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IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : 31.01.2022

JUDGMENT DELIVERED ON : 01.03.2022

CORAM

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

S.A.Nos.208 and 421 of 2014
and
M.P.No.1 of 2014

S.A.No.208 of 2014:
1.S.N.Kandasamy
2.G.Nirmala Devi .. Appellants/Defendants 10 &11

Vs.

1.Kousalya .. 1st respondent/plaintiff
2.Valliammal
3.Muthulakshmi
4.N.S.Palanisamy
5.P.Siva Subramaniam
6.N.M.Krishnasamy
7.Minor Dharshith
Rep. By his guardian and mother Mohana Priya
8.Maragatham
9.Loganathan
10.Vimala Devi
11.Valarmathi
12.Mohana Priya
13.A.Anandan .. Respondents 2 to 13/
Defendants1-5, 7-9, 12-15

PRAYER : This Second Appeal is filed under Section 100 of C.P.C., against the judgment and decree dated 25.11.2013 made in A.S.No.48 of 2013 on the file of the Principal District Judge, Erode, in reversing the decree and judgment dated 08.03.2013 made in O.S.No.137 of 2007 on the file of the II-Additional Subordinate Judge, Erode.

For Appellants: Mr.G.Ethirajulu

For R1 : Mr.N.Manokaran

For R3 to R5,
R7, R9 and R12: Mr.V.Ayyadurai, Senior Advocate
For Mr.D.Gopal

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S.A.No.421 of 2014:
1.Valliammal
2.Muthulakshmi
3.N.S.Palanisamy
4.P.Siva Subramaniam
5.N.M.Krishnasamy
6.Minor Dharshith
Rep. by his guardian and mother Mohana Priya

7.Loganathan
8.Mohana Priya .. Appellants/Defendants 1 to 5 and 7,9 and 14

Vs.

1.Kousalya
2.Maragatham
3. S.N.Kandasamy
4.G.Nirmala Devi
5.Vimala Devi
6.Valarmathi
7.A.Anandan .. Respondents/Plaintiffs & D8,10,11,12,13& 15

PRAYER : This Second Appeal is filed under Section 100 of C.P.C., against the judgment and decree dated 25.11.2013 made in A.S.No.48 of 2013 on the file of the Principal District Judge, Erode, in reversing the judgment and decree, dated 08.03.2013 made in O.S.No.137 of 2007 on the file of the II-Additional Subordinate Judge, Erode.

For Appellants 2 ,3, 4, 6,7 & 8 : Mr.V.Ayyadurai, Senior Advocate
For Mr.D.Gopal

For R1 : Mr.N.Manokaran
For R3 & R4 : Mr.G.Ethirajulu
for Mr.C.S.Saravanan

For R2, R5, R6 and R7 : No appearance

COMMON JUDGMENT

Pending appeal 6th respondent in S.A.No.208 of 2014 died and respondents 1, 7 and 12 are recognised as a legal representatives of the deceased 6th respondent. Pending appeal, second respondent, Valliammal died and respondents 1, 3, 7 and 12 are recognised as legal

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representatives. Memo recorded, vide order, dated 28.01.2022.

2. Appellants in S.A.No.208 of 2014 are only purchasers from the appellants in S.A.No.421 of 2014.

3. For the sake of convenience, parties are referred as per the ranking in S.A.No.421 of 2014.

4. Defeated defendants 1 to 8 are the appellants herein. The first respondent is the plaintiff in O.S.No.137 of 2007 and other respondents are original defendants.

5.The first respondent/plaintiff filed suit in O.S.No.137 of 2007 seeking the relief of partition and separate possession of suit property consisting of four items. The suit was dismissed by the learned II-Additional Sub Judge on 08.03.2013. On appeal in A.S.No.48 of 2013 filed by the first respondent/plaintiff, the lower Appellate Court allowed the same and decreed the suit and hence, the second appeal.

6. The original defendants have filed this S.A.No.421 of 2014 and the S.A.No.208 of 2014 are filed by the subsequent purchasers of the suit properties.

7. In S.A.No.421 of 2014, the following substantial questions of law are framed at the time of admission:

> "1.Is it not the suit filed by the plaintiff nearly after 15 years on 05.03.2007 for division of properties is barred by limitation in terms of Ex.B2 Release Deed dated 14.03.1990 executed voluntarily by the plaintiff in favour of the 6th defendant and thereby relinquished her right in the suit properties?
>
> 2.Whether the lower Appellate Court is justified in holding that the plaintiff came to know about the execution of Release Deed only on 13.07.2007 when the 5th defendant filed a written statement and therefore the starting point of limitation is only from the date of knowledge and it is within time from the date of knowledge?
>
> 3. Is it not the lower Appellate Court has erred in not framing any issue under Order 41 Rule 31 C.P.C., to determine the right of defendants 10 and 11 in respect of the sale deed, dated 30.11.2006 executed in their favour by the 6th defendant which leads to miscarriage of justice?
>
> 4.Whether the lower Appellate Court is justified in drawing adverse inference against the 5th defendant even though the plaintiff admits the execution and her signature in the release deed and for registering the release

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deed and for registering the release deed in Book No.IV in absence of any prohibition under the Registration Act?"

