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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 04.08.2025

Pronounced on : 29.08.2025

CORAM

THE HONOURABLE MR. JUSTICE C.V.KARTHIKEYAN

C.S.No.201 of 2010

1.Prashanth Krishna Singh
2.Dushyanth Krishna Singh ... Plaintiffs

Vs

1.G.C.Bohra Finance
37, General Muthiah Street,
Elephant Gate,
Sowcarpet,
Chennai – 600 079.

2.G.C.Bohra
37, General Muthiah Street,
Elephant Gate,
Sowcarpet,
Chennai – 600 079.

3.Rohit Bohra
37, General Muthiah Street,
Elephant Gate,
Sowcarpet,
Chennai – 600 079. ... Defendants

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This Civil Suit has been filed under Order XXXVII Rule 2 of the O.S.Rules read with Order XXXIV Rule 7 of CPC, 1908, prayed for a judgment and decree against the defendants:

(a) For a declaration that the mortgage deed executed on 6.8.2009 and registered as document No. 1640 of 2009 in the office of the Sub Registrar, Mylapore is illegal, invalid and no-nest in the eyes of law and not binding on the plaintiffs and the suit properties or in the alternate if this Hon'ble Court holds that there is a valid mortgage for a direction that an account may be taken of the amounts due to the defendants by the plaintiffs herein towards the principal and interest in respect of the loan account and on payment of the same by the plaintiffs herein, the 1st defendant may be directed to deliver to the plaintiffs the mortgaged instruments and all the documents in their possession or power relating to the schedule mentioned properties and also execute and register an acknowledgement in writing to the effect that the mortgages created by the plaintiffs herein have been extinguished and also cancel the deed of mortgage dated 06.08.2009 and release the deed of hypotheca as mentioned in the schedule herein, in accordance with law.

(b) For a declaration that the alleged agreement of sale dated 4.8.2009 purported to have been entered into by the plaintiffs 1 and 2 and the 3rd defendant is illegal, invalid and nonest in the eyes of law and not binding on the plaintiffs and the suit property.

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(c) For a declaration that the Memorandum of Deposit of title deed dated 6.8.2009 is illegal, invalid and nonest in the eyes of law and not binding on the plaintiffs and the suit properties.

(d) For a Mandatory Injunction directing the defendants to return all the instrument as mentioned in Schedule-II to the plaint on a day to be fixed by this Hon'ble Court after canceling the sale by signing an acknowledgment on the debt subject to the relief claimed in prayer (a).

(e) For a permanent injunction restraining the defendants or any one claiming through them from enforcing their alleged rights claim on the basis of the schedule II instruments viz. the Memorandum of Deposit of Title Deeds, promissory notes, cheques, declaration, power of attorney, agreement for sale dated 6.8.2009 or other instruments in respect of the suit property and the plaintiffs more fully described in the Schedule I & II mentioned property.

(f) Grant such further or other reliefs: and

(g) Costs of the suit.

For Plaintiffs : Mr.R.Thiagarajan

For Defendants :Mr.A.Thiyagarajan, Senior Counsel
For Mr.S.Ramesh Kumar

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JUDGMENT

This Suit had been filed by two brothers, Prashanth Krishna Singh and Dushyanth Krishna Singh, both sons of Mrityunjaya Singh against the three defendants, M/s.G.C.Bohra Finance, a Partnership Firm, represented by the 2nd defendant G.C.Bohra and the 3rd defendant Rohit Bohra, son of the 2nd defendant, seeking a judgment and decree in the nature of a declaration that a Mortgage Deed executed on 06.08.2009 and registered as Document No.1640 of 2009 in the office of the Sub-Registrar, Mylapore, is illegal, invalid and nonest in the eyes of law and not binding on the plaintiffs or in the alternate grant redemption of the suit property and for a declaration that an agreement of sale dated 04.08.2009 said to have been entered into by the plaintiffs and the 3rd defendant in blank stamp papers is vitiated by fraud and misrepresentation and to declare it as illegal, invalid and nonest in the eyes of law and not binding on the plaintiffs and for a declaration that a Memorandum of Deposit of Title Deed dated 06.08.2009 is vitiated by fraud, misrepresentation and to declare it as illegal, invalid and nonest in the eyes of law and not binding on the plaintiffs and for a mandatory injunction directing the defendants to return all the instruments which had been described in Schedule-II of the plaint namely, the Mortgage

