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O.S.A.No.247 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.06.2023

CORAM :

THE HONOURABLE MR. JUSTICE S.S. SUNDAR

AND

THE HONOURABLE MR. JUSTICE C. KUMARAPPAN

O.S.A.No.247 of 2017

and

C.M.P.No.11011 of 2019

Shahida Begum

... Appellant

Vs.

1.Ramiza

2.M.A.Ajmal Sheriff

3.M.A.Afsar Sheriff

4.Dr.Althaf Sheriff

5.Ameen Sheriff

... Respondents

Original Side Appeal filed under Order XXXVI Rule 1 of Original Side Rules r/w. Clause 15 of the Letters Patent against the judgment and decree dated 16.03.2017 in C.S.No.228 of 2013 on the file of this Court.

For Appellant : Mr.S.Sudarshan

For R1 to R5 : Mr.S.Parthasarathy
Senior Counsel
for M/s.A.Govindasamy



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J U D G M E N T

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(Judgment was delivered by **S.S. SUNDAR, J.**)

- (1) Plaintiff in the suit in C.S.No.228 of 2013 on the file of this Court, is the appellant in the above Original Side Appeal.
- (2) The appellant as plaintiff filed the suit in C.S.No.228 of 2013 before this Court for partition and separate possession of 7/72 share in all the suit properties and for consequential reliefs. The suit is also to declare the family settlement deed, dated 18.05.2005, bearing Document No.1854 of 2005 on the file of Sub-Registrar, Anna Nagar, Chennai, as null, void, illegal and not binding on the plaintiff.
- (3) The suit properties consist of two items. The first item is a vacant land along with building to an extent of One Ground and 1270 sq.ft., situated in Koyambedu Village, Saidapet Taluk, Chenglpet District. The second item is also a plot in a sanctioned layout measuring an extent of 2 Grounds and 893 sq.ft. and an additional land measuring 1010 sq.ft. in Koyambedu Village, Saidapet Taluk, Chengalpet District.
- (4) It is the case of appellant/plaintiff in the plaint that the suit first item was purchased by her father Late Sri M.A.Sheriff under a registered sale deed



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dated 06.02.1974 and the second item was purchased by him under a registered sale deed dated 18.08.1978. It is the appellant's further case that her father Late Sri M.A.Sheriff died on 10.07.2010 intestate, leaving behind plaintiff and defendants as his legal heirs. The 1st defendant in the suit is the appellant's mother and defendants 2 to 5 in the suit are appellant's brothers.

(5) It is contended by the plaintiff that she is a co-owner of the suit properties along with defendants 1 to 5 and that, as per the Mohammedan Law of Succession, the plaintiff has 7/72 share in all the suit properties. It is the case of appellant that defendants 2 to 5 were keeping her father with them and that her father was dependent on the defendants 2 to 5 as he was not keeping good health both physically and mentally because of his old age and several other ailments. In the plaint, it is stated that defendants 2 to 5 had full control over her father Late Sri M.A.Sheriff and her mother 1st defendant, and by taking undue advantage of such a position, defendants 2 to 5 were interfering in all the decisions of Late Sri M.A.Sheriff and unduly influencing his mind to their advantage. Stating that defendants 1 to 5 were in fiduciary relationship with Late Sri M.A.Sheriff, it is



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contended by the appellant/plaintiff that defendants have influenced Late Sri M.A.Sheriff and brought about a deed of family settlement dated 18.05.2005. It is contended that the deed of family settlement is not a true and lawful document and it is void and not binding on the plaintiff nor affects her legitimate share over the suit properties. If the document as such is allowed to exist, it would be impossible for the plaintiff to enjoy her share in the suit properties and therefore, it is stated by the appellant that the settlement deed should be declared as null and void.

