



A.S.(MD)No.305 of 2021

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 09.08.2023

PRONOUNCED ON :29.09.2023

CORAM

THE HONOURABLE MR.JUSTICE K.MURALI SHANKAR

A.S.(MD)No.305 of 2021

and

**C.M.P.(MD)Nos.10845 and 10846 of 2021, 10327 of 2022
and 8787 of 2023**

Selvaraj : Appellant/2nd Defendant
Vs.

V.K.Parasuram (died)

1.Murugesan
2.Anitha
3.Vignesh

: Respondents 1 to 3 /
Plaintiffs 1 to 3

4.Vijaya
5.Soundararaja
6.V.Rathina

: Respondents 4 to 6/
Defendants 3 to 5

PRAYER:- Appeal Suit filed under Section 96 r/w 41 of the Code of Civil Procedure, 1908 against the Judgment and Decree, passed by the



A.S.(MD)No.305 of 2021

Principal District Court, Dindigul in O.S.No.20 of 2019, dated 01.09.2021.

For Appellant : Mr.B.Pandiaraj

For Respondents :Mr.M.Vallinayagam
Senior Counsel
for Mr.B.Rahamadullah
for R.1 to R.3
: No Appearance
for R.4 and R.5
: R.6- exonerated vide order
dated 22.04.2022

JUDGMENT

The Appeal Suit is directed against the judgment and decree passed in O.S.No.20 of 2019, dated 01.09.2021, on the file of the Principal District Court, Dindigul.

2. The suit is for declaration and for permanent injunction.

3. Originally, the first plaintiff has laid a suit against his father V.K.Parasuram and his brother Selvaraj in O.S.No.608 of 2008, on the



A.S.(MD)No.305 of 2021

file of the District Munsif Court, Dindigul and subsequently the suit was transferred to the Principal District Court and was taken on file in O.S.No.20 of 2019.

4. Pending suit, the first defendant had died and his third son Soundararaja and his daughters Vijaya and Rathina were impleaded as defendants 3 to 5. The daughter and the son of the first plaintiff got themselves impleaded as plaintiffs 2 and 3. Admittedly, the suit properties were owned by the first defendant – father of the first plaintiff and the defendants 2 to 5.

5. The case of the first plaintiff is that the first defendant out of his love and affection for the first plaintiff, executed a gift settlement deed in respect of the suit properties in favour of the first plaintiff vide deed dated 02.04.2008 and handed over the possession of the properties, that the first defendant, who was residing with the second defendant, due to the pressure and force applied by the second defendant, had cancelled the settlement deed, vide Gift Settlement cancellation deed on 11.04.2008, that the gift deed had come into effect and as such, it was not open to the settlor to cancel it, that the cancellation deed which was



A.S.(MD)No.305 of 2021

WEB COPY

executed unilaterally without consent and knowledge of the settlee, is not valid, that when the plaintiff had applied for name transfer in respect of the suit properties, he came to know about the cancellation deed, that the first defendant was forced to execute number of other documents in favour of one Gnanavel – brother-in-law of the second defendant's son which includes the sale agreement on the date of cancellation, that the sale agreement had been created only to create an impression that the alleged cancellation deed had been acted upon and as such, the alleged sale agreement is a fraudulent document and that therefore, the plaintiff was constrained to file the above suit to declare that he is the absolute owner of the suit properties by virtue of the gift settlement deed dated 02.04.2008 executed by his father – first defendant and for permanent injunction restraining the second defendant from claiming the rents from the tenants in the suit properties and for declaration that the alleged cancellation deed No.805/2008, dated 11.04.2008 is ab-initio-void.

6. The defendants 1 and 2 have filed a written statement jointly, raising a defence that the settlement deed dated 02.04.2008, registered on 10.04.2008 is a fraudulent document and the same was obtained by force, coercion and undue influence, that the first defendant had never intended



A.S.(MD)No.305 of 2021

WEB COPY

to give the properties to the first plaintiff, that the first defendant on the very next day has executed a settlement cancellation deed dated 11.04.2008 and the said factum would go to show that the document dated 02.04.2008 was not acted upon nor intended to acted upon, that a panchayat was convening and there was a mediation among the family members wherein the first plaintiff was given a cash of Rs.12,00,000/- and 8 items of properties, that the first plaintiff had executed a family release deed on 09.06.2008 before a Notary Public and witnesses, but before registering the said document, he had rushed to the Court and filed the above suit, that the first defendant has then executed a registered gift settlement deed in respect of the first item of the suit properties and other properties in favour of the second defendant and placed him in the possession of the properties.

7. The second defendant, in his additional written statement, has further averred that the first defendant has also executed two settlement deeds on 20.06.2008, one in favour of the first plaintiff in respect of the second item of the suit properties and the other properties and the other one in favour of his third son Soundararaja – fourth defendant in respect of some other properties, that the second defendant has entered into a



A.S.(MD)No.305 of 2021

WEB COPY

sale agreement with one Gnanavel on 26.03.2008, in respect of the first item of the properties, but subsequently the agreement was cancelled, that the second defendant alone has been receiving the rents from 13 shops available in first item of the suit properties and that therefore, the first plaintiff has no cause of action to file the above suit.

8. After impleadment, the fourth defendant has filed a written statement reiterating the stand taken by his father and brother – defendants 1 and 2 in their written statements.

9. Upon the above pleadings, the trial Court has framed the following issues:

- (1) Whether settlement deed dated 10.04.2008 is valid and acted upon?
- (2) Whether cancellation of gift deed is valid?
- (3) Whether the suit is barred by limitation?
- (4) To what relief?



A.S.(MD)No.305 of 2021

WEB COPY

10. During trial, the plaintiffs examined the first plaintiff – Murugesan as P.W.1 and exhibited six documents as Exs.A.1 to A.6. On the side of the defendants, they have examined the second defendant Selvaraj as D.W.1 and exhibited nine documents as Exs.B.1 to B.9. The learned trial Judge, upon considering the evidence both oral and documentary and on hearing the arguments of both sides, has passed the impugned judgment dated 01.09.2021, by holding that the settlement deed dated 10.04.2008 is valid and acted upon and that therefore, the cancellation of gift deed executed by the first defendant on 11.04.2008 is invalid, decreed the suit as prayed for. Aggrieved by the impugned judgment and decree, the second defendant has preferred the present Appeal Suit.

C.M.P.(MD)Nos.10846 of 2021 and 10327 of 2022:

11. Pending appeal, the above applications came to be filed for reception of additional evidence. The case of the petitioner/appellant is that he has engaged a new Counsel before the trial Court and before examining him, his Counsel has instructed him to bring all the original documents, but due to non-availability, he has submitted the



A.S.(MD)No.305 of 2021

WEB COPY

corresponding certified copies and the same were only marked before the trial Court, that after cross-examination he made a due search, but he was not able to find the original documents, that in the meanwhile, the suit has been decreed in favour of the first plaintiff and after which only, he was able to recollect that the original documents have been handed over to the previous Counsel and after due search made by the clerk of his previous Counsel, who died in 2018, he was able to get the original and that few of the additional documents sought to be received had also been mixed up with those records and hence, he was not able to produce the documents before the trial Court.

12. It is the further case of the petitioner that few of the additional documents now sought to be received are old documents mixed up with other documents which were not able to be filed before the trial Court as they were not able to be traced immediately to file the same before the trial Court. It is his further case that few of the additional documents that are sought to be received are after suit which will be helpful for him to bring it to the knowledge of this Court the subsequent events that are just and necessary for just decision of the case.