8. In S.A.No.208 of 2014, the following substantial questions of law are framed at the time of admission:

"1.Is it not the suit filed by the plaintiff nearly after 15 years on 05.03.2007 for division of properties is barred by limitation in terms of Ex.B2 Release Deed, dated 14.03.1990 executed voluntarily by the plaintiff in favour of the 6th defendant and thereby relinquished her right in the suit properties?

2.Whether the lower Appellate Court having allotted only 13/180 share to the plaintiff in the suit schedule items 3 and 4 ought to have held that the appellants are entitled to the remaining properties purchased by them under the sale deed dated 30.11.2006 by upholding the validity of the said sale deed?

3. Whether the lower Appellate Court is justified in holding that the plaintiff came to know about the execution of Release Deed only on 13.07.2007 when the 5th defendant filed a written statement and therefore the starting point of the limitation is only from the date of knowledge and it is within time from the date of knowledge?

4.Is it not the lower Appellate Court has erred in not framing any issue under O 41 R 31 C.P.C., to determine the right of the appellants in respect of the sale deed, dated 30.11.2006 executed in their favour by the 6th defendant which leads to miscarriage of justice?"

9. Mr.V.Ayyadurai, learned counsel for the appellant in S.A.No.421 of 2014 and Mr.G.Ethirajulu, learned counsel for the appellants in S.A.No.208 of 2014 and Mr.N.Manokaran, learned counsel for the first respondent were heard.

10. The necessary facts for determination of the above Substantial Questions of Law are as under:

One Ramana Goundar, Prepositor, his wife Senior Valliammal had only one son, namely, Chinnappa Goundar and his wife is Junior Valliammal as per genealogy as follows:

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Ramana Gounder   ----------------- Sr.Valliammal (wife)
                                   | (only son)
                                 |
                 Chinnappa Gounder [Died-1964]
                                   | (wife)
                              |
          Junior. Valliammal (D-1) [DOD:15.9.2010]
                                |
 ------------------------------------------------------------
                   -------------------------
  | Daughter              | Daughter              | Son
Muthulakshmi (D2)         Pappathi(Died)        Nallasamy
     |                      |                (DOD:01.11.1971)
                 |      | [Husband]               | [Wife]

N.S.Palanisamy(D3) N.M.Krishnasamy(D5)     Maragatham (D8)
   |                  | [Died:20.9.2014]       (No issues)
              |                  | [Memo filed]
-------------------------------------       |
      |        |                    |
Sivasubramanian     Vimaladevi   Valarmathi |
(D4)              (D12)              (D13)
                                            |
-------------------------------------------------------
          |                |
Kousalya(Plaintiff)      Sundaramoorthy (D6)
                         | (Died:19.12.2007
                         |  after suit)
                         |