(6)The suit was resisted by defendants including the mother. The purchase of suit properties by father is admitted. It is stated that father Sri.M.A.Sheriff was a law graduate and was working as Manager of Reserve Bank of India, Mumbai and retired from service on 28.02.1997. It is also stated that father shifted to his native along with 1st defendant and one of his sons, the 5th defendant in July 2008. It is the case of defendants that Late Sri M.A.Sheriff was desirous of bequeathing the suit properties to his four sons, namely, defendants 2 to 5, and executed a registered Will on 31.08.1988, bequeathing the suit properties to defendants 2 to 5. It is also stated that out of love and affection towards



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defendants, Late Sri M.A.Sheriff, while he was in sound disposing state of mind, executed the settlement deed dated 18.05.2005 on his own volition settling the properties in favour of his wife and four sons. It is stated that the father, under the said settlement deed, conveyed his title in favour of defendants 2 to 5 in respect of Item No.1, and settled 5/6 share in respect of property mentioned as B-Schedule in the said deed in favour of defendants. It is stated that 1/6 share in suit 2nd item was retained for himself. It is further stated that 1st defendant executed a Settlement Deed dated 03.09.2013 in respect of her 1/6th share in favour of defendants 2 to 5 in suit item 2. It is also stated in the written statement that the suit 1st item was exclusively given to the defendants 2 to 5. The defendants further stated that they are in absolute possession and enjoyment of all the suit properties. The allegations in the plaint that the defendants have obtained the settlement deed by undue influence, is specifically denied by the defendants. It is stated that father was never dependent on anybody and that it was he who was maintaining the family. It is further stated that as per the Settlement Deed the defendants 2 to 5 are in possession of suit properties and that the plaintiff was aware of the Settlement even in



2005.

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(7) Learned Single Judge of this Court, considering the specific pleadings

raised by the parties, framed the following issues :

- i. *“Whether the plaintiff is entitled to 7/72 share in the suit properties ?*
- ii. *Whether the Will dated 31.08.1988 is valid and binding on the plaintiff ?*
- iii. *Whether Settlement Deed dated 18.05.2005 in Doc.No.1854 of 2005 in favour of the defendants is valid and binding on the plaintiff ?*
- iv. *Whether Settlement Deed dated 03.09.2013 executed by the first defendant in favour of the defendants 2 to 5 is hit by doctrine of lis pendens ?*
- v. *Whether the plaintiff is entitled to the relief of permanent injunction ?*
- vi. *To what other reliefs the parties are entitled to ?”*

(8) At the time of trial, plaintiff examined herself as P.W.1 and Exs.P1 to P4 were marked on the side of plaintiff. On the side of defendants, D.W.1 was examined and Exs.D1 to D7 were marked.

(9) Learned Single Judge specifically held that the burden lies on the plaintiff



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to prove that the Settlement Deed was not bad due to undue influence.

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After considering the evidence of P.W.1, the learned Single Judge found that the plaintiff got married while her father was in service and that after the retirement of father, all are living in the same house. While accepting the case of plaintiff that father and brothers of plaintiff were living together in the same house, the learned Single Judge held that, at no stretch of imagination, their joint living can lead to any presumption that defendants 2 to 5 were in a position to dominate the will of the father who was the head of the family. Relying upon oral and documentary evidence and a few precedents, the learned Single Judge held that the defendants have proved the settlement deed executed by father in favour of defendants and subsequent settlement deed executed by mother in favour of defendants 2 to 5. Since the defendants fairly conceded that father had retained $1/6^{\text{th}}$ share to himself during his lifetime, in suit 2nd item, the learned Single Judge held that plaintiff is entitled to $7/72$ share out of $1/6^{\text{th}}$ share retained by her father in respect of suit 2nd item. Therefore, the suit was partly decreed granting a decree in favour of plaintiff in respect of $7/72^{\text{nd}}$ share in $1/6^{\text{th}}$ share retained by her father under Ex.D4. The suit in



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respect of the suit 1st item and in respect of 5/6th share in suit 2nd item was dismissed. Aggrieved by the judgment and decree of the Trial Court dismissing the suit in respect of item No.1 and 5/6th share in Item No.2, the above appeal is preferred by the plaintiff.