A.S.(MD)No.305 of 2021

WEB COPY

13. In C.M.P.(MD)No.10846 of 2021, the petitioner has sought to receive the Will executed by the first defendant, deed cancelling the Will by the first defendant, the sale deeds in the name of the first defendant, release deed executed by the first plaintiff, settlement deed in favour of the petitioner, joint memo of compromise, copy of the proof affidavit of P.W.2 served on the petitioner, lease deeds and the rent payment advices, legal notice sent by the first plaintiff's Counsel and the reply notice sent by the tenants.

14. In C.M.P.(MD)No.10327 of 2022, the petitioner has sought to receive the sale deeds dated 11.02.1970 standing in favour of the petitioner's mother Pommakkal, as additional evidence by alleging that the said document has been misplaced and mixed up with his several other documents and hence, he was not able to produce the same before the trial Court.

15. The first plaintiff has filed a counter statement raising serious objections in receiving the additional evidence, that reasons assigned are false and untenable, that the documents produced are totally irrelevant for deciding the present appeal and that the petitioner has not satisfied



A.S.(MD)No.305 of 2021

the three requirements contemplated under Order 41 Rule 27 C.P.C., for reception of additional evidence.

16. Before entering into further discussion, it is necessary to refer Order 41 Rule 27 C.P.C.

“Production of additional evidence in Appellate Court

(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if (1) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or (2) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or (3) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Whenever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.”



A.S.(MD)No.305 of 2021

WEB COPY

17. Under Rule 27 of Order XLI C.P.C., production of additional evidence where oral or documentary is permitted only under three circumstances which are;

-Where (i) the trial Court had refused to admit the evidence, though it ought to have been admitted; (ii) the evidence was not available to the party, despite exercise of due diligence and (iii) the appellate Court requires the additional evidence so as to enable it to pronouncement judgment or for any other substantial cause of like nature.

18. It is settled law that additional evidence in appellate Court cannot be produced by a party as of right and that the essentials of Order 41 Rule 27 C.P.C., have to be satisfied. It is pertinent to note that the said provision cannot be used to patch up the weak points in the case and fill up the omission in the Court of appeal.

19. When the learned Counsel for the appellant, after completing his arguments with respect to the appeal, has attempted to canvass his arguments with regard to the applications for the reception of additional evidence in CrI.M.P.(MD)Nos.10846 of 2021 and 10327 of 2022, the



A.S.(MD)No.305 of 2021

learned Senior Counsel for the respondents has raised serious objections, that the Court has to hear the arguments of both sides in the main appeal and if the Court comes to a view or decision, that the evidence already available are sufficient enough to dispose of the appeal, then the question of considering the additional evidence does not arise at all and relied on a decision of the Hon'ble Division Bench of this Court in ***M.Ayyaswami and another Vs. S.P.Ganesan and another*** reported in ***1994-2-L.W.376*** and the relevant passage is extracted hereunder:

“5. It is the settled position of law that an application filed in the Appeal for permission to adduce additional evidence has to be considered along with the main appeal and not separately. The Privy Council has considered this question in ' Kessowji v. G.I.P. Railway ' (34 I.A. 115) and has again reiterated the same view in ' Parsotim v. Lal Mohan ' (58 I.A. 254 = A.I.R. (18) 1931 P.C. 143 = 34 L.W. 76(P.C) The Supreme Court in ' Arjun Singh v. Kartar Singh ' (A.I.R. 1951 S.C. 193 = 64 L.W. 537(SC) after referring to the aforesaid decisions, has held that without examination of the evidence on record, and without a decision is reached that the evidence as it stood disclosed a lacuna which the Court required to be filled up for pronouncing its judgment, the appellate Court would not be justified in admitting the additional evidence under O. 41 R. 27 C.P. Code. The



WEB COPY



A.S.(MD)No.305 of 2021

relevant portion of the judgment of the Supreme Court is as follows:

“The discretion to receive and admit additional evidence is not an arbitrary one, but is a judicial one circumscribed by the limitations specified in O. 41, R. 27 C.P.C., if the additional evidence was allowed to be adduced contrary to the principles governing the reception of such evidence, it would be a case of improper exercise of discretion, and the additional evidence so brought on the record will have to be ignored and the case decided as if it was non-existent. Under O. 41, R. 27, it is the appellate Court that must require the evidence to enable it to pronounce judgment. As laid down by the Privy Council in the well-known case of Kessowji v. G.I.P. Railway, 34 I.A. 115; (31 Dom, 381 (P.C.).

'the legitimate occasion for the application of the present rule is when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent, not where a discovery is made, outside the Court of fresh evidence and the application is made to import it.'

and they reiterated this view in stronger terms even in the later case of Parsotim v. Lal Mohan , 58 I.A. 254; (A.I.R. (18) 1931 P.C. 143 = 34 L.W. 76(P.C). The true test,



A.S.(MD)No.305 of 2021

therefore, is whether the appellate Court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced.

“In the present case, there is nothing to show that there was any lacuna or gap which had to be filled up and that the appellate Court felt the need for the omission being supplied so that it could pronounce a judgment; to put it the other way round, it does not appear and it was not stated, that the District Judge felt himself unable to come to a decision without copies of the settlement registers that were sought to be put in before him for the first time. On the other hand, the District Judge made up his mind to admit the certified copies of the kami beshi and muntakhib asami-war registers even before he heard the appeal. The order allowing the appellant to call the additional evidence is dated 17.3.1942. The appeal was heard on 24.4.1942. There was thus no examination of the evidence on the record and a decision reached that the evidence as it stood disclosed a lacuna which the Court required to be filled up for pronouncing its judgment. In the circumstances, the learned Judges of the High Court were right in holding that the District Judge was not justified in admitting this evidence under O. 41, R. 27”



A.S.(MD)No.305 of 2021

WEB COPY

Therefore, it is not possible to sustain the order allowing the petition filed for adducing additional evidence which has been considered separately, without reference to the evidence on record and without considering the application along with the main appeal.”

20. The learned Senior Counsel for the respondents has also relied on the decision of this Court in ***M.Shanmughasundaram Vs. N.T.P.Subburaya Chettiar*** reported in ***1998(1) CTC 483***, wherein the judgment of the Division Bench in ***Ayyaswami's case*** has been followed. In the above decisions/cases, the point for consideration was, whether the application for reception of additional evidence be considered separately or ought to be considered along with the appeal.

21. No doubt, Hon'ble Supreme Court in catena of decisions, has settled the legal position that when an application for reception of additional evidence under Order 41 Rule 27 C.P.C., is filed in an Appeal, the Appellate Court has to consider the application along with the appeal and deprecated the practice of considering the application for reception of additional evidence separately. No doubt, the Hon'ble Division Bench



A.S.(MD)No.305 of 2021

of this Court has referred to the judgment of Hon'ble Supreme Court in ***Arjun Singh Vs. Kartar Singh*** reported in ***AIR 1951 SC 193***, wherein our Apex Court after referring to the decision of the Privy Council, has held that without examination of the evidence on record and without a decision is reached that the evidence as it stood disclosed a lacuna which the Court required to be filled up for pronouncing its judgment, the appellate Court would not be justified in admitting additional evidence under Order 41 Rule 27 C.P.C.