-----------------------------------------------
 |                        |
 Minor                Mohanapriya
 Dharsith (D7)         (D14-W/o. D6)
```

10(a). The ranking of other parties are Jr.Valliammal-D1, wife of Chinnappa Goundar(died). The first defendant Jr.Valliammal died on 16.07.2016. The only son of Ramana Goundar died in the year 1964. The son of Chinnappa Goundar by name, Nallasamy died on 01.11.1971. His wife is Maragatham-D8 had no issues. This is the one branch of the family.

10(b). The transaction between this branch of the family are of D4, D12, D13 and D3. D3-husband of D2-Muthulakshmi has obtained from the branch-1 in favour of Muthulakshmi-second defendant. Jr.Valliammal is the first defendant. 9th defendant is the brother of D5. D1 has executed a Will on 09.04.2015 in favour of D2 and D7. D6-Sundara Moorthi died after filing of the suit on

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19.12.2007. Mohanapriya-D14 is added as LR of D6, namely his wife. D7-Dharsith is the son of D14 and D6. The Jr.Valliammal-D1 died on 16.07.2016. After filing the second appeal since all the LRs are on record, they are recognised as legal representatives of the deceased Jr.Valliammal, widow of Chinnappa Goundar.

10(c). The first respondent/plaintiff Kousalya is the daughter of Papathi and N.M.Krishnasamy-D5. D5/died on 20.09.2014. They belongs to the second branch.

10(d). The second defendant/Muthulakshmi, D3/her husband, N.S.Palanisamy, D4, D12 and D13 belongs to the third branch.

10(e). The other admitted sale transaction amongst the another parties are Ex.A7 whereby 3rd defendant and 5th defendant purchased the share of Nallasamy after his death, from his wife Maragatham D8. Under Ex.A22, dated 12.06.2006, D5 sold to D6 Sundaramoorthy, who is the brother of the first respondent/plaintiff.

10(f). The plaint was filed on 20.03.2007. Amendment application was filed in the year 2009 to insert paragraph 16-C and prayer (da). As per the orders in I.A.No.878 of 2009 dated 08.10.2009 and I.A.No.228 of 2010, dated 23.08.2009, paragraph 16-C and prayer (da) were inserted.

10(g) The suit was initially filed for partition of four items in the suit property. The written statement of D5 was filed on 13.07.2007. In the above IA to amend the prayer is filed in the year 2009 and the same was allowed, which are discussed infra.

10(h). On perusal of the plaint prayer, I find that there are four items in the schedule of the property, which consisting of four agricultural lands and one house.

10(i). The first respondent/plaintiff seeks partition of Item No.1 of the property on the footing that the property was originally owned by her grandfather Muthusami Goundar and her father D5 and D6. She claims share in the paternal grandfathers' property on the strength of Ex.A1-registered partition deed of the year 1982. Accordingly, she claims the share of 1/3x1/2= 1/6.

11. In fine, she claims the share that fall into the share of the grandfather in the above said 1982 partition deed between the grandfather and his two sons.

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12. Both the Courts below has concurrently held that since the paternal grandfather of the plaintiff-Muthusamy Goundar has obtained the property under the family partition. It is the separate property. Both the Courts below have rightly come to the conclusion that in the absence of any pleadings or evidence with regard to the Item Nos. 1 and 2 of the suit property or with the other properties, the prayer in respect of the Item No.1 of the property cannot be countenanced and both the Courts have hold that the plaintiff cannot claim right as far as the Item No.1 of the suit property. Both the Courts below have relied upon the decision of G.Narayan Raju vs. G.Chamaraju & Others, reported in AIR 1968 (SC) 1276. As against this finding, the respondent/plaintiff has not preferred any appeal and same has attained finality.

13.Mr.N.Manokaran, learned counsel for the first respondent/plaintiff has fairly conceded that in view of the settled preposition of law governing the appeal, the first respondent/plaintiff cannot claim a share in respect of Item No.1 of the suit property. Accordingly, the order of dismissal of partition relief in respect of Item No.1 of the property as rendered by both the Courts below is hereby confirmed besides there was no appeal by the first respondent/plaintiff and the same was not challenged during the argument.

14. Now in the second appeal, Item Nos.2, 3 and 4 are to be considered. In respect of item No.2 of the property, the sum and substance of the first respondent/plaintiff's claim is that in this position of ancestral and self-acquired property of D5 and as an Class-1 heir, she is entitled for 1/3rd share in the said property by virtue of amended Act, which came into force on 14.03.1997-(Tamil Nadu State Amendment Act).

15. Mr.V.Ayyadurai, learned Senior Counsel could contend that according to the 5th defendant (father), he has filed the separate written statement on 30.07.2007, wherein he has categorically mentioned about Ex.B2, dated 14.03.1990, which is executed by the first respondent/plaintiff Kousalya relinquishing right in respect of item Nos.2, 3 and 4 of the suit properties.

16. At this juncture, it remains to be stated that Item Nos.3 and 4 of the property, the plaintiff claims title from the maternal great grandfather and maternal great grandfather and claims share of 5/96 share of Sr.Valliammal and share of Chinnappa Gounder as indicated in the above genealogy tree.

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17.Both side counsel have fairly conceded that there is some overlapping in list of the property in Item Nos.3 and 4 in which the first respondent/plaintiff claims partition basing her claim as ancestor property in nature, from the share of maternal great grandfather and maternal grandfather. Hence, the scope of second appeal is now reduced to whether the first respondent/plaintiff is entitled for 1/3rd share in Item No.2 of the property and 5/96 share in Item Nos.3 and 4 of the suit property. The common defence taken by the 5th defendant-father is that under Ex.B2, dated 14.03.1990, she had relinquished her right.

18. I perused the plaint filed on 20.03.2007. In the original plaint, there is no whisper regarding Ex.B2-release deed. The first respondent/plaintiff, who is the daughter of the fifth defendant seeks the partition of the property from the paternal grandfather in Item No.1 of the property and from the father in the Item No.2 of the property and she claims share in the property from the share of maternal great grandfather and maternal grandfather in Item Nos.3 and 4.