(10)Learned counsel for the appellant/plaintiff submitted that the parties are Muslims and therefore, all questions relating to intestate succession or property inherited or obtained under gift should be considered on the basis of Muslim Personal Law. Referring to Shariat Act, 1937 as amended by Madras Act 18 of 1949, learned counsel for the appellant submitted that the Court is bound to apply the provisions of Shariath Act as amended by Madras Act 18 of 1949 to the suit filed by the appellant/plaintiff. Learned counsel for the appellant submitted that the Trial Court failed to apply the law without understanding or on a wrong interpretation of Section 16 of Indian Contract Act. He further submitted that the burden was wrongly placed on the plaintiff when it is for the defendants to prove the genuineness of the Settlement Deed by showing that Exs.D3 and D5 are not vitiated by undue influence as defined under section 16 of the Indian Contract Act. Learned counsel then submitted



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that the Trial Court failed to consider the suspicious circumstances regarding execution of Exs.D3 and D5 which have been brought out during cross examination of DW1. Since the defendants have not examined the attesor of Exs.D3 and D5, the Trial Court ought to have drawn adverse inference since the best evidence available to prove the genuineness of the Settlement Deed is not produced by defendants. Learned counsel for the appellant further submitted that when a specific plea of undue influence once has been raised by the appellant/plaintiff, the learned Single Judge without considering the legal implication of Sections 68 and 70 of the Indian Evidence Act, has accepted the Settlement Deed. He would also submit that there is no reason why the appellant/plaintiff should be denied her legitimate share as a legitimate heir of her father and therefore, the judgment of the learned Single Judge is vitiated.

(11) Learned counsel for the appellant relied upon a few judgments and submitted that the gift under Mohammedan Law should satisfy three ingredients namely, [1] declaration by the donor ; [2] acceptance by the donee, expressed or implied ; and [3] delivery of possession. Though a formal instrument is not required for a valid gift under Mohammedan



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Law, the gift in order to be valid and to be acted upon, should be proved by [1]existence of a declaration of gift by a donor ; [2]acceptance of gift by the donee ; and [3] delivery of possession. Learned counsel pointed out that the defendants have not proved the necessary ingredients for a valid gift.

(12) *Per contra*, the learned Senior counsel appearing for the respondents submitted that the plea of undue influence has to be supported by necessary evidence to show how the defendants were in a dominating position to influence their father and there cannot be a presumption in favour of appellant/plaintiff. Learned senior counsel further submitted that the execution of the Settlement Deed under Ex.D5 dated 18.05.2005 and the Settlement Deed executed by the 1st defendant in favour of defendants 2 to 5 under Ex.D6 dated 03.09.2013 are admitted. Referring to the fact that father Late M.A.Sheriff had earlier executed a Will under Ex.D4 dated 31.08.1988, learned Senior counsel submitted that since the Will dated 31.08.1988 was not disputed and the subsequent Settlement Deed under Ex.D5 dated 18.05.2005 was in tune with the Will executed by Late M.A.Sheriff, the father on his own volition bequeathed the



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properties originally under the Will and the later in terms of the Settlement

Deed only to re-affirm the Will. Learned Senior counsel then submitted that there is no pleading in the plaint challenging the validity of the Settlement Deed on any other ground, except undue influence and therefore, the plaintiff cannot develop now a new case on the ground that the gift was not supported by acceptance or delivery of possession.

(13) This Court considered the submissions of the learned counsels on either side and finds that the following points arise for determination in the present Original Side Appeal:-

- A) Whether the Settlement Deed under Ex.D5 dated 18.05.2005 executed by the father in favour of defendants 2 to 5 and the Settlement Deed executed by the 1st defendant in favour of defendants 2 to 5 under ExD6 dated 03.09.2013 are valid and binding on the appellant/plaintiff?***
- B) Whether the documents namely Exs.D5 and D6 dated 18.05.2005 and 03.09.2013 are vitiated by undue influence?***
- C) Whether the appellant/plaintiff who has not challenged the Settlement Deeds under Exs.D5 and D6 on any other ground***



except on the ground of undue influence, can plead that the Settlement Deeds are invalid on the ground that the three essential ingredients of a Gift Deed are not proved by defendants 2 to 5?