22. The learned Senior Counsel for the respondents would submit that the above observations of the Hon'ble Supreme Court would only mean that the Court has to consider the evidence already available on record for deciding the appeal and if any other evidence is required for the Court to pronounce the judgment, then only the concerned Appellate Court can hear the petition for reception of additional evidence and decide whether the additional evidence sought to be received are required for pronouncing the judgment. If such an interpretation is given to the said observation, the Appellate Court without conducting any enquiry in the application for the reception of additional evidence and without even knowing the reason for filing the petition for reception of additional



A.S.(MD)No.305 of 2021

WEB COPY

evidence, has to reject the same, if the Court comes to a decision that the evidence already available is sufficient enough to decide the appeal.

23. Moreover, the Appellate Court requires additional evidence to enable it to pronounce the judgment is one of the reasons contemplated under Sub-Rule 1(b) of Rule 27 of Order 41 C.P.C. Apart from this reason, there is one other reason available under the same Sub-Rule 1(b) which states that the Appellate Court may receive additional evidence, if it comes to the conclusion that the said evidence is necessary for any other substantial cause. In addition to the above, there are two more reasons available under Sub Rule 1(a) and 1(aa). Sub-Rule 1(a) authorizes the Appellate Court to receive additional evidence, if the trial court improperly refuses to admit the same and whereas Sub-Rule 1(aa) empowers the Appellate Court to receive additional evidence, if the parties seeking permission to receive the said evidence establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not after the exercise of due diligence be produced by him in the trial Court. Without conducting any enquiry in the petition for reception of additional evidence, it is not possible for the Appellate Court to decide whether the said petition satisfies the reasons



A.S.(MD)No.305 of 2021

specified under Sub-Rule 1(a), 1(aa), first or second part of Sub – Rule 1(b) of Rule 27 of Order 41 C.P.C. The word used in Rule 27 (1), at the end of each ground is "or" and not "and". The use of the conjunction "or" is to connect two or more alternatives or possibilities. This conjunction indicates an independent existence. Hence, if any one of the ground exists, or two or even all three can exist and can be presented for producing additional evidence.

24. The Hon'ble Supreme Court in ***Sanjay Kumar Singh Vs. The State of Jharkhand*** reported in ***AIR 2022 SC 1372 (Civil Appeal No. 1760 of 2022)*** has held that though the appellate Court should not travel outside the record of the lower Court and cannot take any evidence in the appeal, there is exception under Order 41 Rule 27 C.P.C., which enables the appellate Court to take additional evidence in exceptional circumstances and the relevant passages are extracted hereunder:

“4. It is true that the general principle is that the appellate court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order 41 Rule 27 CPC enables the appellate court to take additional evidence in



WEB COPY



A.S.(MD)No.305 of 2021

exceptional circumstances. It may also be true that the appellate court may permit additional evidence if the conditions laid down in this Rule are found to exist and the parties are not entitled, as of right, to the admission of such evidence. However, at the same time, where the additional evidence sought to be adduced removes the cloud of doubt over the case and the evidence has a direct and important bearing on the main issue in the suit and interest of justice clearly renders it imperative that it may be allowed to be permitted on record, such application may be allowed. Even, one of the circumstances in which the production of additional evidence under Order 41 Rule 27 CPC by the appellate court is to be considered is, whether or not the appellate court requires the additional evidence so as to enable it to pronouncement judgment or for any other substantial cause of like nature. As observed and held by this Court in the case of [A. Andisamy Chettiar v. A. Subburaj Chettiar](#), reported in (2015) 17 SCC 713, the admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not the appellate court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause. It is further



WEB COPY



A.S.(MD)No.305 of 2021

observed that the true test, therefore is, whether the appellate court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced.

5. Applying the law laid down by this Court in the aforesaid decision to the facts of the case on hand, we are of the opinion that while considering the application for additional evidence, the High Court has not at all adverted to the aforesaid relevant consideration, i.e., whether the additional evidence sought to be adduced would have a direct bearing on pronouncing the judgment or for any other substantial cause”

25. It is necessary to refer the decision of the Hon'ble Supreme Court in ***Malayalam Plantations Ltd., Vs. State of Kerala and another*** reported in ***AIR 2011 SC 559 (Civil Appeal Nos.309 and 310 of 2003)***, wherein the Hon'ble Apex Court has specifically held that the appellate court is duty bound to consider at the time of hearing the appeal on merits so as to find out whether the documents or evidence sought to be adduced have any relevance/bearing in the issues involved and that it is for this Court to consider and take a decision in the application filed



A.S.(MD)No.305 of 2021

under Order 41 Rule 27 C.P.R., one way or other as to the applicability of the same and decide the appeal with reference to the said conclusion and the relevant passages are extracted hereunder:

“10) In view of the above provision, in our opinion, when an application for reception of additional evidence under Order 41 Rule 27 of CPC was filed by the parties, it was the duty of the High Court to deal with the same on merits. The above principle has been reiterated by this Court in Jatinder Singh & Anr. Vs. Mehar Singh & Ors. AIR 2009 SC 354 and [Shyam Gopal Bindal and Others vs. Land Acquisition Officer and Another](#), (2010) 2 SCC 316.

11) If any petition is filed under Order 41 Rule 27 in an appeal, it is incumbent on the part of the appellate Court to consider at the time of hearing the appeal on merits so as to find out whether the documents or evidence sought to be adduced have any relevance/bearing in the issues involved. It is trite to observe that under Order 41, Rule 27, additional evidence could be adduced in one of the three situations, namely, (a) whether the trial Court has illegally refused the evidence although it ought to have been permitted; (b) whether the evidence sought to be adduced by the party was not available to it despite the exercise of due diligence; (c) whether additional evidence was necessary in order to enable



A.S.(MD)No.305 of 2021

the Appellate Court to pronounce the judgment or any other substantial cause of similar nature. It is equally well-settled that additional evidence cannot be permitted to be adduced so as to fill in the lacunae or to patch up the weak points in the case.

12) Adducing additional evidence is in the interest of justice. Evidence relating to subsequent happening or events which are relevant for disposal of the appeal, however, it is not open to any party, at the stage of appeal, to make fresh allegations and call upon the other side to admit or deny the same. Any such attempt is contrary to the requirements of Order 41 Rule 27 of CPC. Additional evidence cannot be permitted at the Appellate stage in order to enable other party to remove certain lacunae present in that case.

13) In the light of the separate application filed under Order 41 Rule 27 of CPC for reception of additional evidence by both sides, it is for the High Court to consider and take a decision one way or other as to the applicability of the same and decide the appeal with reference to the said conclusion. In this view of the matter, we refrain from going into the merits of the materials placed by both sides and it is for the High Court to consider and take a decision one way or other as per the mandate of the said provision.”



A.S.(MD)No.305 of 2021

WEB COPY

26. It is settled law that the application filed under Order 41 Rule 27 C.P.C., should be heard along with the appeal, but that does not mean that the judgment in the appeal and the order in the application filed under Order 41 Rule 27 C.P.c., should be pronounced simultaneously. The hearing of the appeal along with the application for reception of additional evidence is mandatory, but not the disposal. In case, if the appellate Court comes to a decision that the additional evidence sought to be received is to be allowed, then the next question that arises is as to whether the appellate Court itself shall record the evidence or the trial Court or any other Court should be directed to record the evidence and transmit the same. But if the appellate Court comes to a decision that the application for reception of additional evidence is liable to be rejected, then there is no bar or prohibition for the appellate Court to pronounce the judgment in the appeal along with the dismissal order of the petition filed under Order 41 Rule 27 C.P.C., and in that case, the appellate Court has to pass a common judgment and order. But in case, if the appellate Court comes to a decision that the additional evidence sought to be received is to be allowed, then the appellate Court by re-opening the appeal has to pass orders only in the



A.S.(MD)No.305 of 2021

WEB COPY

application. In case of the appellate Court allowing the application filed under Order 41 Rule 27 C.P.C., if the respondent in the petition for reception of additional evidence stated no objections for marking the documents or if the Court comes to a decision that there is no issue with regard to the admissibility of the document and the objections raised by the other side are formal, the appellate Court by itself can mark the documents and proceed to pronounce the judgment. If the respondent raises serious objections for marking the documents and there exists an issue with regard to the very admissibility of the document itself, then the appellate Court has to call the applicant to adduce further evidence either before the appellate Court or before any other Court as directed by the appellate Court and in that case, the other side is entitled to produce the rebuttal evidence in accordance with the provisions of the Evidence Act.

