IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 25.04.2024

PRONOUNCED ON : 09.07.2024

THE HONOURABLE Ms. JUSTICE P.T. ASHA

A.S.No.971 of 2009

1.Palani

2.P.Nagaraj … Appellants

Vs.

1.Janaki

2.Vasantha

3.T.Parasuram (Died) ... Respondents

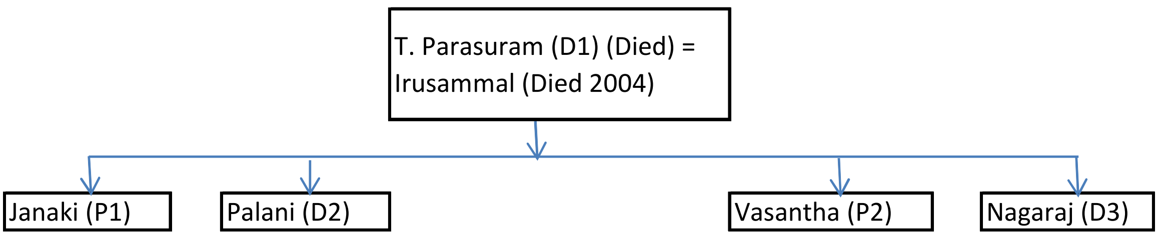
(R3 died. Appellants 1 and 2 and respondents 1 and 2 are legal representatives of the deceased 3rd respondent vide order dated 12.08.2022 in A.S.No.971 of 2009)

Prayer: First Appeal is filed under Section 96 seeking to set aside the decree and judgement dated 12.01.2009 in O.S.No.7822 of 2007 on the file of the VI Additional Judge, City Civil Court, Chennai.

For Appellants	:	Mr. R.Ganesh Kumar for Mr. P.Vishnu
For Respondents 1 and 2	:	Mr. J.Saravanavel
For Respondent 3	:	Died.

JUDGEMENT

Challenging the decree for partition granted by the VI Additional Judge, City Civil Court, Chennai, the defendants 2 and 3 are before this Court. The following is the genealogy of the parties:



Plaintiffs' case:

2. It is the case of the plaintiffs that the suit schedule property was the ancestral property of their father and the property had been allotted to the share of the 1st defendant under a partition between him and his brother in the year 1983. The plaintiffs' case is that their father was living a wayward life and was addicted to alcohol and it was their mother who was taking care of the family, till she died. Their mother Irusammal had passed away in the year 2004.

3. The plaintiffs would submit that though they are married they continued to live in the suit schedule property. The 1st plaintiff was taking care of their mother. It is her case that she was working as a maid in a house in the locality and had spent huge sums of money for the marriage of defendants 2 and 3 by borrowing money from her employer. The plaintiffs would submit that the 2nd and 3rd defendants were causing continuous harassment and torture to the plaintiffs of

their peaceful possession and enjoyment of the suit schedule property. In fact, the defendants 2 and 3 have not permitted the 1st defendant to stay in any portion of the building but had put a cot under a staircase leading to the 1st floor. The plaintiffs are residing in one room portion each in the ground floor.

4. The plaintiffs would submit that the 2nd and 3rd defendants apart from living in the suit schedule property had also rented out portions to about 5 tenants and have been collecting rents to the tune of Rs.4,600/- per month. The 2nd defendant is also an alcoholic and uses abusive and filthy language towards the plaintiffs.

5. The plaintiffs would submit that the defendants 2 and 3 are demanding vacant possession of the portions in their occupation stating that it entirely belongs to them. The plaintiffs then came to know that the defendants 2 and 3 have fraudulently got the 1st defendant to execute a settlement deed in their favour on 11.10.2000

registered before the Joint Sub Registrar II, Thousand Lights, Chennai. The plaintiffs thereafter obtained certified copy of the same and it is their contention that the settlement deed would not bind their share in the property.

6. The plaintiffs would submit that the suit property being an ancestral property, they are entitled to the share in the same. When questioned, the 1st defendant had stated that the 2nd and 3rd defendants had asked him to sign it stating that it is a proposal for insurance policy and that he had never signed the settlement deed. They would also state that the photograph which has been affixed in the settlement deed was not current photograph of the 1st defendant and appears to be morphed from the voter ID.

7. The plaintiffs had thereafter issued a legal notice dated 17.02.2007 calling upon the defendants to cancel the settlement deed and demanding partition of the plaintiffs' share. There was no

response to the above and therefore the plaintiffs have come forward with the suit in question.