POINT [B]:-

(14)Section 16 of the Contract Act, 1872, reads as follows:-

"16-Undue Influence:-

(1) A contract is said to be induced by “undue influence” where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

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

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

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



distress.

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

(15) When a plea of undue influence is raised challenging the Gift Deed, two ingredients are to be satisfied. Firstly, it must be shown that the relationship between the donor and donee was such that the donee was in a position to dominate the will of the donor. Secondly, it should be shown that the donee used his position to obtain an unfair advantage over the donor. Sub-section [2] of Section 16 of the Indian Contract Act gives some guidance when a person can be presumed to be in a position to dominate the will of another. When a person holds a real or apparent authority over the other or where he stand in a fiduciary relation to the other or where a person makes a contract with the person whose mental capacity is temporarily or permanently affected by the reason of age, illness or mental or bodily distress, it may be presumed that such person



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is in a position to dominate the will of another. When such person who is in a position to dominate the will of another enters into a contract with the other and the contract or transaction on the face of it, appears to be unconscionable, the burden of proving that the contract was not induced by undue influence will be on the person who was in a position to dominate the will of the other.

(16)The principle of undue influence has its origin relatable to doctrine of equity. This principle was applied where a person is guilty of abuse, in taking advantage of his position to influence another person to reap a benefit to the detriment of the other. In other words, where a person who acted in good faith is betrayed, the doctrine of undue influence is applied to challenge a gift or transaction in the form of a contract by which the person who was in a position to dominate the will of the other had derived benefit. When a contract is unconscionable, then the burden of proving that the transaction was not influenced by undue influence lies upon the person who was in a position to dominate the will of the other. Therefore, reading of Section 16 of the Contract Act indicates that existence of fiduciary relationship is a necessary ingredient. However, there cannot be



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presumption of undue influence in the relationship of an adult male member over his aged parents. Even the relationship between the husband and wife may not give rise to the presumption of undue influence. In the present case, it is admitted during evidence that the father was in a sound disposing state of mind all through. It is admitted in the course of evidence that the father late M.A.Sheriff was a Law Graduate and was working as Manager of RBI in Mumbai. The plaintiff was given in marriage when the plaintiff's father was in service. It is also admitted that the father has conducted the marriage by meeting out all the marriage expenses including jewels and sridhana by the father himself. Ex.D1 is the general Power of Attorney Deed in the handwriting of father. It is admitted by the plaintiff herself that the document-Ex.D1 is in the handwriting of her father M.A.Sheriff. The father prepared the Power of Attorney Deed referring to his own family Settlement Deed as a token of his love and affection towards his sons. It is to be pointed out that the said Power of Attorney Deed was prepared by him and sent it to one of his sons so that he would appoint his brother to act as power agent to deal with the properties on his behalf. This model general Power of Attorney



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shows the independent mind of the father and the legal knowledge he had to do the work of an Advocate. It is admitted that the father executed a registered Will on 31.08.1988 bequeathing item No.1 in favour of his four sons jointly and absolutely. In the Will, he has given valid reasons, why he has not given any share to his wife in favour of whom her father had already executed a Gift Deed. It is also to be noted that the testator/father has expressed his intention to give his wife the benefit of Provident Fund and Gratuity etc., at the time of his retirement. Settlement Deed reflects what he had intended to bequeath under the Will dated 31.08.1988 in favour of his wife and sons.

(17)As admitted, the Settlement Deed executed by late M.A.Sheriff on 18.05.2005 shows that the father has settled the first item in the suit schedule in favour of his sons absolutely and 5/6th share in favour of his wife and sons in respect of the suit 2nd schedule. The mother, namely, Mrs.M.A.Sheriff, executed a Settlement Deed on 03.09.2013 in favour of her sons in respect of her 1/6th share.

(18)The Settlement Deed was executed by the father when he was in Mumbai and it is admitted during his evidence that the father late



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M.A.Sheriff got employment for everyone in the family and his son and wife were under his care and protection till his life time. The Settlement Deed was executed when father was living with his wife and therefore, this Court finds reasons to hold that father was always independent and in a sound disposing state of mind with an absolute control over the entire family. Drafting of general Power of Attorney by himself on behalf of one of his sons would indicate that the father was active and capable of drafting legal documents by himself. Hence, it cannot be presumed that he could be subject to any influence by anyone of his family members including his wife or children. Absolutely there is no evidence indicating that the sons were in a position of active confidence so that undue influence or good faith as contemplated under Section 111 of Evidence Act can be inferred.