27. Considering the legal position above referred, the objections of the learned Senior Counsel that the enquiry in the application for the reception of additional evidence is to be heard by the appellate Court only after hearing both sides in the appeal and after coming to a decision



A.S.(MD)No.305 of 2021

that the evidence already available are not sufficient enough to decide the appeal, in my humble view, is not only impracticable, but is not in accordance with the procedure contemplated under the code of Civil Procedure. The objections raised by learned senior counsel will not sustain, as it is not what the law makers had thought, not to create a clog in the disposal of Appeal or be mired down without a clarity.

28. In the case on hand, admittedly the suit was filed in the year 2008 and the trial Court has pronounced the judgment on 01.09.2021, after the lapse of 13 years. It is not the case of the petitioner/appellant that the documents now sought to be received were produced before the trial Court and the trial Court had refused to admit the same. The petitioner, as already pointed out, has canvassed three reasons; one is that the original documents were handed over to his earlier Counsel before the trial Court and he forgot to receive back the documents while conducting the case through another Counsel and the second one is that some of the documents are old documents and they were mixed up with his other documents and he was not able to trace the said documents at that time to file the same before the trial Court and now only he has traced out the same and the last one is that some of the documents are



A.S.(MD)No.305 of 2021

WEB COPY

produced to show the subsequent events that are necessary for the just decision of the case.

29. As rightly pointed out by the learned Senior Counsel for the plaintiffs, the petitioner/appellant in his evidence before the trial Court, has specifically admitted that the release deed dated 09.06.2008 alleged to have been executed by the first plaintiff was very much available with him, but he has not produced the same before the trial Court. The petitioner has produced the sale deeds standing in favour of his father with respect of the suit properties. But as rightly pointed out by the learned Senior Counsel for the plaintiffs, there is absolutely no dispute about the first defendant's ownership over the suit properties. Moreover, it is not the case of the appellant that despite diligence, the documents now sought to be received were not within his knowledge and came to know about the same subsequently. As rightly contended by the learned Counsel for the respondents, the petitioner/appellant has not canvassed any valid reason or explanation for non-production of the above documents before the trial Court. Regarding the documents which came into existence after the impugned judgment, the petitioner has produced the legal notice sent by the first plaintiff's Counsel and the reply notice



A.S.(MD)No.305 of 2021

WEB COPY

alleged to have been sent by the tenants. The petitioner has not shown as to how the said notices are relevant for deciding the present appeal. Since the petitioner has not shown the existence of the conditions required for reception of additional evidence as contemplated under Order 41 Rule 27 C.P.C., the same cannot be received at this stage. Hence, this Court concludes that the above petitions are devoid of merits and the same are liable to be dismissed.

30. The learned Counsel for the appellant would submit that the entire case revolves around Ex.A.1 settlement deed, which is a document requires compulsory attestation under Section 68 of the Evidence Act., but the first plaintiff by not examining any of the attessor, has miserably failed to prove the settlement deed and that therefore, Ex.A.1 cannot be looked into for any purpose, as the same does not have any evidentiary value, that the first defendant who executed Ex.A.1 settlement deed, cancelled the same on the very next day by giving reasons that he was in confusion and that some changes are needed with regard to the properties and that the above reasons would go to show that the first defendant has no clear intention to settle the properties in favour of the first plaintiff.



A.S.(MD)No.305 of 2021

WEB COPY

31. The learned Counsel would further submit that though they have challenged the Ex.A.1 settlement deed on the grounds of coercion and undue influence, the entire burden of proof is on the first plaintiff to prove that there was no undue influence and that the first defendant in the written statement has specifically stated that the intrinsic evidence in the document itself would expose the fraud, deceit committed by the plaintiff in getting the documents in his favour.

32. The learned Counsel would further submit that though the entire burden of proof lies on the first plaintiff being the beneficiary under Ex.A.1, he has failed to prove the absence of undue influence, that he has also failed to prove the absence of coercion on his part, as he stands in a position to gain active confidence, that though the first defendant had died, the circumstances prevailed, the recitals found in Ex.A.1 itself and also the suspicious circumstances surrounded Ex.A.1 would prove the amount of fraud, coercion and undue influence, exerted by the first plaintiff over the first defendant in getting Ex.A.1 executed and registered.



A.S.(MD)No.305 of 2021

WEB COPY

33. The learned Counsel would submit that stamp papers utilised for Ex.A.1 stand purchased in the name of the first plaintiff, that the stamp vendor for the stamps in Ex.A.1 is one of the witness to the said document, that the document writer for Ex.A.1 is not the family document writer, that the photos affixed in Ex.A.1 are very old photos, that though Ex.A.1 document is alleged to have been executed on 02.06.2008, the same was presented for registration in the afternoon session on 10.06.2008 and that the above suspicious circumstances and along with the plaintiff's failure to clear/remove the above suspicious circumstances, can easily be inferred that the first plaintiff has not proved Ex.A.1 document as required under law. He would further submit that even assuming for arguments sake that Ex.A.1 was executed in favour of the first plaintiff, there is absolutely no evidence to show that he had accepted the gift.

34. The learned Counsel would further submit that the first plaintiff himself has admitted in his evidence that the second defendant alone had been receiving the rents from the shops available in the first item of the suit properties for some years and without being in possession, he has claimed the relief of permanent injunction, only to



A.S.(MD)No.305 of 2021

WEB COPY

cover up the absence of proof for acceptance of Ex.A.1. He would further submit that though the first plaintiff has pleaded for suspicious circumstances, coercion and undue influence in execution of Ex.A.2, the first defendant in his written statement has dislodged the above pleas by making clear and categorical statement that he had cancelled the settlement deed on the next day itself ie., on 11.04.2008 and that Ex.A.1 was not acted upon. He would further submit that the trial Court without considering the above aspects in proper perspective and without considering the legal position, has mechanically rendered the finding that Ex.A.1 settlement deed is valid and acted upon and consequently Ex.A.2 cancellation of gift deed is invalid and that therefore, the same is liable to be interfered with.

35. The learned Senior Counsel appearing for the respondents 1 to 3 would submit that the first defendant had voluntarily and on account of his love and affection, executed Ex.A.1 – settlement deed in favour of the first plaintiff, who is his last son, that possession of the property was also handed over to the first plaintiff and the same was recited in the document itself, that the second defendant who was residing with the first defendant by pressurising the first defendant made him to execute a



A.S.(MD)No.305 of 2021

WEB COPY

cancellation deed – Ex.A.2 on 11.04.2008, that the cancellation deed unilaterally executed by the first defendant without the knowledge of the first plaintiff is not valid and that since the suit properties originally belonged to the first defendant, he has every right to execute the settlement deed under law.