19. For the reasons recorded in the preceding paragraphs, this Court has held that Item No.1 of the property is not available for partition and thus Item Nos.2, 3 and 4 alone are arises for consideration. The plea of the first respondent/plaintiff-daughter is extracted as supra. The defence of the father-fifth defendant as reflected in the written statement filed on 13.07.2007 relies upon the Ex.B2- release deed, dated 14.03.1990 suit was filed on 20.03.2007. Admittedly, after 17 years, ie., after the Ex.B2-release deed executed by the first respondent/plaintiff-daughter in favour of the fifth respondent father. The original plaint, does not disclose about the release deed. Lower Court records reveals that in the Interlocutory Applications, viz., I.A.No.878 of 2009 and I.A.No.228 of 2010, filed for amendment of the pleadings and amendment of the prayer column, whereby paragraph 16(c) was incorporated in the plaint touching upon the release deed, dated 14.03.1990(Ex.B2) and prayer d (a) declaring the release deed- Ex.B2, dated 14.03.1990 has not proved as true, genuine and unenforceable and not binding on the plaintiff in I.A.No.228 of 2010 and I.A.No.878 of 2009.

20. In short, the first respondent/plaintiff-daughter has not whispering anything regarding Ex.B2-release deed, dated 14.03.1970 in the original plaint filed on 20.03.1990

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which is clearly after 17 years of the said deed. The written statement of the fifth defendant is filed on 13.07.2007 and thereafter, in the year 2009, the amendment petitions are filed and allowed. Since the amendment petitions are from the date of the written statement is within three years, the trial Court has allowed the said application as stated supra. The trail Court has held that since the suit is filed after 17 years, ie., after the execution of Ex.B2, it is barred by limitation and the so-called date of knowledge from the written statement is not the pleading of the party, but it is a clever drafting of the lower Court advocate to get over the 17 years of limitation period and hence, the trial Court has rightly held, as per Ex.B2-release deed, dated 14.03.1970, whereby the first respondent/plaintiff-daughter has released her share in favour of her father-D5/appellant, that Item Nos.2, 3 and 4 are not available for partition and dismissed the suit.

21. On appeal by the first respondent/plaintiff-daughter, the lower Appellate Court has considered that since the parties to Ex.B2-document is daughter and the father and the marriage of the first respondent/plaintiff-daughter was solemnized on 10.06.1990, ie., within three months of Ex.B2 and also recorded certain finding that the father has dominated the will of the daughter and obtained Ex.B2 and held that Section 111 of the Indian Evidence Act is applicable to the facts and circumstances of the case. and accordingly, believed the version of PW1, viz., the plaintiff/daughter had no knowledge about Ex.B2 and her knowledge is only from the date of written statement dated 13.07.2007, ie., after 17 years. Since the amendment has been filed from the date of the alleged knowledge is within three years held that the suit is maintainable and not barred by the limitation and further hold that since the beneficiary is the father from the executant of the daughter entertained the suspicion and accordingly held Ex.B2 is unenforceable in law. Consequently, held that the plaintiff is entitled for share in Item Nos.2 and 3 of the suit property.

22. Challenging the correctness of the said finding, father has filed one appeal along with the branch and the purchasers have filed another appeal. Senior Advocate Mr.V.Ayyadurai and Mr.G.Ethirajulu made submissions in support of the finding of the trial Court and prayed for setting aside the judgment of the lower Appellate Court and to restore the finding of the trial Court.

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23. Per contra, Mr.N.Manoharan, learned counsel for the first respondent/plaintiff would contend that the finding rendered by the lower Appellate Court is sustainable in law and prayed for confirming the judgment and decree of the lower Appellate Court.

24. Now, the point for consideration is whether the finding of the trial Court in respect of Ex.B2 is to be restored or as that of the lower Appellate Court is to be confirmed.

25. At the risk of repetition, however for the sake of continuity and clarity, by way of amendment, an additional pleadings and additional prayer was inserted by the first respondent/plaintiff-daughter challenging the Ex.B2 release deed by her in favour of her father fifth defendant. Before proceeding further, this Court has noticed that by way of amendment, the first respondent/plaintiff-daughter has sought for the relief to declare the release deed, dated 14.03.1990 has not binding upon her. Though the plaintiff has averred the settlement deed, dated 12.06.2006 and partition deed, dated 19.06.2006 and sale deed, dated 30.11.2016, however, she has not sought for any prayer in the plaint relief column, assumes significance. In other words, there is no challenge or relief sought for by the plaintiff-daughter in respect of the settlement deed, dated 12.06.2006 (Ex.A22), partition deed, dated 19.06.2006 (Ex.A23), sale deed, dated 30.11.2006(Ex.B3).

26. Learned Senior Advocate Mr.V.Ayyadurai, for the appellant relied upon the decision of the Hon'ble Supreme Court reported in the case of Raja Ram vs. Jai Prakash Singh and others reported in 2019 (8) SCC 701 as under:

> "The onus would shift upon the original defendants under Section 16 of the Indian Contract Act, 1872 read with Section 111 of the Indian Evidence Act, 1872, only after the plaintiff would have established a prima facie case.
>
> Close relation between parties would not lead to presumption of undue influence, particularly in a case where some only of the siblings are/is providing care to parent(s)/the elderly - on facts held, instance of undue influence and impairment of body not made out - consequent dismissal of suit, held justified in present case.
>
> Any other interpretation by inferring a reverse burden of proof straightway, on

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those who were taking care of elders, as having exercised undue influence can lead to very undesirable consequences."