Defendants' case:

8. The 1st defendant had remained ex parte.

9. The 2nd and 3rd defendants have filed a joint written statement inter alia denying the claim of the plaintiffs. It is their contention that the suit property is neither ancestral property nor a coparcenary property and hence the 1st defendant voluntarily and without any undue influence, out of his free will executed an irrevocable settlement settling suit property upon the defendants 2 and 3. They would deny the contention of the plaintiffs that their mother was taking care of their family and would submit that they had also contributed for the family. The allegations of the plaintiffs that the 1st defendant had obtained loan to conduct marriages of the defendants 2 and 3 was refuted.

10. The defendants would submit that the 1st plaintiff had got married between years 1989 – 1990 and the 2nd plaintiff got married between the years 1998 – 1999 and after the marriage they had not been residing in the suit schedule property. The defendants would submit that the plaintiffs were living in and around Chennai. The 1st plaintiff had on her own volition left her husband and started living separately and taking pity on her, the defendants had allowed her to live in one portion of the suit schedule property in the year 2003 - 2004. Thereafter, the 2nd plaintiff requested permission of the defendants to occupy another portion and the defendants have also permitted her to occupy one portion. After entering possession with the permission of the defendants, the plaintiffs are now asserting independent right to the property.

11. The defendants denied the allegations of the plaintiffs that

they were disturbing the peaceful possession and enjoyment of the plaintiffs in the suit property. They would contend that they are the exclusive owners of the suit schedule property and the plaintiffs are not entitled to any share as the property was self acquired property of their father and he has executed the settlement deed. Therefore, they sought for the dismissal of the suit.

<u>Trial Court:</u>

12. The Trial Court had framed the following issues:

> *"1.Whether the plaintiffs are entitled to get partition? If so what is the ratio?*
>
> *2.Whether the 2nd and 3rd defendants are absolute owners as per settlement deed?*
>
> *3.Whether the settlement deed dated 11.10.2006 is valid and binding the plaintiffs?*
>
> *4.To what other relief the plaintiffs are entitled to?*

13. The 1st plaintiff examined herself as P.W.1 and marked Ex.A.1 to Ex.A.6. On the side of the defendants, the 3rd defendant had examined himself as D.W.1 and marked the original settlement deed as Ex.B.1.

14. The learned Trial Judge taking note of the amendment brought about to the Succession Act, in and by which daughters were also to derive title to the ancestral property on birth decreed the suit with reference to the partition. As regards Ex.B.1, the learned Judge had observed that none had been examined to prove the settlement deed and the 1st defendant has not appeared and deposed in favour of defendants 2 and 3. Ultimately, the plaintiffs were allotted a 1/5th share each in the suit schedule property and the learned Judge held that the settlement deed executed by 1st defendant in favour of

defendants 2 and 3 was not binding upon the plaintiff. Aggrieved by the above, the defendants 2 and 3 are before this Court.

Appeal Suit:

15. The following points for consideration arise in the above Appeal Suit:

(a)Whether the plaintiffs have discharged their burden of proof, proving settlement deed is invalid document?

(b)Whether the defendants have proved that the settlement deed Ex.A.1 = Ex.B.1 is a valid document?

16. From the grounds that have been raised in the appeal there appears to be no challenge to the decree for partition granted. However, in the course of the arguments, the learned counsel for the defendants has touched upon the above by stating that the plaintiffs

have not proved that the property in question is an ancestral property. The 1st defendant had died pending the appeal and the plaintiffs and the defendants 2 and 3 who are his only legal heirs were recorded so.

Submissions:

17. Mr. R.Ganesh Kumar, learned counsel for the defendants would submit that under Section 101 of the Indian Evidence Act, the burden is upon the person alleging fraud to prove the same. He would also draw the attention of the Court to the proviso to Section 68, which clearly stipulates that in the normal course where the execution of document has been denied then the onus is upon the person who pleads so to prove the same. In the instant case, the plaintiffs except for pleadings that the settlement deed has been obtained by fraud has not let in any evidence whatsoever to prove the same. That apart, they have also not chosen to put the father, the 1st defendant into the box. Even the pleadings in this regard are very sketchy.