36. The learned Senior Counsel would further contend that the execution of Ex.A.1 has been fortified by the execution of the alleged cancellation deed under Ex.A.2 by the first defendant and the factum of cancellation would go to prove the execution of Ex.A.1 and as such, the plaintiff has no obligation to examine any evidence much less any of the attesting witness to Ex.A.1 and that though the defendants have taken a stand that Ex.A.1 was obtained by the first plaintiff by compulsion, force, coercion and undue influence, they have not pleaded any particulars as required under law. He would further submit that though D.W.1 has deposed that the plaintiff obtained Ex.A.1 by misrepresenting and taking signature of the first defendant for loan transaction, the same was neither pleaded in the written statement nor shown in Ex.A.2 cancellation deed, that the first defendant has assigned some other reasons for cancelling Ex.A.1 settlement deed under Ex.A.2 and that the very production of



A.S.(MD)No.305 of 2021

WEB COPY

Ex.A.1 settlement deed by the plaintiff would go to show that he has accepted the gift under Ex.A.1.

37. The learned Senior Counsel would further submit that the first defendant in Ex.A.1 settlement deed, has specifically stated that he has no power of cancellation or revocation of the settlement deed and that he has not reserved any right for the same in Ex.A.1 and that therefore, the very execution of Ex.A.2 cancellation deed is to be declared as a void document. The learned Senior Counsel would further contend that since Ex.A.1 settlement deed has been proved as valid and Ex.A.2 cancellation as void, the trial Court has rightly decreed the suit as prayed for and that therefore, there is nothing to interfere with the reasoned judgment of the trial Court.

38. The points for consideration in the appeal are :

(1) Whether the learned trial Judge erred in giving a finding that Ex.A.1 settlement deed is valid and acted upon despite showing that the first plaintiff has failed to prove the execution of Ex.A.1 settlement deed, that though the entire burden is on the plaintiff, he has miserably failed to prove the absence of undue influence and coercion and that even



A.S.(MD)No.305 of 2021

assuming that Ex.A.1 was executed in favour of the first plaintiff, he has not proved that he has accepted Ex.A.1 settlement deed?

(2) Whether the settlement deed dated 02.04.2008 executed by the first defendant in favour of the first plaintiff is proved to be valid and accepted by the first plaintiff?

(3) Whether the cancellation of settlement deed dated 11.04.2008 is valid and legal?

(4) Whether the judgment and decree passed in O.S.No.20 of 2019 is liable to be interfered with?

(5) What other relief, the parties are entitled to?

39. Sections 122 to 129 of the Transfer of Property Act deals with gifts. Section 122 of the Transfer of Property Act which defines gift contemplates voluntary execution, passing of no consideration and acceptance by donee. Section 123 mandates that a transfer must be effected by registered instrument signed by or on behalf of doner and attested by atleast two witnesses. No doubt, the gift or settlement deed is a document requiring compulsory attestation. Section 68 provides that if



A.S.(MD)No.305 of 2021

WEB COPY

a document is required by law to be attested, it shall not be used as evidence until atleast one attesting witness has been called for the purpose of proving its execution.

40. In the case on hand, admittedly, the plaintiffs have not chosen to examine any of the attesting witness to Ex.A.1 settlement. But the proviso to Section 68 says that unless the execution of gift deed is specifically denied, it is not mandatory to lead the evidence of an attestating witness under Section 68 of the Evidence Act to prove the gift deed. In the case on hand, though the defendants have alleged that Ex.A.1 was obtained by the plaintiff by exerting undue influence and coercion, but they have not specifically denied or disputed the very execution of Ex.A.1 settlement deed. More importantly, as rightly contended by the learned Senior Counsel for the respondents, the first defendant who executed Ex.A.1 settlement deed has also executed the deed cancelling Ex.A.1 settlement deed and the very factum of cancellation would go to show the execution of Ex.A.1. Since the first defendant has cancelled the settlement deed which was executed by himself, the question of examining any one of the attesting witness to Ex.A.1 settlement deed by the plaintiffs does not arise at all.



A.S.(MD)No.305 of 2021

WEB COPY

41. Now the only question remains to be seen is as to whether the first plaintiff has accepted the settlement deed under Ex.A.1. Before that, let us take the grounds on which Ex.A.1 settlement deed was attacked by the defendants. In the written statement filed by the defendants 1 and 2 jointly in February 2009, they have alleged the ground of coercion in paragraph No.3 and the same is extracted hereunder:

“ While so the plaintiff had compelled this 1st defendant, coerced him and forced him to execute a document styled as gift settlement deed on 02.04.2008. Though the document was written on 02.04.2008, the first defendant was coerced and was compelled to sign the document. After coming to know about the fraudulent act of plaintiff the 1st defendant has cancelled the said document on 11.04.2008.”

42. In paragraph No.6 of the written statement, they have averred as follows:

“The plaintiff has hastily coerced the 1st defendant and induced him to execute the said document. In fact it was the plaintiff who had used force to compel the 1st defendant to execute such a document in his favour. The intrinsic evidence in the document itself would expose the fraud, deceit



A.S.(MD)No.305 of 2021

committed by the plaintiff in getting the document in his favour.”

43. After the death of the first plaintiff, the second defendant has filed additional written statement in the month of May 2019, whereunder he had raised the plea of undue influence. In paragraph No.4 of the additional written statement, it is stated as follows:

“வாதியால் முன்னிலைப்படுத்தப்படும் 02.04.2008 – ம் ுத்தியிட்ட செட்டில்மெண்ட் பத்திரம் நீத வாதி தனது தகப்பனாரான 1ம் எதிர்வாதி V.K.பரசுராம் அவர்களை undue influence மற்றும் coercion செய்து வாதியால் உருவாக்கப்பட்ட பத்திரமாகும். வாதியை தனது தகப்பனாரான 1ம் எதிர்வாதியை undue influence, coercion செய்துஇ அவரது விருப்பத்திற்கு மாறாக செட்டில்மெண்ட் பத்திரத்தில் அவரது கையொப்பத்தைப் பெற்றுள்ளார்.”

44. In paragraph No.5 of the additional written statement, it has been stated as follows:

“ நீத வாதி தனது தகப்பனாரை undue influence மற்றும் coercion மூலமாக தனது தகப்பனாரிடமிருந்து எழுதிப் பெற்ற செட்டில்மெண்ட் பத்திரம் 1ம் எதிர்வாதியால் 11.04.2008 – ம் ுத்தியன்று cancel செய்யப்பட்டது”.



A.S.(MD)No.305 of 2021

45. Thereafter, the fourth defendant – brother of the first plaintiff and the second defendant has filed his written statement on 14.02.2021, whereunder he went to the extent of alleging that the first plaintiff had taken the custody of the first defendant and compelled him to execute the settlement deed and the relevant portion is extracted hereunder:

“மற்படி சேட்டில்மெண்டு பத்திரமும் 1ம் பிரதிவாதியை மற்படி 1ம் வாதி கட்டி எடுத்து கட்டாயப்படுத்தி மற்படியாரின் விருப்பத்திற்கு மாறாக 1ம் வாதியால் ஏற்படுத்தப்பட்டதாகும்.”

46. As rightly contended by the learned Senior Counsel for the respondents, the first defendant in the written statement filed by him along with his son second defendant, has nowhere whispered that Ex.A.1 was obtained by the first plaintiff by exercising undue influence. It is not in dispute that the first defendant, before and after execution of Ex.A.1 settlement, was residing only with the second defendant – his elder son.