27. The Hon'ble Supreme Court has taken note of the earlier decision of 2006(5) SCC 558, 1967 SC 878, AIR 1951 SC 280, could point that undue influence is different from coercion whereas execution of document is admitted, Section 111 of the Indian Evidence Act has no application. In such circumstances, strong points are to be pleaded in the plaint and the same has to be duly supported by the evidence of the parties and draw my attention to the evidence of the cross-examination of the DW1, DW2 and DW3 and Ex.B2. So also, the evidence of PW1 touching upon the said documents.

28. Per contra, Mr.N.Manokaran, learned counsel for the first respondent/plaintiff daughter had relied upon the decision of the Hon'ble Supreme Court in the case of Muddasani Venkata Narsaiah (Dead) through Legal Representatives vs. Muddasani Sarojana reported in 2016 (12) SCC 288 as under:

" Contract and Specific Relief – Specific Relief Act, 1963 – Ss. 5 and 34 – Suit for possession of Immovable property can be filed without prayer for declaration of title where there is no serious cloud over plaintiff's title.

Evidence Act, 1872 – Ss.137 and 138 – Non cross-examination of plaintiff's witness with respect to a particular fact – Effect of – Court would presume that the witness account has been accepted – Civil Procedure Code, 1908 Or.18 R. 4(2).

Evidence Act, 1872 – Ss.58,17,37 and 138 – Fact which is not disputed – Proof of – Examination of witness in respect of – is not necessary – Civil Procedure Code, 1908, Or.18 Rr. 4(1) & (2)."

and also relied upon the decision of the Hon'ble Supreme Court in the case of Krishna Mohan Kul @ Nani Charan Kul vs. Pratima Maity and Ors., reported in 2004 (9) SCC 468, wherein the Hon'ble Supreme Court has considered the 'onus of proof' in a case of transaction executed in 'fiduciary relationship', the usual rule for onus of proof, in case of fraud, misrepresentation or undue influence was considered.

29. Let us consider the facts and circumstances of the case in hand, whether the decision of the Hon'ble Supreme Court in Rajaram's case is applicable or decision of the Hon'ble Supreme Court in Krishna's case is applicable.

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30. Perused Ex.B2-release deed was executed on 14.03.1990. The suit is filed on 02.03.2017, ie., after 17 years of the release deed, which was effected by the daughter in favour of the father, that is, the first respondent/plaintiff to the appellant-fifth defendant. Marriage of the first respondent/plaintiff is admittedly solemnized on 10.06.1990. Per se, the plaint in O.S.No.137 of 2007 is admittedly after 17 years. As per the original plaint, there is no whisper regarding Ex.B2 by the daughter. Father-D5 filed written statement on 13.07.2007. Amendment application is filed in the year 2009. Taking the written statement as a point of limitation, the trail Court has allowed the amendment prayer subject to the proof and relevancy of the case of the plaintiff. For amending the relief as d(a) in the relief column, corresponding amendment of pleadings is effected as in paragraph 16(c). The pleadings, after perusal of the plaint, is to the effect that as per the plaintiff-DW1-daughter, the release deed obtained by the fifth defendant(father) is not true and genuine. The marriage of the plaintiff was solemnised on 10.06.1990. It is her further pleadings that the fifth defendant has taken the plaintiff to the office of the Sub Registrar, Perunthurai three months prior to the marriage for the purpose of getting loan from the bank to meet out the expenses and a document is to be executed in his favour and accordingly, he has obtained a signature, without even giving an opportunity to read the contends of the documents, from the plaintiff. The other plea is that no consideration as alleged in the document is paid and it is also pleaded that the document is obtained by way of fraud and coersion without consent.

31. The evidence of PW1 in this regard "tpLjiy Mtzk; vd;dplk; nkhroahf kiwj;J bgwg;gl;L tpl;lJ/ Mfnt me;j Mtzk; cz;ikahdjy;y." ie., the release deed obtained by fraudulent means and it is not true. At this juncture, it remains to be stated that there is no whisper in the evidence of PW1 that she was taken to the Sub Registrar office and influenced by her father and subject to believing the words of the father, PW1 had signed it. There is no pleading as to how the father dominated or influenced PW1 in connection with Ex.B2- settlement deed. There is no pleading or by means of any evidence touching upon, how the father, namely the 5th defendant was dominated in exercising the role of the father and influenced her and she was subjected to such an influence. The trial Court has considered this, want of pleadings and the evidence in this regard. Accordingly, the trial Court has disbelieved PW1 and also taking note of the specific pleading at paragraph No.16(c) of the plaint that her father took her to the Sub Registrar

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Office and obtained release deed, has held that the plaintiff-daughter knows the execution of the release deed, even on the date of the document, namely, 14.03.1990 only, but to avoid the limitation, she has suppressed the alleged factum of going to the Sub Registrar Office and execution of Ex.B2 in the original plaint filed on 20.03.2017. Since it is "already 17 years has gone-by" and such act amounts to suppression of material fact in view of the prayer in the suit for relief of partition and hence, has rightly held that the plaintiff has committed a "suppression of material fact", which she knew on the date of filing of the original plaint, that is, on 20.03.2017.

32. While observing so, the learned trial Judge has categorically held that in view of the pleadings in paragraph No.16 subsequent to the marking of the document-Ex.B2 by D5 and her admission in the cross-examination, viz., during the cross-examination of PW1-plaintiff-daughter has admitted that along with her, two of her cousin sisters D12 and D13 have also executed similar release deed in favour of their father under Ex.B6 (this is relating to the other branch of the very same family), which goes to show that the female heir of Muthukrishnan, the another branch have also executed a similar kind of release deed in respect of the family property and thus, all female members of different branches have executed the said document in view of ensuing marriage of respective persons, and hence, the trial Court has rightly appreciated the pleadings in the plaint and the evidence of PW1 and answer elicited in the cross-examination of PW1 as to her knowledge about the execution of Ex.B2 and consequently, held that the plaintiff-daughter knew about the execution of Ex.B2-release deed by her, in favour of her father-D5. On the very same day, also D12 and D13 were executed Ex.B6-release deed in favour of their father. When PW1-daughter knew about the document and had the knowledge about Ex.B2, she ought not to have suppressed the fact, especially, when she filed a suit for partition. Hence, I find that the amendment petition was the only resues to escape the limitation deployed by the austerity of skill by the advocates in the lower Court.