18. The only plea raised by the plaintiffs with reference to the fact that the document has been fraudulently executed is set out in paragraph no.9. However, none of the statement that had been set out in paragraph no.9 has been substantiated in evidence by the plaintiffs. He would rely upon the Judgement of the Hon'ble Supreme Court reported in ***2006 (5) SCC 558 – Anil Rishi Vs. Gurbaksh Singh.*** The subject matter of that Judgement was a suit for declaration filed by the respondent alleging that sale deed executed on 26.03.1990 was forged and fabricated document. This statement has been denied by the appellant / defendant and the issue that was framed was *Whether the sale deed was forged and a fraudulent document?* It appears that thereafter the learned Judge had re-framed the issue and the new issue would read as *Whether the alleged sale deed dated 26.03.1991 is a valid and genuine document?*

19. By reason of re-framing the issue, the burden of proof

shifted upon the defendant. Therefore, the defendant challenged the same by filing revision before the High Court. The High Court upheld the order passed by the Trial Court stating that the defendant is in a dominating position to prove the document and once it is proved the onus shifts to the plaintiff to show that it was fraudulently obtained. However, the fact that the defendant was in dominating position has to be proved by the plaintiff at first instance.

20. The learned counsel for the defendants herein would submit that one of the allegation made in the plaint was that the defendants had misused the relationship that they had with the 1st defendant, their father and had manipulated into signing the settlement deed. Therefore, the Trial Court has erred in shifting the burden on the defendants to prove that the document is a valid document.

21. The learned counsel would submit that the Courts below has totally erred in observing that the execution of the settlement deed has

not been proved by the defendants. It has to be noted that pending the proceedings, the 1st defendant had died and therefore, how is 1/5th share would devolve is matter in issue.

22. Mr. J.Saravanavel, learned counsel appearing on behalf of the plaintiffs would submit that once the settlement deed is challenged it is for the defendants to prove its execution and the onus is upon the defendants to disprove the case that the document had been obtained by them fraudulently. He would submit that the defendants have not proved the execution of the settlement deed in the manner known to law.

23. The learned counsel would submit that the father 1st defendant was under the care and custody of the sons and they have misused their relationship and has misrepresented to the 1st defendant and obtained his signature in the settlement deed. He would rely upon the Judgement reported in ***2012 (4) CTC 639 – Valliammal Vs.***

Sokkammal with particular reference to paragraph no. 26.

24. He would also rely upon the Judgement reported in ***2015 SCC Online Mad 9789 – Tamilkodi Vs. N.Kalaimani and another*** with particular reference to paragraph nos.20 and 22. On the similar lines, the learned counsel had relied on the Judgement of the Hon'ble Supreme Court reported in ***2004 (9) SCC 468 – Krishna Mohan Kul vs. Pratima Maity and others*** relying upon paragraph nos.13, 14 and 17.

25. The learned counsel would submit that the plaintiffs have challenged the validity of the settlement deed even in the legal notice issued by them and the defendants have not taken any steps to prove the execution. That apart, the father had remained ex parte and therefore adverse inference has to be drawn in favour of the plaintiffs by presuming that the father had no defense against the plaintiffs'

contention that Ex.A.1 settlement deed had been obtained fraudulently. That apart, D.W.1 has himself admitted that the father was addicted to liquor. Therefore, he would submit that the Trial Court has rightly come to the conclusion that the settlement deed has not been proved.

26. Heard the learned counsels on the either side and perused the records.

27. As stated earlier there is no challenge to the decree for partition granted to the plaintiffs in the memorandum of grounds of appeal. The dispute is now only with reference to the devolution of the share of the 1st defendant. *Whether the property would devolve equally on the plaintiffs and the defendants or whether by reason of Ex.A.1 settlement deed, the 1/5th share would devolve only on the*

defendants? The plaintiffs had pleaded that the settlement deed had been obtained fraudulently by the defendants. In the plaint, they had made the following averments with reference to the settlement deed:

> *"..... The plaintiffs came to know that a Settlement deed was got executed by the 1st defendant in favour of the 2nd and 3rd defendant by fraud, misrepresentation and undue influence in Doc. No.1009 of 2006 dated 11-10-2006 before the Joint Sub-Registrar II, Thousand lights, Chennai-6. The plaintiffs obtained a certified copy which is produced herewith. The said settlement deed is not binding on the plaintiffs in any manner whatsoever and the said document is sham and nominal. The said scttlement deed cannot take away of the rights of the plaintiffs over the schedule property.*
>
> *9.It is submitted that the 1st defendant stated that the 2nd and 3rd defendant asked him to sign in some papers*

representing that it was a proposal of an insurance policy and that the 1st defendant never signed in any settlement deed claimed to have been executed by him in the above stated documents. The photograph of the 1st defendant affixed in the above stated settlement deed is not the true likeness of the 1st defendant's present looks. But the Photograph was taken by morphing from the voter I.D. card which was issued 3 years back.