47. The learned Counsel for the appellant would submit that since the defendants have taken the grounds of undue influence and coercion, as per Section 16(2) and (3) of the Indian Contract Act and Section 111



A.S.(MD)No.305 of 2021

WEB COPY

of the Evidence Act, the entire burden is on the plaintiffs to prove the absence of undue influence and coercion and relied on the following decision in support of his contentions:

(i) **1996(2) CTC 279: (Dharman and six others Vs. Marumuthu):**

“17. The various decisions referred to above would go to show that if on the face of the document and the nature of the transaction covered by the document appears to be either unconscionable or unnatural one, the burden of proving that the transaction was not induced by undue influence was considered uniformly to rest with the beneficiary under the document. Though normally, courts do not concern itself with a man making even an improvident gift or effecting a disposition of the property in a way that no right-minded person would be disposed to do so, such factors or circumstances appended with the execution of a gift may furnish a clue or serve as a pointer to the fact that the donor either did not intend it or that it was an unconscionable and unnatural transaction and in such circumstances the beneficiary under such transaction is bound in law to clear such suspicions or explain about the existence of some valid or other reason for such a disposition being made. It is in such circumstances, the Apex Court also on more than one occasion observed that if the transaction appears to be unconscionable, then the burden of proving that the contract was not induced by undue influence lies heavily upon the



A.S.(MD)No.305 of 2021

beneficiary under the document, who was in a position to dominate the will of the other.”

(ii) 2004((9) SCC 468 (Krishna Mohan Kul @ Nani Charan Kul and another Vs. Pratima Maity and others):

“When fraud, mis-representation or undue influence is alleged by a party in a suit, normally, the burden is on him to prove such fraud, undue influence or misrepresentation. But, when a person is in a fiduciary relationship with another and the latter is in a position of active confidence the burden of proving the absence of fraud, misrepresentation or undue influence is upon the person in the dominating position, he has to prove that there was fair play in the transaction and that the apparent is the real, in other words, that the transaction is genuine and bona fide. In such a case the burden of proving the good faith of the transaction is thrown upon the dominant party, that is to say, the party who is in a position of active confidence. A person standing in a fiduciary

relation to another has a duty to protect the interest given to his care and the Court watches with zealously all transactions between such persons so that the protector may not use his influence or the confidence to his advantage. When the party complaining shows such relation, the law presumes everything against the transaction and the onus is cast upon



WEB COPY



A.S.(MD)No.305 of 2021

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 engrained in [Section 111](#) of the Indian Evidence Act, 1872 (in short the '[Evidence Act](#)'). The rule here laid down is in accordance with a principle long acknowledged and administered in Courts of Equity in England and America. This principle is that he who bargains in a matter of advantage with a person who places a 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.”

(iii) 2008(2) CTC 433 (Suguna and another Vs. Vinod

G.Nehemiah and others):

“35. Under [Section 16\(2\)\(a\)](#) of the Indian Contract Act,



WEB COPY



A.S.(MD)No.305 of 2021

1872, 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." As per sub section (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. As per [Section 16\(3\)](#), onus is cast upon a person holding the position of confidence of trust show that the transaction is a fair one not brought forth by reason of the fiduciary relation and that he had not taken any advantage of his position.

36. The Apex Court, in the decision reported in (2004) 9 SCC 468 (KRISHNA MOHAN KUL Vs. PRATIMA MAITY), dealing with a similar question as to challenge on the execution of the settlement deed on the ground of undue influence exercised by reason of fiduciary relationship, held as follows:

"13. In judging the validity of transactions between persons standing in a confidential relation to each other, it is very material to see whether the person conferring a benefit on the other had competent and independent advice. The age or capacity of the person conferring the benefit and the nature of the benefit are of very great importance in such cases. It is always obligatory for the donee/beneficiary under a



WEB COPY



A.S.(MD)No.305 of 2021

document to prove due execution of the document in accordance with law, even dehors the reasonableness or otherwise of the transaction, to avail of the benefit or claim rights under the document irrespective of the fact whether such party is the defendant or plaintiff before the Court. "

48. In the case on hand, as rightly contended by the learned Senior Counsel for the respondents, though the defendants have raised the grounds of undue influence and coercion, they have not furnished the particulars of the above allegations. Order 6 Rule 4 C.P.C., contemplates that in all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, willful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars with dates and items if necessary shall be stated in the pleadings. It is fundamental that any amount of evidence without pleadings and any amount of pleadings without evidence are of no use. Moreover in the first decision referred above, a learned Judge of this Court has referred to the judgment of the Hon'ble Supreme Court in ***Subhas Chandra Das Mushib Vs. Ganga Prosad Das Mushib and others*** reported in ***1967 AIR 878*** wherein the Hon'ble Supreme Court has noted the principles as



A.S.(MD)No.305 of 2021

found encapsulated in Head note “B” and “C” and the same are extracted hereunder:

"(B) Contract Act (1872), [Section 16](#)- Proof of undue influence - Three consecutive stages for consideration - No presumption of undue influence can arise merely because parties were nearly related to each other or merely because donor was old or of weak character - Relation in which such presumption arises indicated A.F.O.D.No.193 of 1954, D/-12.8.1960 (Cal), Reversed.

The Court trying a case of undue influence must consider two things to start with, namely, (1) are the relations between the donor and the donee such that the donee is in a position to dominate the will of the donor, and (2) has the donee used that position to obtain an unfair advantage over the donor? Upon the determination of these issues a third point emerges, which is that of the onus probandi. If the transaction appears to be unconscionable, then the burden of proving that the contract was not induced by undue influence is to lie upon the person who was in a position to dominate the will of the other.

Merely because the parties were nearly related to each other or merely because the donor was old or of weak character, no presumption of undue influence can arise. Generally speaking the relations of solicitor and client, trustee and cestui quo trust, spiritual adviser and devotee, medical attendant and



A.S.(MD)No.305 of 2021

WEB COPY

patient, parent and child are those in which such a presumption arises.

(C)Civil P.C.(1908), Order 6 Rule 4 and 2, Order 7, Rule 1 - Plea of undue influence - Court must scrutinise pleadings to find out that a plea has been made out and that full particulars thereof have been given before examining whether undue influence was exercised or not. and (1906) 33 Ind App 86 (PC), Rel .on.”

49. When a plea of undue influence is raised at the first instance, the party pleading the same must show that there existed some relationship between the donor and donee and that the donee is in a position to dominate the Will of the donor. If that is shown and if the transaction appears to be unconscionable, then the burden of proving that the contract was not induced by undue influence is to lie upon the person, who was in a position to dominate the will of the other.

50. In the third judgment above referred, the Hon'ble Division Bench of this Court has specifically observed that in order to establish the existence of a fiduciary relationship, it is necessary to show that one party relies on the other to such an extent that there is a complete trust



A.S.(MD)No.305 of 2021

WEB COPY

and confidence placed on the other, thus facilitating him to influence the former and if that is proved, then if such a person in a fiduciary position wants to have a benefit in a transaction executed in his favour, it is absolutely essential that he must show that the result or the benefit had not flown out of the influence.

51. In the case on hand, no doubt, there existed a relationship of father and son, but there is absolutely no evidence to show that there existed fiduciary relationship in such a way, that the father relies on the third son to such an extent, there is a complete trust and confidence placed on him.

52. It is pertinent to note that the second defendant though alleged in the chief examination affidavit that Ex.A.1 was obtained by the first plaintiff by exercising undue influence and coercion, in cross-examination would say that he was not aware as to whether the settlement deed was executed on 02.04.2008 in favour of the first plaintiff in respect of four items of properties and that he was not in the town on that day and that when he returned to home at about 07.00 p.m. or 08.00p.m. on 10.04.2033, his father informed that the first plaintiff



A.S.(MD)No.305 of 2021

WEB COPY

had taken him for getting amount from finance and compelled him to put his signatures and he does not know as to for what purpose it was taken.