33. Once the party had the knowledge and knew the factum of execution of release deed they are suppose to disclose the fact in the partition suit and hence the factum of release of the Ex.B2 execution thereto has been admitted the plaintiff ought to have disclosed the same to the original plaint filed in the year 2007. However, such a document being going to the route of the partition suit is a material fact and hence the plaintiff is "guilty of

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suppression of material fact" and besides since she spoke the execution of Ex.B2 and the suit having been filed in the year 2007, namely, 17 years after the execution of Ex.B2(1990) The trial Court has rightly held that the suit is out of time, besides also commented upon the attitude of the plaintiff by instituting the plaint by suppressing the material fact of execution of Ex.B2.

34. At this juncture, I propose to deal with the submissions of advocate Mr.N.Manoharan for the respondent/plaintiff.

34(a). The learned counsel for the first respondent/plaintiff, relied upon 2016 (12) SCC 288, Muddasani Venkata Narsaiah's case, wherein the Hon'ble Supreme Court, considering Sections 58, 137 and 138 of the Indian Evidence Act has held that the fact, which is not disputed and examination of the witnesses in respect thereof and further also considered the non cross-examination of the plaintiff witness with respect to a particular fact and effect thereon, would contend that in view of the above decision, in the absence of any cross-examination touching upon the PW1 regarding Ex.B2, the same is not open to challenge.

35(b). At this juncture, the pleadings of the plaintiff, as extracted supra, except the fact that he has admitted the execution of Ex.B2. According to her pleadings, her father took her to the Sub Registrar Office and obtained the signature so as to get the loan for her marriage. Admittedly, her "marriage was solemnized within three months from the date of release deed". In the evidence, she has not whispered anything against her father. She has not whispered anything about the domination of her father. She has not even dispose about the alleged pleadings as extracted supra in her evidence.

35(c).When she has spoken the language of silence regarding the alleged decision of the father in the absence of anything against the father, I find there is nothing for father to cross-examination on that score, and hence, the learned counsel for the defendant has not cross-examined PW1 on those points since it was not deposed by the witness herself. When the party getting into witness box has not whispered anything regarding the father, who is said to be dominant position or his alleged representation said to have made to her before the execution of Ex.B2 nor whispered anything regarding the circumstances leading to coming into the existence of Ex.B2 and hence, when she has not whispered anything on the above details with regard to

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Ex.B2, therefore, I find that nothing arises for the cross-examination.

35(d). Had she been whispered anything in the witness box (as PW1) regarding the alleged domination position or alleged representation by the father or as alleged in the plaint, in such even, in the absence of non cross-examination alone, the above decision will come to the rescue of the plaintiff. Admittedly, all facts as narrated above, PW1 has not whispered anything against her father D5, except to say, it is obtained by misrepresentation means. In the pleadings, she admitted the execution thereof and hence, I find that the above decision relied upon by the learned counsel for the first respondent/plaintiff-daughter does not applicable to the facts and circumstances of the case for the reasons stated supra.

36. Learned counsel Mr.N.Manokaran, appearing for the first respondent/plaintiff daughter relied upon 2004 (9) SCC 648 Krishna's case cited supra to the point that the onus of proof in case of transaction executed in fiduciary relationship, the usual rule for onus of proof in case of plea of undue influence has been dealt with and relied upon the answer spoken by DW1-father in the cross-examination.

37. Per contra, Mr.V.Ayyadurai, learned Senior Counsel for the appellant/defendant-father could contend that on the facts and circumstances of the case, the decision of Hon'ble Supreme Court in Rajaram's case cited supra reported in 2019 (8) SCC 701 is applicable.

38. In the above said decision, the Hon'ble Supreme Court has held that the onus could shift on the defendant as per Section 16 of the Indian Contract Act r/w Section 111 of the Indian Evidence Act. Only after the plaintiff establishes the prima facie case a close relationship between the parties could not lead to presumption of undue influence.(emphasis supplied)

39. Let us consider whether the facts of the instant case falls under which category.

40(a). The learned trial Judge, taking into note of the evidence of PW1-daughter and pleading as extracted supra, has held that she failed to prove that she is entitled for presumption under Section 111 of the Indian Evidence Act. The learned lower Appellate Court Judge has taken note of the answer elicited in the cross-examination of DW1, namely, the father that she has not dis-spelt the reverse

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onus of prove on his part and upheld the plea of the plaintiff that it was obtained by fraudulent means.

40(b).I am unable to affix the seal of approval on the finding of the lower Appellate Court for multiple grounds, firstly, with due respect to the lower Appellate Court and to go by the pleadings of the first respondent/plaintiff-daughter, she admitted the knowledge of Ex.B2-release deed in the year 1990 and hence, the suit is barred by limitation without any mathematical calculation. Secondly, the limitation aspect has not been considered by the lower Appellate Court.