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Deed dated 06.08.2009 registered as Doc.No.1640 of 2009 in the office of the Sub-Registrar, Mylapore, an Agreement of Sale dated 06.08.2009, Power of Attorney dated 06.08.2009 registered as Doc.No.375 of 2009 Volume III, in the office of the Sub-Registrar, Sowcarpet, the Memorandum of Deposit of Title Deeds, five cheques drawn on State Bank of India, Gopalapuram Branch, five promissory notes and 8 blank stamp papers, to the plaintiffs after cancelling the sale by signing an acknowledgment on the debt and for permanent injunction restraining the defendants from enforcing their alleged rights on the basis of the aforementioned documents and for costs of the suit.

2.In the plaint, it had been stated that the 1st plaintiff was a distributor for Amway products and a High School drop out and lacked proper formal education. The 2nd defendant was studying in Loyola College. They were the absolute owners of a flat in the 3rd floor measuring 2284.21 sq.ft. in Block 1 of the building complex called Rani Meyammai Towers at Door No.66/10, Sathya Dev Avenue, M.R.C.Nagar, R.A.Puram, Chennai – 600 028 and also of one open car park bearing No.37 together with 655.95 sq.ft. of undivided share in 102820 sq.ft. along with amenities. It had been stated

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that the said flat had been purchased by the mother of the plaintiffs by sale deed dated 22.04.2009 registered as Document No.834 of 2009 in the office of the Sub-Registrar, Mylapore.

3.It had been further stated that the 3rd defendant, Rohit Bohra was a former classmate of the 2nd plaintiff, Dushyanth Krishna Singh. He came to know that the 1st plaintiff, Prashanth Krishna Singh was facing financial crisis in his business and offered help. The plaintiffs approached him for financial assistance. He obliged them with financial assistance of Rs.5/- lakhs over a three month period commencing from August 2008. The 3rd defendant invited the plaintiffs for a trip to Bombay and Goa and considerable amounts were spent on the trip. The 1st plaintiff was under the impression that it was a pleasure trip. But the 3rd defendant demanded reimbursement of the expenses spent for the travel and the trip and the amounts spent were treated as loan and was added to the earlier loan amount. The defendants then insisted that the 1st plaintiff should pay interest at the rate of 25% compounded monthly. Since the 1st plaintiff was not in a position to repay the loan, the interest was added to the principal and there was a demand for payment every month.

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4.The 3rd defendant then obtained five blank undated unfilled cheques and two undated, unfilled promissory notes as security for the loan given to the plaintiffs. Subsequently, when a registered mortgage was executed in favour of the 1st defendant in August 2009, three more blank undated promissory notes were obtained from the plaintiffs as security for repayment of the principal and interest. It had been contended that the five blank, signed promissory notes were in the custody of the defendants besides five blank signed cheques drawn on State Bank of India, Gopalapuram Branch, and signed by the 1st plaintiff. The defendants also obtained signatures of the plaintiffs in eight blank undated and unfilled non-judicial stamp papers. The plaintiffs apprehend that the defendants might misuse them.

5.The plaintiffs had liquidated a sum of Rs.14.50/- lakhs towards the principal and Rs.1.60/- lakhs towards interest out of the borrowals made from the defendants. The plaintiffs had borrowed funds from one Rakesh and one Saravanan for a sum of Rs.7.50/- lakhs and Rs.6/- lakhs respectively and utilized the said funds to pay the liability towards the defendants. The plaintiffs also foreclosed fixed deposits in their names in Indian Overseas Bank, Stella Maris College Branch to repay the amount

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they had taken from the defendants. It has been contended in the plaint that the plaintiffs had repaid much more than what they were liable to pay to the defendants. It has been further contended that a sum of Rs.5.50/- lakhs was due and payable by the plaintiffs to the defendants which the plaintiffs are ready to settle, provided the defendants handover the original title deeds and undated and unfilled promissory notes and cheques and other documents besides cancelling the mortgage deed.