28. The defendants have countered the above statement as follows:

"It is not true the settlement deed was executed by the 1st defendant in favour of this defendant by fraud, misrepresentation and under influence. If it is the same, it is open to him challenge in the court of law.

11) With regards to the averments in para-9 are denied. This defendant states that the plaintiffs conveniently have hidden the vital truth as to whom they came to known about the execution of the settlement deed by the 1st defendant in favour of the 2nd and 3rd defendant. The plaintiffs were very much aware of the execution of the settlement deed and in fact they were present at the time of execution. The 1st defendant have voluntarily consciously and willfully and without any forceful coercion, under influence has executed the settlement deed. Once the settlement deed before the competent court of law. It is not true that the photograph affixed on the settlement deed is a morphed from the voter ID and put the petitioner under strict proof of the same. I state that at the time of execution of the settlement deed the registrar executed the settlement deed only after proper *legal formalities. Therefore the questions of morphing the photograph doesent arise. The averments in para - 9 are the statements of the plaintiffs along and not that of the 1st defendant, it at all, it would be under the instigation of the plaintiffs. It is also false to state that 2nd and 3rd defendant refused to maintain 1st defendant since the 1" defendant have not challenged settlement deed and have not received any court notice regarding the same."*

29. The defendants have therefore taken out two defenses with reference to the plaintiffs' claim relating settlement

"(a)That the plaintiffs have not come forward to state as to when they had come to know about the execution of the settlement

(b)That the settlement deed had been executed by the father on his own free will and the plaintiffs have to prove the contrary."

30. From the allegations in the plaint, it is clear that the plaintiffs have challenged the settlement deed on the ground that it is a fabricated one. They have also stated that they have been informed by the 1st defendant that he had never executed settlement deed and he was asked to sign papers stating that it is a proposal of Insurance policy. This fact is denied by the defendants. Further, the document in question is a registered document. Therefore, there is a presumption that the same is a genuine document.

31. Section 68 which deals with the proof of execution of the document states that where a document is required by law to be attested then such document cannot be used in evidence unless atleast

one witness is examined to prove the execution where they are alive. However, the proviso says that it is not necessary to call the attesting witness to prove any document not being a will which has been registered. However, where the execution of the registered document is denied by a person then the same has to be proved.

32. The plaintiffs have taken out two defenses for challenging the settlement deed. In paragraph no.8 of the plaint they would submit that the settlement deed has been executed by fraud, misrepresentation and undue influence. However, in paragraph no.9, the plaintiffs would state that the 1st defendant had admitted the execution of the settlement deed, however the 1st defendant had informed that he was told that he was executing the proposal for insurance policy and was not aware that he was signing the settlement deed.

33. Therefore, from the plaint it is clear that the execution of the

document has been proved. Therefore, the onus would shift upon the plaintiffs to now prove that the document has been fraudulently obtained and on a misrepresentation particularly when the defendants have categorically denied this contention. That apart, the 1st defendant has not chosen to support the case of the plaintiffs. The non prosecution of the suit by the 1st defendant can only be construed as he having admitted the execution of the settlement deed. If the 1st defendant has not executed such settlement deed then upon receipt of the summons in the suit and on perusing the contents of the plaint, he would have come forward to state that he had not executed the settlement deed and what he was led to believe he was executing was only a proposal for insurance policy.

34. In the Judgement of the Hon'ble Supreme Court reported in ***2001 (1) CTC 359 – Ishwar Dass Jain (dead) through LRs Vs.***

Sohan Lal (dead) by LRs, the Hon'ble Supreme Court had stated as follows:

> *"The mode of proof of documents required to be attested is contained in sections 68 to 71 of the Evidence Act. Under section 68, if the execution of a document required to be attested is to be proved, it will be necessary to call an attesting witness, if alive and subject to the process of Court and is capable of giving evidence. But in case the document is registered - then except in the case of a will - it is not necessary to call an attesting witness, unless the execution has been specifically denied by the person by whom it purports to have been executed. This is clear from section 68 of the Evidence Act. It reads as follows:*
>
> *"Section 68: If a document is required by law to be attested, it shall not be used as evidence until one*

attesting witness atleast has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908, unless its execution by the person by whom it purports to have been executed is specifically denied."