53. Considering the above, it is very much clear that the second defendant was not at all available in the station on 02.04.2008. It is pertinent to mention that neither in the written statement filed jointly by the defendants 1 and 2 nor in the additional written statement filed by the second defendant, it has been averred that the first defendant was taken by the first plaintiff to get a loan from the finance company and compelled him to put his signatures. More importantly, in Ex.A.2 – cancellation deed, the first defendant has neither averred the coercion or undue influence alleged to have been exercised by the first plaintiff nor the reason that he was taken by the first plaintiff to get a loan from the finance and at that time compelled to put his signatures. On the other hand, he has stated that since he had realised that the purpose and intention of executing the settlement deed could not be carried out and as he wanted to make some changes in respect of the properties given in the settlement deed and that he was in confusion, he was constrained to execute the cancellation deed. But in the written statement, the first defendant has nowhere whispered as to what was his confusion and what



A.S.(MD)No.305 of 2021

WEB COPY

were the changes he wanted to make in respect of the properties.

54. Considering the above, as rightly contended by the learned Senior Counsel, the defendants were not clear as to the basis on which they are challenging the settlement deed and the reasons for cancelling the same.

55. Now turning to the plea of non-acceptance of the gift by the first plaintiff, the learned Counsel for the appellant would contend that the possession of the suit properties shown in the settlement deed were not handed over to the first plaintiff, that the first defendant while executing the settlement deed on 20.06.2008 under Ex.B.3 in favour of the second defendant handed over the possession of the properties including the first item of the suit properties, that the second defendant has been in possession and enjoyment of the properties including the first item of the suit properties since Ex.B.3, that Ex.A.1 had been cancelled by the first defendant on the very next day, ie., on 11.04.2008 and that therefore, there was absolutely no occasion or chance for the first plaintiff to accept the settlement and there is absolutely no evidence to prove the factum of acceptance and relied on the decision of this Court in



A.S.(MD)No.305 of 2021

WEB COPY

Kali Naicker and others Vs Jaganathan and others reported in **2013(1)**

CTC 318, to prove his contention that in order to establish a valid gift, there has to be acceptance supported by evidence.

“ Gift – pre-requisites for valid Gift – Gift how to be made – Acceptance of Gift – Gift Deed executed by donor in favour of donee – When Gift Deed comes into effect – Acceptance of Gift by donee is essential for valid Gift – Gift deed was not acted upon and validly accepted by donee – After execution of Gift Deed, donee has cancelled Gift Deed by Cancellation Deed and same was acted upon – Non-acceptance of Gift by donee would make Gift invalid.”

56. The learned Senior Counsel for the respondents would submit that Ex.A.1 settlement deed was handed over by the donor to the first plaintiff and the same was sufficient enough to prove that the gift was accepted and relied on the judgment of the Patna High Court reported in AIR 1975 Patna 140 (Samrathi Devi Vs. Parasuram Pandey and others) and the relevant paragraph is extracted hereunder:

“8. Mr. Premlal, however, contended that the transfer by way of gift in favour of the plaintiff purported to have been made under the document (Ext. 5) was not complete as the same



WEB COPY



A.S.(MD)No.305 of 2021

was not accepted by the plaintiff, and she herself had stated to this effect in the impugned document (Ext. D). It is true that a transaction of gift in order to be complete must be accepted by the donee during the lifetime of the donor. The fact of acceptance, however, can be established by different circumstances, such as by the donee's taking possession of the property or by possession of the deed of gift alone. There are numerous authorities in support of the proposition that if a document of gift after its execution or registration in favour of the donee is handed over to him by the donor which he accepts, it should amount in law to be valid acceptance of the gift. In support of this proposition, Mr. J. C. Sinha relied upon a decision of the Judicial Committee in the case of [Kalyanasundaram Pillai v. Karuppa Mooppanar](#), (AIR 1927 PC 42). In this case, their Lordships approved the view of the Full Bench of the Bombay High Court in [Atmaram Sakharam v. Vaman Janardhan](#), (AIR 1925 Bom 210) (FB) that where the donor of immovable property handed over to the donee an instrument of gift duly executed and attested, it would amount to the acceptance of the gift by the donee, and the donor had no power to revoke the gift even if the registration of the instrument had not taken place. This court also in [Ram Chandra Prasad v. Sital Prasad](#), (AIR 1948 Pat 130) took a similar view and held that the fact of the deed being handed over by the donor to the donee was sufficient evidence of his having accepted the gift, and that the



WEB COPY



A.S.(MD)No.305 of 2021

acceptance of the said document was a relevant fact to prove the acceptance of the gift by him. To the same effect is the view of the High Court of Travancore and Cochin in the case of Esakkimadan Pillai v. Esakki Amma, (AIR 1953 Trav-Co 336). It is not necessary to multiply authorities in support of this proposition. From the above, discussion, it must be held that the deed of gift executed by defendant No. 1 in favour of the plaintiff was a valid and binding document resulting in a complete transfer of the interest of defendant No. 1 in respect of the suit properties to the plaintiff.”

57. The Hon'ble Supreme Court in ***Asokan vs Lakshmikutty and others*** reported in ***2007(13) SCC 2010***, has specifically held that the Transfer of Property Act does not prescribe any particular mode of acceptance and it is the circumstances attending to the transaction which may be relevant for determining the question, that there may be various means to prove acceptance of a gift and that the document may be handed over to a donee, which in a given situation may also amount to a valid acceptance and also the fact that possession had been given to the donee also raises a presumption of acceptance.



A.S.(MD)No.305 of 2021

WEB COPY

58. At this juncture, it is necessary to refer the judgment of the Hon'ble Supreme Court in ***Daulat Singh (D) Thr. Lrs. vs The State Of Rajasthan(Civil Appeal No.5650 of 2010, dated 08.12.2020)***, wherein the Hon'ble Apex Court while referring to the ***Lakshmikutty's*** decision above referred has 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.

25. 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., page 19).

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

27. Hence, being an act of receiving willingly, acceptance can be inferred by the implied conduct of the donee.”

59. In the case on hand, according to the plaintiffs, though he was not available at the time of execution of Ex.A.2 settlement, his father –



A.S.(MD)No.305 of 2021

first defendant has thereafter called him and handed over the document.

WEB COPY

It is pertinent to note that the first plaintiff has produced the original settlement deed, dated 02.04.2008, along with the plaint. Moreover, the defendants by raising their plea that Ex.A.1 was obtained by undue influence, has taken an inconsistent plea that the settlement was not accepted by the plaintiff. It is pertinent to note that the defendants in their written statement or in additional written statement has nowhere specifically pleaded that the first plaintiff did not accept the settlement.

60. It is necessary to refer the decision of the Division Bench of this Court in ***S.Shanmuga Sundaram Vs. S.Mohan and others*** reported in ***2023(1) CTC 30*** and the relevant paragraph is extracted hereunder:

“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



WEB COPY



A.S.(MD)No.305 of 2021

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 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”

61. As rightly observed by the Division Bench of this Court, the appellant's stand that the settlement deed was not voluntary and was executed due to coercion and undue influence, are inconsistent with the stand that the settlement was not accepted by the first plaintiff. Since the



A.S.(MD)No.305 of 2021

defendants have taken a plea that the document was obtained by coercion and undue influence, it can only be inferred that the settlement was accepted.