6.The plaintiffs were then informed by the 2nd and 3rd defendants that they required certain documents from the plaintiffs to furnish the same before the Income Tax Authorities with respect to the loan they had taken. The 1st defendant suggested that the plaintiffs put any tangible property in the City as security for the debt. They requested the property to be mortgaged in their name for a sum of Rs.20/- lakhs even though only a sum of Rs.5.50/- lakhs was due to be returned by the plaintiffs to the defendants.

7.The plaintiffs then went ahead with the mortgage without doubting the intention of the defendants. They executed a first simple mortgage in favour of the 1st defendant on 06.08.2009 registered as Document No.1640

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of 2009 in the office of the Sub-Registrar, Mylapore. On the very same date, the 1st and 2nd defendants coerced the plaintiffs to execute a General Power of Attorney in favour of the 3rd defendant, which document was also executed by them. This was registered as Document No.375 of 2009 in the office of the Sub-Registrar, Sowcarpet. The defendants also obtained signatures of the plaintiffs in blank unfilled, undated non-judicial stamp papers bearing Nos.37AA 270114 and 37AA 270115. The plaintiffs agin did not doubt the intentions of the defendants. They trusted them. It had been contended that the defendants however threatened the plaintiffs for return of the amount.

8.The plaintiffs, therefore cancelled the Power of Attorney executed in favour of the 3rd defendant by a Deed of Cancellation dated 31.11.2009. It had been contended that the defendants had prepared fraudulent documents to usurp the valuable property belonging to the plaintiffs. The plaintiffs also stated that they are due and liable to the defendants to a sum of Rs.5.50/- lakhs towards the mortgage created by them. It was stated that there was no intention to create such mortgage. It had been further stated that the defendants had forced the plaintiffs to sign various other blank papers.

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9.With respect to the agreement of sale, it had been contended that it was for a total sum of Rs.1.22/- crores and it had been covenanted that the entire sale consideration had been paid to the 1st and 2nd plaintiffs by cash on several earlier occasions. The agreement of sale was however not registered. It had been contended that the tenant in occupation of the property has been paying rents to the plaintiffs. It had been further contended that the 3rd defendant introduced the 1st plaintiff as a prospective customer and opened an account in Indian Overseas Bank, Gemini Circle Branch, Chennai. The 1st plaintiff deposited a sum of Rs.1,100/- on 10.08.2009. On the very same day amounts were withdrawn by using the withdrawal slip which had been obtained by the 1st plaintiff from the 3rd defendant. Two other payments had been deposited on 11.08.2009 by the 1st and 2nd defendants and on the same day date, the said sums were also withdrawn by the defendants. It had been contended that the Mortgage Deed dated 06.08.2009 is vitiated by fraud perpetuated by the defendants who colluded with each other. The plaintiffs had also given the details of the mortgage in the plaint. According to them, they were due and payable to the defendants a sum of Rs.5,99,500/-. It was under those circumstances that the suit had been filed seeking a judgment and decree as prayed for.

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10.The defendants filed written statement. They confirmed that the 1st plaintiff had approached the defendants for financial assistance through the 2nd plaintiff. It had been stated that the 1st plaintiff used to borrow amounts from the defendants from the year 2008 and used to repay the same. The further averments about the total amount available with the defendants and the amounts repaid by the plaintiffs by borrowing from outside had been denied. The allegation that the 3rd defendant made the 1st plaintiff to reimburse the expenses spent in the trip to Bombay and Goa was also specifically denied. It had been contended that the plaintiffs had consciously executed the Power of Attorney and they had signed the promissory notes, cheques and Memorandum of Deposit of Title Deeds voluntarily and after understanding the nature of the documents.

11.The defendants further denied that they had declined to accept the amount of Rs.5,50,000/- offered by the plaintiffs. They claimed that the said amount is an incorrect amount with respect to the mortgage. It had been stated that on the face of the records, the 1st plaintiff had borrowed a total sum of Rs.40/- lakhs on two occasions, which were paid by cheques and as

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security for repayment of Rs.20/- lakhs, a simple mortgage was executed on 06.08.2009. With respect to the remaining amount of Rs.20/- lakhs, the plaintiffs had executed a Memorandum of Deposit of Title Deeds on 12.08.2009. The defendants stated that both the Deed of Simple Mortgage and the Memorandum of Deposit of Title Deeds had been lawfully executed. The plaintiffs had not repaid any amount either towards principal or interest. The allegations in the plaint regarding the amounts already paid had been denied and disputed by the defendants. It had been contended that the plaintiffs had executed the promissory notes and cheques and all other documents voluntarily with knowledge of the contents and the outcome, if the amounts are not repaid. It had been very specifically denied that they aimed to grab the property of the plaintiffs. It had thus been stated that the Suit should be dismissed.