40(c).Without considering the limitation point, namely, 17 years, it appears that the plea of the plaintiff was accepted by the lower Appellate Court. A substantial law describes right of the parties, however, procedural law like Limitation Act extinguishes the right confirmed by the substantial law. Having had the knowledge of Ex.B2, the plaintiff, having admitted in the pleadings about the going to the Sub Registrar office and signing and execution of the document, suppressing the same, has filed the original plaint after 17 years and further covering up "her wiseful act of suppression of material fact", she comes by way of amendment as if she came to know about Ex.B2 only from the written statement by changing the stand she stands exposed.

40(d). Hence, I find that the lower Appellate Court, for the reasons best known, has not taken into consideration the limitation point, which was discussed in detail by the trial Court.

41. Secondly, in the additional written statement filed by the 5th defendant, after amendment was allowed, it is a specific pleading of the 5th defendant-father stated that " the plaintiff had full knowledge of the said document on the date of execution itself". However, a contra opinion has been expressed by the lower Appellate Court without looking into the pleading of the fifth defendant in the additional written statement. As stated supra, when the plaintiff has not averred anything against the father in the pleadings and not whispered anything against the father in the chief-examination, however, the lower Appellate Court has forgotten to take note of the above said factual position, however, trying to dig the so-called weakness upon the defendant. On a combined reading of evidence elicited in the cross-examination of PW1, the age of PW1 at the relevant point of time is 21 and on perusal of Ex.B2, it appears that the plaintiff has signed the document in a clear convent English, besides her father-D5 also gave

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Rs.5000/- for the daughter for the execution of the document. It is a specific plea of the father-DW1 in the witness box, in connection with the marriage, certain sridhana has to be done by the bride side to the bridegroom side in the District of Erode is a well-known fact to one and all in the State of Tamilnadu. A similar plea was whispered by DW1 to the effect that her daughter has made request that in view of the fact that the father has to do lot of sridhana in the community they belonged in the district of Erode. She wanted to relinquish her right for a sum of Rs.5000/-. Based upon the said representation of the daughter-PW1 alone, he had executed Ex.B2 and she received Rs.5000/-. It is significant to note that there was no denial or any suggestion of denial in this regard with DW1-the father assumes significance.

42. It remains to be stated that similar to Ex.B2, in the other branch of the family, D12 and D13 are also executed Ex.B6-release deed in favour of their father. This factum is admitted by PW1 in the cross-examination. Further, PW1 also admitted that on the date when she went for registration of Ex.B2, the defendants 12 and 13 also came to the Sub Registrar Office for execution of Ex.B6-release deed. It is clearly demonstrated the act that PW1-daughter (plaintiff) knows about the nature of the document that she signed and hence, it is clear that she knew the nature and character of Ex.B2 and she also knew the year of the document and hence, I find that in view of the pleadings and the answer elicited in the cross-examination of PW1, the finding rendered by the lower Appellate Court by taking into consideration of the snap answer of DW1 is not a proper. Further more, in the evidence of PW1, she was not even whispered anything to the effect that she signed Ex.B2 as directed by her father assumes significance.

43. In the absence of any positive pleading and evidence, I find that the finding rendered by the lower Appellate Court is without any substratum of pleading or evidence, such a finding and the conclusion recorded is liable to be interfered with. I have also perused the cross-examination of the DW1, namely, the father of the plaintiff. There is no suggestion in the cross-examination and there is no basis for the lower Appellate Court to proceed to assume the domination of the father as stated above under Section 111 of the Indian Evidence Act.

44. Except the above narrated facts, there is nothing in the cross-examination of DW1 to infer that DW1-appellant/5th defendant/father has exercised his so alleged dominant position and made a fraudulent representation so

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as to make the daughter-plaintiff to sign the document. She has categorically stated the reason for execution of release deed and it was only at the instance of the daughter not at the instance of the father, namely, the appellant/5th defendant. When that being the case, the lower Appellate Court, without properly appreciating the evidence in the cross-examination of DW1, has recorded a contra finding to that of the trial Court.

45. Besides in view of the discussion in the preceding paragraphs regarding the pleadings and evidence of the plaintiff-daughter touching upon Ex.B2 and in view of the answer elicited by the cross-examination of DW1, which only shows that the execution of the document is with consent of voluntariness of the daughter-PW1 and hence, I do not find that in the absence of any pleadings and evidence, being adduced by the respondent/plaintiff, the decision of the Hon'ble Supreme Court in Rarajam's case is applicable to the facts and circumstances of the case. On re-appreciation of the evidence of DW1 and PW1 along with their respective pleadings and accordingly, I hold that the plaintiff has not let in any positive evidence to discharge the onus of the proof much less any evidence. At the risk of repetition neither in the pleadings nor in the evidence, he has not uttered any dominant position of the 5th defendant-father in getting Ex.B2 and she has not whispered anything much less, any, ill-words, are so called fraudulent about the father in getting the document.

46. Besides it is only the contention raised by the Appellate Court advocate at the appeal stage. When pleading or evidence is absent, the argument advanced by the Appellate Court advocate cannot be a substitute for pleading and evidence of the party. When the party is silence in both the pleadings and evidence, the same cannot be subrogated by the arguments of the advocate and hence, I find that the finding rendered by the trial Court is just and proper. Consequently, the finding recorded by the lower Appellate Court is liable to be vacated and the same is hereby vacated.

