proviso, the Courts held that the some meaning must be given to the words “specific denial”. The Kerala High Court held that the specific means with “exactness, precision in a definite manner”. It is therefore clear that something more than a mere denial to connote specific denial is required in order to challenge the registered deed. In the absence of the specific denial the person who seeks to prove the document can invoke the Proviso to Section 68 of Indian Evidence Act. The specific denial must relate to the execution of the document. In the present case, the appellant had stated in the plaint that the document may even be forged. In our view that cannot be said to be a specific denial. That apart, report of the Handwriting Expert Ex.C1 shows that the signature of the deceased in the document tallied with the admitted signature. The appellant was not able to establish that the signature was forged. In the absence of the specific denial as regards the execution of the document, the first respondent in our view is entitled to invoke the Proviso to Section 68 of the Evidence Act. The other averments made by the appellant is not with regard to denial of the execution of the document but are averments which would make the document invalid. There is a



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difference between saying that the settlement deed was not executed by the deceased and saying that the settlement deed is invalid because it was not executed in a sound disposing state of mind and voluntarily. Therefore, the ratio of the decision of Hon'ble Apex Court **(2020) 16 SCC 225** is squarely applicable to the facts of the present case.

17.The other ground raised by the appellant in the plaint to challenge the settlement deed is that it was not executed in a sound disposing state of mind. That apart, the appellant had stated that there was an undue influence coercion and fraud by the first respondent.

18.As regards the question as to whether the appellant had established that the Settlement Deed was not executed voluntarily when the late Mr.Sengodan was not in a sound disposing state of mind, we find that the appellant had not only stated the late Mr.Sengodan had not voluntarily executed the document, but also had stated that there may have been fraud, undue influence or coercion. It is a matter of common sense that not being in a sound state of mind and absence of mental capacity is inconsistent with the case of undue influence fraud and coercion. The appellant without being specific as to the exact reason for denying the settlement deed has stated all the grounds possible to challenge it. Even



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though he had stated all the grounds no particulars have been stated in the plaint as required under Order VI Rule 4 CPC. The learned Senior Counsel for the appellant submitted that the requirement to state the particulars under Order VI Rule 4 cannot be construed in a straight jacket formula and has to be seen in the light of the facts and circumstances of the case. The learned Senior Counsel had relied upon the Judgment of the Hon'ble Apex Court in ***Ramesh B.Desai and others vs. Bipin Vadilal Mehta and others*** reported in ***(2006) 5 SCC 638*** which we have extracted earlier. The principle of law therefore is very clear that there cannot be any definite rule as to what has to be stated when the plaintiff alleges the fraud, coercion and undue influence. However a reading of Order VI Rule 4 C.P.C would make it clear that the object of the Proviso is that there must be sufficient pleading to put the defendant on notice as what he has to defend. Mere repetition of words such as fraud, coercion and undue influence are definitely insufficient and it does not satisfy the requirements of Order VI Rule 4 C.P.C. In our view therefore, the appellant has not pleaded and furnished particulars in support of his plea in so far as fraud, coercion and undue influence.

19.As regards voluntariness and sound disposing state of mind we find that the deceased Sengodan was alive for nearly 40 days after the settlement deed. The



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settlement deed was executed at the Sub Registrar's office and the endorsement

confirms the presence of the deceased Mr.Sengodan physically for the purpose of registration. Further we also find that he was not an illiterate person and he held a very responsible position in the Government and after retirement practiced as a lawyer. Section 111 of Evidence Act no doubt states that where there is a question as to good faith of a transaction between the parties, one of whom stands to the other in a position of active confidence, the burden of proving good faith of the transaction is on the party who is in a position of active confidence. However in order to invoke Section 111 the appellant has to first establish that the first respondent was in a position to dominate the Will of the deceased and he was in active confidence and that he had obtained unfair advantage by using that position. The appellant apart from merely stating that the deceased died 40 days after the execution of the settlement Deed has not proved that the deceased was not in a sound disposing state of mind. In order to establish undue influence over a person of the stature of the deceased, the appellant ought have produced the materials to show that the first respondent was in active confidence and was in a position to exercise undue influence over the deceased. This is the view of the Hon'ble Apex court in the case of ***Ladli Prashad Jaiswal vs. The Karnal Distillery Co.Ltd., Karnal*** reported in ***AIR 1962 SC 1279*** which we have



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extracted earlier.

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20. That apart, there is a presumption that a registered document is validly executed. The registered document therefore, *prima facie* would be valid in law. The onus of proof, thus would be on the person who leads evidence to rebut that presumption. In this case, the appellant had not rebutted the presumption in favour of the registered document. In this regard, the Judgment of the Hon'ble Apex Court in **2006 (5) SCC 353 (Prem Singh Vs. Birbal)** which has been extracted in the Judgment of the Hon'ble Apex Court in **(2019) 2 SCC 727** is applicable to the facts of the present case.