12.On the basis of the above pleadings, the following issues were framed:

> "*1).Whether the Mortgage Deed dated 06.08.2009 registered as Doc.No.1640 of 2009 in the Office of the Sub-Registrar, Mylapore is legal, valid and binding on the plaintiffs?*

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2.If the Mortgage Deed is binding on the plaintiffs what is the amount due and payable towards the principal and interest by the plaintiffs to the defendants under the said Mortgage Deed?

3.Whether the agreement of sale dated 04.08.2009 entered into between the plaintiffs and the 3rd defendant is legal and binding on the plaintiffs?

4.Whether the Memorandum of Deposit of Title Deeds dated 06.08.2009 is valid and binding on the plaintiffs?

5.Whether the cancellation of power of attorney dated 31.12.2009, executed by the plaintiffs 1 and 2 in favour of the 3rd defendant is valid?

6.Whether the plaintiffs are entitled to permanent injunction restraining the defendants from enforcing their claims under the mortgage?

7.To what other reliefs the parties are entitled?"

13.During trial, the 1st plaintiff examined himself as PW-1 and marked Exs.P1 to P9. The 2nd defendant examined himself as DW-1 and marked Exs.D1 and D5. Ex.P1 was the certified copy of the Sale Deed in favour of the plaintiffs. Ex.P2 was the Sale Deed executed by the 1st and 2nd plaintiffs in favour of S.Syed Azam Mohamed dated 19.09.2008. Ex.P3 was the copy of the agreement of sale entered between the plaintiffs and the 3rd defendant. Ex.P4 was the copy of the Memorandum of Deposit of Title

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Deeds dated 06.08.2009. Exs.P5 and P6 were the certified copies of the Mortgage Deed executed by the plaintiffs and the original cancellation of Power of Attorney executed by the plaintiffs in favour of the 3rd defendant. The certified copy of the Power of Attorney executed by the 1st and 2nd plaintiffs in favour of the 3rd defendant was marked as Ex.P8. The original promissory note executed by the plaintiffs in favour of the 1st plaintiff was marked Ex.D1. The certified copy of the Statement of Accounts in the name of the 1st and 2nd plaintiffs were marked as Exs.D8 and D9.

14.Heard arguments advanced by Mr.R.Thiagarajan, learned counsel for the plaintiffs and Mr.A.Thiyagarajan, learned Senior Counsel for Mr.S.Ramesh Kumar, learned counsel for the defendants.

15.Mr.R.Thiagarajan, learned counsel for the plaintiffs took the Court through the facts of the case. He stated that the 3rd defendant had an earlier acquaintance with the 2nd plaintiff. Thereafter, when the 1st plaintiff had suffered losses in the business, the plaintiffs approached the 3rd defendant seeking loan. The 3rd defendant had initially advanced a sum of Rs.5/- lakhs repayable in monthly instalments. The plaintiffs were not able to repay the

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amount. Interest was also demanded on the amount advanced. The unpaid interest amount was added on to the principal.

16.Thereafter, the 3rd defendant had enticed the plaintiffs to come with him to a trip to Bombay and Goa. The plaintiffs were under the impression that it was a pleasure trip. However, the 3rd defendant demanded repayment of the ticket fare and other expenses. The 2nd plaintiff was not able to so repay the amount. The 3rd defendant therefore, sought the plaintiffs to execute a Memorandum of Deposit of Title Deeds on 06.08.2009 which was registered in the Sub-Registrar office. He further obtained signatures in five blank cheques and five blank promissory notes. Pointing out all these facts, the learned counsel stated that the gullibility of the 1st plaintiff was taken advantage of by the 3rd defendant.

17.The learned counsel contended that all the documents executed were sham and nominal and were not meant to be acted upon. The learned counsel contended that the plaintiffs admitted to have received amounts from the 3rd defendant and stated amounts have also been repaid. The learned counsel contended that even if the mortgage was found to be a true

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and lawfully executed document, the plaintiffs must be permitted to redeem the mortgage by payment of a sum of Rs.5.50/- lakhs which was the amount outstanding. The learned counsel stated that it was under these circumstances that the Suit had been filed seeking the reliefs as stated in the plaint.