(19)The Hon'ble Supreme Court in the case of *Afsan Sheikh and Another Vs. Soleman Bibi and Others* reported in *1976 [2] SCC 142* has held as follows:-

"14. The specific case set up in the plaint was that the hiba-bil-ewaz in question was vitiated by fraud and misrepresentation practised by Afsar defendant. It



was in that context it was stated in a general way that the plaintiff was a simple, illiterate man of 90 years, and had great confidence in Afsar, and “the parties used to help each other in respective cultivation”. Apart from this general and nebulous allegation, no particulars of a plea of undue influence were pleaded. Even the near relationship between the plaintiff and Afsar was not disclosed. It was not particularised how Afsar was in a position to dominate the will of the plaintiff, in what manner he exercised that influence, how the influence, if any, used by Afsar over him was “undue”, and how and in what circumstances the hiba-bil-ewaz was an “unfair” or unconscionable transaction. In short, no material particulars showing that the transaction was vitiated by undue influence were pleaded. Rather, somewhat inconsistently with a plea of undue influence, it was alleged that the hiba was tainted by fraud, misrepresentation and deceit practised by Afsar.

15. While it is true that “undue influence”, “fraud”, “misrepresentation” are cognate vices and may, in part, overlap in some cases, they are in law



distinct categories, and are, in view of Order 6 Rule 4, read with Order 6 Rule 2 of the Code of Civil Procedure, required to be separately pleaded, with specificity, particularity and precision. A general allegation in the plaint, that the plaintiff was a simple old man of ninety who had reposed great confidence in the defendant, was much too insufficient to amount to an averment of undue influence of which the High Court could take notice, particularly when no issue was claimed and no contention was raised on that point at any stage in the trial court, or, in the first round, even before the first appellate court.

16. The High Court has tried to spell out a plea of undue influence by referring to para 7 of the written statement in which the defendant inter alia stated that he was looked after and brought up by the plaintiff as his son and he became very much attached to the plaintiff and since his infancy till the middle of this year this defendant always lived with the plaintiff and used to treat him as his father, helped him and looked after all his affairs. This paragraph, according to the learned Judge, contains a clear admission of the intimate relationship between the two indicative of the



position of dominating the will of the plaintiff by Defendant 1.

17. We are, with due respect, unable to appreciate this antic construction put on the defendant's pleading. All that has been said in the written statement is that the relationship subsisting between the plaintiff and the defendant was marked by love and affection, and was akin to that of father and son. Normally, in such paternal relationship, the father, and not the son, is in a position of dominating influence. The defendants' pleading could not be reasonably construed as an admission, direct or inferential, of the fact that he was in a position to dominate the will of the plaintiff. In spelling out a plea of undue influence for the plaintiff by an "inverted" construction of the defendants' pleading, the High Court overlooked the principle conveyed by the maxim secundum allegata et probata, that the plaintiff could succeed only by what he had alleged and proved. He could not be allowed to travel beyond what was pleaded by him and put in issue. On his failure to prove his case as alleged, the court could not conjure up a new case for him by stretching his



pleading and reading into it something which was not there, nor in issue, with the aid of an extraneous document. Thus considered, the High Court was in error when by its judgment, dated October 16, 1963, it remanded the case to the first appellate court with a direction to determine the question of undue influence “on material, already on record”.