21. The next submission of the learner Senior Counsel for the appellant is that the first respondent has taken inconsistent stand with regard to the acceptance of the gift. Since he admitted in his evidence that he was not aware of the settlement made in his favour till his retirement which was much after Mr. Sengodan's death, the gift is void in terms of Section 122 of Transfer of Property Act. Section 122 of Transfer of Property Act is extracted hereunder for easy reference:-

"122. "Gift" defined.—"Gift" is the transfer of



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certain existing moveable or immoveable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee. Acceptance when to be made.—Such acceptance must be made during the lifetime of the donor and while he is still capable of giving. If the donee dies before acceptance, the gift is void."

The learned Senior Counsel submitted that though in the Settlement deed the donor namely the deceased has stated that he had handed over the possession of the property to the first respondent and handed over the documents, the first respondent in his evidence would state that he was not aware of the execution of the settlement deed and also state that he came to know only after his retirement. The learned Senior Counsel for the appellant read to us another portion of the evidence wherein the first respondent had stated that he accepted the settlement on 21/5/2007 itself. We find that there is inconsistency in the evidence of first respondent as regards to the acceptance of the gift deed. However, we are of the view that acceptance of the gift deed has to be inferred from the overall facts and circumstances of the case. On the one hand, it is the case of the appellant that the settlement deed was executed under the influence of the first respondent and on the other hand has pleaded that it was not accepted. That apart, the appellant had not pleaded that the first respondent did not accept the settlement deed either in



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the plaint or in the reply to the written statement. The appellant's stand that the settlement deed was not voluntary and was executed due to fraud, coercion undue influence etc., are inconsistent with the stand now taken with regard to acceptance. That is the reason why there is no pleading to that effect. The appellant had only stated that the settlement deed was executed at the instance of the first respondent. It is seen that first respondent is in possession of second item of the suit property settled on him and further the settlement deed is in possession of the first respondent. In this regard it will be useful to refer to the observations of the Hon'ble Supreme Court in ***Daulat Singh v. State of Rajasthan*** reported (2021) 3 SCC 459, wherein it has been held as follows:-

.....**24.** *At the outset, it ought to be noted that Section 122 of the Transfer of Property Act, 1882 neither defines acceptance, nor does it prescribe any particular mode for accepting the gift. The word “acceptance” is defined as “is the receipt of a thing offered by another with an intention to retain it, as acceptance of a gift”. (See Ramanatha P. Aiyar: The Law Lexicon, 2nd Edn., p. 19.)*

25. *The aforesaid fact can be ascertained from the surrounding circumstances such as taking into possession the property by the donee or by being in the possession of the gift deed itself. The only requirement stipulated here is*



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that, the acceptance of the gift must be effectuated within the lifetime of the donor itself.

26. Hence, being an act of receiving willingly, acceptance can be inferred by the implied conduct of the donee. The aforesaid position has been reiterated by this Court in Asokan v. Lakshmikutty [Asokan v. Lakshmikutty, (2007) 13 SCC 210] : (SCC pp. 215-16, para 14)

“14. Gifts do not contemplate payment of any consideration or compensation. It is, however, beyond any doubt or dispute that in order to constitute a valid gift acceptance thereof is essential. We must, however, notice that the Transfer of Property Act does not prescribe any particular mode of acceptance. It is the circumstances attending to the transaction which may be relevant for determining the question. There may be various means to prove acceptance of a gift. The document may be handed over to a donee, which in a given situation may also amount to a valid acceptance. The fact that possession had been given to the donee also raises a presumption of acceptance.”

Therefore, in the facts and circumstances of the instant case, though the first respondent had taken inconsistent stand as regards his knowledge of the execution of settlement deed on the overall appreciation of the evidence and stand taken by the appellant that the settlement deed itself was executed under undue influence of the first respondent, we are of the view that the gift deed was accepted by the first



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respondent during life time of the donor and it cannot be held to be void on that ground.

22. Thus, we hold that the first respondent has proved the settlement deed and answer point No.ii in favour of the first respondent. Thus, the appellant is not entitled to seek for partition in respect of the disputed property.

23.Hence, we are of the view, that the judgement of trial court is in accordance with law and we have no reason to interfere with the Judgment. The First Appeal is dismissed. No Cost.

(V.M.V.,J)

(S.M.,J)

17.11.2022

Index : Yes/No

Internet : Yes/No

Speaking Order/Non Speaking Order

dk/vsn

To

The IV Additional District Judge, Court,

Erode.



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