62. The second defendant has also taken a stand in the written statement that the second item of the suit properties was owned by his mother Pommakkal and that since it is a joint family property, the first plaintiff has no right to claim the said property individually. It is also the contention of the second defendant that since the property was owned by his mother, his father – first defendant has no right to execute any document in respect of the said property.

63. For this plea, as rightly pointed out by the learned Senior Counsel for the respondents, the answer is available in the document produced by the defendants under Ex.B.4 settlement deed said to have been executed by the first defendant in favour of the first plaintiff on 20.06.2008, whereunder the first defendant has allegedly settled some properties including the second item of the suit properties. In Ex.B.4, the first defendant has specifically stated that the said second item of the property was owned and possessed by his wife Pommakkal and during



A.S.(MD)No.305 of 2021

WEB COPY

her life time, she had executed a Will dated 20.02.1988 in favour of her husband – first defendant and after the death of Pommakkal, the Will has come into force and on that basis, the second item of the property came to be owned by him.

64. Though the first plaintiff has stated that he was not aware of Ex.B.4 settlement and that he has claimed the ownership of the suit properties including the second item on the basis of Ex.A.1 settlement deed and not on the basis of Ex.B.4 settlement deed. Ex.B.4 was produced and exhibited by the second defendant. Since the second defendant himself has produced and exhibited Ex.B.3 settlement deed and that since the first defendant has specifically stated as to how the second item of the property came to be owned by him, the present contention of the second defendant that the first plaintiff cannot claim the second item of the suit properties cannot be accepted.

65. Moreover, the plaintiffs have alleged some suspicious circumstances surrounding Ex.A.2 cancellation deed. It is evident from the records that on 11.04.2008, when Ex.A.2 cancellation deed was executed by the first defendant, he has also entered into a sale agreement



A.S.(MD)No.305 of 2021

WEB COPY

with one Gnanavel in respect of the said properties under Ex.B.1 and that subsequently, the same was cancelled under Ex.B.2 on 23.06.2008. Admittedly, the said Gnanavel is none other than the brother-in-law of the second defendant's son.

66. As already pointed out, the first defendant has allegedly executed three settlement deeds in favour of his three sons under Exs.B.3 to B.5 respectively and under Ex.B.3 settlement deed, he has settled some properties including the first item of the property in favour of the second defendant. As rightly pointed out by the learned Senior Counsel for the respondents, when the first item of the suit properties was settled in favour of the second defendant on 20.06.2008, the sale agreement under Ex.B.1 in favour of the said Gnanavel, in respect of the first item of the suit properties was in force. More importantly, the said Gnanavel has subscribed his signature as an attesor to Ex.B.3 settlement deed. It is further evident that when the sale agreement – Ex.B.1 was cancelled on 26.03.2008, the second defendant has entered into a sale agreement with the said Gnanavel under Ex.B.8 and subsequently, the same was also cancelled on 23.09.2010 under Ex.B.10. The learned Senior Counsel for the respondents would submit that the above sale agreements and



A.S.(MD)No.305 of 2021

cancellation of sale agreements came to be executed only to show that Ex.A.2 cancellation deed was acted upon and that the subsequent Ex.B.3 settlement deed was also acted upon. Considering the above circumstances, the above submission deserves to be accepted.

67. As rightly contended by the learned Senior Counsel for the respondents, the first defendant has handed over the possession of the suit properties to the first plaintiff on the date of Ex.A.1 settlement deed itself, as the same is evident from the recitals of the said document. Though the first plaintiff has alleged that he has been in possession and enjoyment of the suit properties, including the first item of the properties, it is not in dispute that there were 13 shops in the first item of the properties and some of the shops were leased out to the tenants.

68. No doubt, as rightly pointed out by the learned Counsel for the appellant, P.W.1 in his cross-examination would admit that the second defendant has been receiving the rents for the past 12 years. P.W.1 would further say that he had received rents for two months and that he had put up a shed in the vacant space available in the first item of the suit properties and running Anita Steel Industries in the name of his wife.



A.S.(MD)No.305 of 2021

WEB COPY

Just because the second defendant was managed to get rents from some of the tenants, it cannot be stated that he had been in actual possession and enjoyment of the suit properties. Considering the recitals in Ex.A.1, it can only be inferred that the first plaintiff was in constructive possession of the suit properties. On considering the entire facts and circumstances, the finding of the trial Court that Ex.A.1 settlement deed is valid and acted upon, cannot be found fault with.

69. Now turning to the validity of Ex.A.2 – cancellation deed, the learned Senior Counsel for the respondents would submit that the first defendant has not reserved any power of revocation in Ex.A.1 and in the absence of any such power, the settlement cannot be cancelled unilaterally and relied on the decision of this Court in ***S.Packialakshmi Vs. K.Baskaran and another*** reported in ***(2017)2 MLJ 502*** and the relevant passages are extracted hereunder:

“25. Admittedly, the settlement deed of the year 2007, which is marked as Ex.P.26, does not show any power of Revocation. The settlor has not reserved for any power of Revocation. In the absence of any power of Revocation of



A.S.(MD)No.305 of 2021

Settlement Deed, the settlement cannot be cancelled unilaterally.

26. Unless and until the power of Revocation is reserved in the documents, such unilateral revocation cannot be sustained in law. It is well settled that settlement can be revoked only if it falls within the exception under [Section 126](#) of the Transfer of Property Act. Without bringing the case under exception provided in the [Transfer of Property Act](#), the unilateral cancellation of the document is not permissible in law. Once the settlement is executed, title passes to the settlee and transfer is completed, the same cannot be cancelled unilaterally by the settlor.”

70. In Ex.A.1 settlement deed, the first defendant has specifically stated that he has no right or power to change or amend or cancel the settlement deed and the exact wordings are extracted hereunder:

“நேத தான செட்ல்மெண்ட் ஆவணத்தை எக்காரணத்தைக் கொண்டும்
நான் மாற்றுவாஇ அல்லது திருத்துவா அல்லது ரத்து செய்யுவா
எனக்கு எவ்வித உரிமையும் அதிகாரமும் லேலை”

71. Considering the above recitals in Ex.A.1 settlement deed that the first defendant has not reserved any right to cancel or revoke the



A.S.(MD)No.305 of 2021

settlement deed and taking note of the legal position above referred, this Court has no hesitation to hold that the unilateral cancellation of settlement deed vide document under Ex.A.2, dated 11.04.2008 is invalid in law. Considering the above, the decision of the trial Court in decreeing the suit as prayed for, cannot be found fault with and this Court is in entire agreement with the findings arrived at by the trial Court. Consequently, this Court concludes that the Appeal Suit is devoid of merits and the same is liable to be dismissed. Considering the other facts and circumstances and the relationship between the parties, this Court further decides that the parties are to be directed to bear their own costs and the above points are answered accordingly.

72. In the result, the Appeal Suit is dismissed, confirming the judgment and decree passed in O.S.No.20 of 2019, dated 01.09.2021, on the file of the Principal District Court, Dindigul. Consequently, C.M.P. (MD)Nos.10846 of 2021 and 10327 of 2022 are dismissed and the other connected Miscellaneous Petitions are closed. The parties are directed to bear their own costs.

29.09.2023



A.S.(MD)No.305 of 2021

WEB COPY

Index : Yes : No

Internet : Yes : No

SSL

To

1. The Principal District Court, Dindigul.

2. The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



WEB COPY



A.S.(MD)No.305 of 2021

K.MURALI SHANKAR,J.

SSL

PRE-DELIVERY JUDGMENT MADE IN

A.S.(MD)No.305 of 2021

29.09.2023