47. In view of the discussion in the preceding paragraphs as to the deficiency in pleadings and deficiency in the evidence and the correctness of the evidence of the DW1 in the proper perspective compels this Court to hold that the 5th defendant has successfully demonstrated that Ex.B2 was came into existence on a true and proper presentation about the nature and character of the document. The executant of the document-PW1-daughter has understood the nature of the document and put the signature

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and she had the knowledge of the said document. She also corroborates that her cousin sisters also executed similar release deeds in favour of their father and she knew the nature of the document. Even at the relevant point of time, she was 21 years of age, and had a convent education capable of signing in clear English. Accordingly, I hold that the plea raised in the plaint that she came to know the Ex.B2 only from the written statement appears to be "suppression of material fact" and unbelievable and unrealistic. Accordingly, her evidence in this regard stands rejected and she, "having the knowledge of Ex.B2, filed suit after 17 years, is out of time" and therefore, all the findings rendered by the lower Appellate Court stands vacated.

48. Yet another point raised by the learned Senior Advocate for the appellant is that the release deed in favour of the Kartha of the family whether valid or not. In this connection, the lower Appellate Court has relied upon the decision in L.Sundaram and another vs. Lakshmanan (died) reported in 2002 (4) CTC 710. With due respect, that decision is not applicable to the facts and circumstances of the case on hand.

49. In the decision reported in 1997(3) LW 333, (P.R.Muniswamy Naidu Vs. V.Venkatesan and 14 others), this Court has held that when one of the co-sharers released the right to the Kartha of the family, she is not releasing her right to the individual co-sharers. However to the hotchpot of the family and on the facts and circumstances of the case, the above decision [1997 (3) LW 333] is alone applicable and accordingly, I hold that Ex.B2 is true and genuine document being executed by the plaintiff- daughter and the same is valid in law. She has "not challenged the document for 17 years" and such document came into existence in the manner as spoken to by DW1 and accordingly, Ex.B2 is held to be valid and consequently, she, having released her share in schedule 2, 3, 4 of the suit property, she is not entitled for any relief for partition. In respect of item 3 and 4 of the suit property the plaintiff claims share in the property from the maternal great grandfather and maternal grandfather. In view of the finding in the preceding paragraphs, Ex.B2 is valid and the plaintiff had relinquished that right also. The properties are obtained by Sr.Valliammal, on the death of her husband, which consists of self-acquired property. Thereafter the said Sr.Valliammal along with her daughter Jr.Valliammal and grandson Nallasamy, his wife namely, Maragatham-D8 had entered into a release deed releasing part of her share in the nature of the partition deed. By

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the nature of the diversion taken in the deed, it is the separate property of Sr.Valliammal. Therefore, she can divide her property by way of partition, wherein her great grand daughter- plaintiff has no right to sell the property. Sr.Valliammal has released her right to her daughter-in-law voluntarily and to the grandson Nallasamy and therefore that release deed is valid in law and hence, both Ex.A6 and Ex.B2 are held to be valid and the plaintiff is not entitled to any share in item No.3 of the property.

50. Hence, the judgment and decree passed by the trial Court appears to be correct. On a different analysis of factual position and the legal position as extracted supra, the judgment and decree passed by the lower Appellate Court is liable to be set aside. Accordingly, all the other Substantial Questions of Law are answered in favour of the appellant and held against the first respondent/plaintiff.

50(a). Hence, the judgment and decree passed by the trial Court appears to be right and different analysis of actual position and legal position extracted supra, the judgment and decree passed by the lower Appellate Court is liable to be set aside.

50(b). The Substantial Question of Law No.4 in S.A.No.421 of 2014 that the release deed was registered in Book No.IV and the same was commented upon by the lower Appellate Court. It remains to be stated that as per the Tamilnadu Registration Manual Book No.IV is meant for any other document and it is the prerogative of the Sub Registrar to register in the said Book No.IV, the same cannot be given an attribution to the intention of the father in getting the release deed, especially, when there is no prohibition under the Registration Act or under the Tamilnadu Registration Manual and hence, the adverse inference drawn by the appellant/fifth defendant/father is unsustainable in law and the same stands vacated and the Substantial Question of Law No.4 in S.A.No.421 of 2014 is answered accordingly in favour of the appellants.

50(c). The Substantial Question of Law No.2 in S.A.No.208 of 2014 does not arise for consideration in view of the finding that the release deed Ex.B2 is true and valid and hence, it is held to be does not arise in view of the said consideration. All other Substantial Questions of Law are answered in favour of the appellants and held against the first respondent/plaintiff.

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51. In the result, the S.A.421 of 2014 is allowed. The judgment and decree of the lower Appellate Court in A.S.No.48 of 2013, dated 25.11.2013 is set aside. The judgment and decree granted in O.S.No.137 of 2007, dated 08.03.2013 is hereby restored. Consequently, connected M.P.No.1 of 2014 is closed.

52. Since this Court has held that Ex.B2-release deed executed by the plaintiff in favour of her father is valid, consequent partition between the father and the son and the subsequent transfer to the various defendants and change of hands to the various other defendants over the past 17 years are held to be valid and hence, the S.A.No.208 of 2014 filed by the purchasers also stands allowed. No Costs.

Sd/-
Assistant Registrar(CSI)

//True Copy//

Sub Assistant Registrar

PJL

To
1.The Principal District Judge, Erode.
2.The II-Additional Subordinate Judge, Erode.

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S.A.Nos.208 and 421 of 2014

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