(20) From the above judgment of the Hon'ble Supreme Court, it is seen that mere intimate relationship between two persons is not decisive and the Court has to determine the question whether there is an undue influence based on records. Further, there must be specific pleading of undue influence as required under Order 6 Rule 4 of CPC. Pleadings should contain material facts on the basis of which a claim is made. For a plea of undue influence, there must be specific particulars constituting undue influence. When the sons were living with the father and the family was under the control of father, this Court cannot presume that the sons were in a position to dominate the will of father. From evidence this Court finds that the father was in a position to dominate the will of his wife and children. Hence, it cannot be presumed that the sons who were in good faith, obtained a Settlement Deed by undue influence without specific



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averments in the pleadings. In the instant case, the plea of undue influence is raised merely by stating that the father and sons were jointly living together. This cannot be entertained without specific allegations that the sons were in a position to dominate the will of father and exercised influence. Therefore, in the absence of proper pleadings and evidence, this Court has no hesitation to hold that the Settlement Deeds are not vitiated by undue influence. **Hence, Point [B] is answered against the appellant/plaintiff.**

POINTS [A] & [C]:-

(21) From the recitals of the document Ex.D5 dated 18.05.2005, it is seen that the father has made a declaration in an unambiguous language that the settlor was prompted to execute the Settlement Deed out of natural love and affection, the settlor had towards the settlees. In the Deed, it is specifically mentioned that the settlor handed over physical possession of all the scheduled mentioned properties to the settlees. The incidents of transfer by way of settlement was also indicated in the document with precision and the Settlement Deed was intended as a document conveying interest in presenting in unambiguous terms. This Court has already seen



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that there is no specific pleading that there was no acceptance or delivery of possession being handed over to defendants 2 to 5 pursuant to the Settlement Deed. From the written statement and the evidence of DW1 through the proof affidavit it is seen that the defendants have pleaded and gave evidence to the effect that the defendants became the absolute owners and they are in possession and enjoyment of the properties except 1/6th share retained by the father in Item No.2. A specific plea regarding physical possession as absolute owners of the suit property shows acceptance especially when the document records possession. This Court is unable to find any valid suggestion put to DW1 doubting acceptance or delivery of possession as deposed by DW1. The entire evidence of DW1 speaks in support of a valid gift with all the ingredients required under the Mohammedan Law. The mere fact that the father M.A.Sheriff was living with his sons in the same residence at Maharashtra for a long time cannot be considered as a strong circumstance to decide that the Settlement Deed was executed by undue influence. From the general averments in the plaint that the father was under the control of defendants 2 to 5, this Court cannot presume that the settlor was not independent nor in a



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disposing state of mind. In this case, the Settlement Deed was executed by father after recording several facts that would indicate that the father had the intention to execute the Settlement Deed in faovur of his sons. The reason for not providing any property in favour of plaintiff in the Settlement Deed is also stated in the document. Further, it is also admitted that the father died only on 10.07.2010 and therefore, the settlor was hale and healthy when the Settlement Deed was executed. In the light of the earlier Will and the admitted facts surrounding the execution of the registered Settlement Deed, this Court is of the view that the findings of the learned Single Judge are based on proper appreciation of evidence.

(22)It is well settled that the appeal is not maintainable on a ground which is not raised before the learned Single Judge. In the absence of a specific plea questioning the settlement on the ground that it was not accepted or that possession was not taken, this Court may not permit the appellant/plaintiff to agitate any new ground which is not seen from the pleadings. This Court has already found that there is a recital in the very Settlement Deed to the effect that possession was handed over to the



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settles. This recital normally indicate acceptance and delivery in the absence of any evidence to the contrary. Though the actual physical possession is imperative, the Court has recognised recitals in the document as evidence of possession. The effect of recitals in the document is the subject matter of consideration in several decisions. A recital to the effect that the settlor made the settlee possessory of all the properties given by the Deed and that the settlor had abandoned all connections with the property as evidence of delivery of possession by the Privy Council in the judgment in *Sheik Muhammad Mumtaz Ahmed and Others Vs. Zubaida Jan and Others* reported in **1889 LR 16 IA 205 : LLR 11 All 460 [PC]**.