In the present case, though it was stated in the written statement that there was no relationship between the parties as mortgagor and mortgagee, the defendant admitted in his additional pleas in the same written statement that the mortgage deed was executed but he *contended that it was executed to circumvent the Rent Control legislation. In fact, in his evidence as DW2 the defendant admitted the execution of the mortgage. It must therefore be taken that there was no specific denial of execution. Hence it was not necessary for the plaintiff to call the attestor into the witness box, this not being a will. The plaintiff could therefore not be faulted for not examining any of the attestors. Hence the mortgage stood proved by the certified copy. The Courts below were right in accepting that the deed was proved. Point 2 is decided in favour of plaintiffs- appellants.*

35. The converse is applicable in the instant case since it is the defendants who are asserting the deed and the plaintiffs are denying the same. The plaintiffs are denying the execution of the settlement on the ground that the father had executed the document thinking that

he was executing the proposal for insurance policy and not that he was executing a settlement deed. Further, the proviso to Section 68 would be applicable only to the person who is claimed to have executed the document and who denies such execution.

36. In the instant case neither the execution nor its non execution has been accepted or denied by the 1st defendant. In fact, the 1st defendant by remaining ex parte has tacitly accepted the execution of the settlement deed.

37. In the Judgement of the Hon'ble Supreme Court reported in ***2006 (5) SCC 558 – Anil Rishi Vs. Gurbaksh Singh,*** the learned Judges have drawn a distinction between the terms “burden of proof” and “onus of proof”. In paragraph no.19 of the said Judgement they would set out as follows:

> *“There is another aspect of the matter which*

should be borne in mind. A distinction exists between a burden of proof and onus of proof. The right to begin follows onus probandi. It assumes importance in the early stage of a case. The question of onus of proof has greater force, where the question is which party is to begin. Burden of proof is used in three ways : (i) to indicate the duty of bringing forward evidence in support of a proposition at the beginning or later; (ii) to make that of establishing a proposition as against all counter evidence; and (iii) an indiscriminate use in which it may mean either or both of the others. The elementary rule is Section 101 is inflexible. In terms of Section 102 the initial onus is always on the plaintiff and if he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those circumstances, if any, which would disentitle the *plaintiff to the same.”*

38. The learned Judges have set out that the elementary rule in Section 101 is inflexible and would constitute the burden of proof. As regards Section 102 the initial onus is always upon the plaintiff and once he discharges the onus cast upon him then the same shifts to the defendant. Therefore, in the case on hand, the plaintiffs have come forward with a case that the settlement deed has been fraudulently obtained and have also gone on to state that the father had informed them that he had only executed a proposal for insurance policy and not a settlement deed. However, the father has not chosen to appear either in person and file written statement or to adduce evidence in support of this contention of the plaintiff. Therefore, the initial burden which is fixed on the plaintiffs has not been discharged particularly when the plaintiff has not only stated that the document has been fraudulently created but goes on to admit execution but state that the execution was on a misrepresentation that what was being

executed was only a proposal for insurance policy and not a settlement deed.

39. In the light of the statement in the plaint not having been proved the onus cannot be shifted on to the defendants to prove otherwise. Therefore, the first point for consideration is answered against the plaintiffs and the second point for consideration is answered in favour of the defendants.

40. Considering the fact that the defendants have not challenged the portion of the decree, which grants partition of a 1/5th share each to the plaintiffs, the same does not require any re-consideration. However, the finding of the Trial Court that the settlement has not been executed by the 1st defendant has to necessarily set aside and is accordingly set aside. Pending appeal since the 1st defendant had died, his share would devolve on the defendants 2 and 3 by virtue of Ex.B.1 settlement deed. Therefore, the decree of the Trial Court gets

partially modified as follows:

That the plaintiffs are entitled to a 1/5th share each in the suit schedule property; that the defendants 2 and 3 would be entitled to a half share each in the 1/5th share of their father along with their 1/5th share. Accordingly, defendants 2 and 3 would be entitled to a 3/10th share each in the suit schedule property.

41. The Appeal Suit is partly allowed with the above modification. No costs.

09.07.2024

Index: Yes/No
Speaking order/non-speaking order
Neutral Citation: Yes/No
kan

To,

The VI Additional Judge,
City Civil Court,
Chennai.

P.T.ASHA, J.,

kan

A.S.No. 971 of 2009

09.07.2024