(23)The learned counsel for the appellant/plaintiff relied upon the judgment of Hon'ble Supreme Court in the case of *Hafeeza Bibi and Others Vs. Shaikh Farid and Others* reported in **2011 [5] SC 654** for the proposition that transaction of gift in a particular form is not necessary but the three essential requisites are to be satisfied to constitute a valid gift. It is also reiterated that three essential ingredients namely, declaration of gift by donor, acceptance of gift by donee and delivery of



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possession should be proved though it is not essential that the gift should be in writing. However, this Court is unable to find any support from the said judgment in favour of appellant/plaintiff as this Court has factually held that declaration, acceptance and delivery of possession in this case can be inferred from the recitals in the Settlement Deed.

(24) Similarly, learned counsel for the appellant relied upon the judgment of Bombay High Court in the case of *Chaudhri Mehdi Hasan V. Muhammad Hasan* reported in *1906 [4] CLJ 295* and the judgment of Hon'ble Supreme Court in the case of *Rasheeda Khatoon Vs. Ashiq Ali* reported in *2014 [10] SCC 459* and a few more judgments. Having regard to the factual findings in the present case that the three essential ingredients of a Gift Deed is proved, this Court finds no assistance from the judgments relied on by the learned counsel appearing for the appellant to support his arguments.

(25) Learned counsel then placed reliance upon the judgment of the Hon'ble Supreme Court in the case of *Krishna Mohan Kul Vs. Pratima Maithy and Others* reported in *2004 [9] SCC 468* for the proposition that section 111 of Evidence Act applies equally to all persons standing in fiduciary



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relationship with each other and section 111 can be applied in the case of an old, illiterate, ailing person who is unable to apprehend the nature of document or the contents thereof. It is further observed in the said judgment that it should be established that there was no more physical act of the executant involved but the mental act. The Hon'ble Supreme Court, as a general principle, held that when fraud, misrepresentation or undue influence is alleged by a party in a suit, normally the burden is on him to prove such fraud or undue influence. When a person is in a fiduciary relationship with another and the latter is in a position of active confidence, it is held that the burden of proving the absence of fraud or misrepresentation or undue influence is upon the person in the dominating position to prove that there was a fair play in the transaction and that the transaction is genuine and bona fide. The Hon'ble Supreme Court has considered the case where the alleged Deed of Settlement was executed when the donor was 106 years old and he was becoming lacklustre due to old age apart from other ailments and mental shocks. Therefore, this Court is unable to rely upon the judgment of the Hon'ble Supreme Court in ***Krishna Mohan Kul's case [cited supra]***.



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(26)Learned counsel for the appellant submitted that the Settlement Deed is not proved by examining any one of the attesting witness as required under Section 68 of the Evidence Act. The execution of the document, namely, the Settlement Deed by the father is not in issue and there is no specific pleading disputing the signature of executant in the document. The only plea in the plaint is that the document was obtained by undue influence. The document being a Settlement Deed and not a Will, does not require to be proved by examining any of the attesting witness.

(27)Another judgment of the Hon'ble Supreme Court in the case of ***K.Lakshmanan Vs. Tekkayil Padmini and Others*** reported in **2009 [1] SCC 354**, relied upon by the appellant has no application to the facts of the present case.

(28)Having regard to the nature of pleadings and the evidence adduced, this Court is convinced that the plaintiff/appellant has not come forward with a specific plea questioning the legality of the Settlement Deed on the ground that the defendants/respondents have not proved the ingredients of a Gift Deed in Mohammedan Law.



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(29) Having regard to the recitals in the documents and the fact that declaration, acceptance and delivery of possession can be inferred from the document of Settlement Deed itself, this Court finds that the Settlement Deed is proved to be valid and binding on the appellant / plaintiff. This Court is fully convinced that the findings of learned Single Judge are perfectly in order and warrant no interference.

(30) In view of the conclusions reached above, this Court finds no merit in the Appeal. Hence, the Original Side Appeal stands **dismissed** and the judgment and decree dated 16.03.2017 made in C.S.No.228 of 2013 by the learned Single Judge is hereby confirmed. Having regard to the relationship between parties, there shall be no order as to cost. Consequently, connected miscellaneous petition is closed.

[SSSRJ] [CKJ]
15.06.2023

mkn/AP

Internet : Yes

Index : Yes / No



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To

- 1.The Section Officer
VR Section, High Court,
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