18.Mr.A.Thiyagarajan, learned Senior counsel for the defendants however disputed the said contentions. The learned Senior counsel stated that the plaintiffs had borrowed a sum of Rs.40/- lakhs which is proved by Ex.P4 and a Memorandum of Deposit of Title Deed had been executed by the plaintiffs in favour of the 2nd defendant also by Ex.P5 a registered Simple Mortgage executed again by the plaintiffs in favour of the 2nd defendant. The learned Senior Counsel contended that the amount were advanced by two cheques and the aforementioned documents had been executed as security for the amounts advanced by the 3rd defendant in favour of the plaintiffs. The learned Senior Counsel contended that Exs.P4 and P5, the Memorandum of Deposit of Title Deeds and the registered Simple Mortgage had been entered into by the plaintiffs with knowledge and consent. It had been further contended that the plaintiffs have not

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established fraud or coercion. Mere statements would not constitute that the documents are null and void.

19.The learned Senior Counsel further pointed out that the defendants were always ready to admit to the alternate prayer provided the plaintiffs pay the entire amounts of Rs.40/- lakhs together with interest at 18% per annum. The learned Senior Counsel further stated that the payment of Rs.40/- lakhs could be easily proved since the amounts were paid through cheques and is reflected in the bank statement marked as Ex.P9. On the other hand, he contended that the plaintiffs have not proved any repayment of the amounts borrowed. The learned Senior Counsel further pointed out that the 1st plaintiff had admitted during cross examination that he had signed the promissory note voluntarily. It had been further contended that the stipulations under Order VI Rule 4 CPC had not been complied with in the pleadings which contained allegations of fraud. The learned Senior Counsel further stated that the suit is vexatious and frivolous and therefore, urged that the suit should be dismissed.

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Issue Nos.1, 2 and 4:

20.These three issues surround the Mortgage Deed dated 06.08.2009 registered as Doc. No.1640 of 2009 in the office of the Sub-Registrar, Mylapore and the Memorandum of Deposit of Title Deed again dated 06.08.2009 and whether both the Mortgage Deed and Memorandum of Deposit of Title Deed are lawful and binding on the plaintiffs and if the Mortgage Deed is binding what would be the amount due and payable towards principal and interest by the plaintiffs to the defendants.

21.It is the case of the plaintiffs that the 2nd plaintiff, Dushyanth Krishna Singh and the 3rd defendant, Rohit Bohra were friends. It had been further stated that the 1st plaintiff was a distributor in Anway products and did not have a regular source of income. The 2nd plaintiff was a student in Loyola College. They were the absolute owners of a flat in the 3rd floor measuring 2284.21 sq.ft. in Block 1 of the building complex called Rani Meyammai Towers at Door No.66/10, Sathya Dev Avenue, M.R.C.Nagar, R.A.Puram, Chennai – 600 028 and one open car park bearing No.37 together with 655.95 sq.ft. of undivided share in 102820 sq.ft. along with amenities.

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22.The 1st plaintiff was facing financial crisis and it is the contention of the plaintiffs that the 3rd defendant came forward to help to tide over the financial crisis. Initially, a loan of Rs.5/- lakhs had been given by the 3rd defendant to be repaid in three months commencing from August 2008. It is further contended that the plaintiffs and the 3rd defendant went on holiday trip to Bombay and Goa. The plaintiffs were under the impression that the 3rd defendant would bear the expenses. But however, the 3rd defendant demanded the expenses to be repaid after returning back. In those circumstances, the 3rd defendant obtained signatures, according to the plaintiffs, in five blank undated cheques and five blank promissory notes. It had been stated that the plaintiffs had repaid a sum of Rs.14.5/- lakhs towards principal and Rs.1.60/- lakhs as interest towards the various borrowals made from the defendants. The plaintiffs had also borrowed Rs.7.5/- lakhs and Rs.6/- lakhs from one Rakesh and one Saravanan respectively and had utilized that money to liquidate the liability towards the defendants. They also foreclosed their fixed deposits in Indian Overseas Bank, Stella Maris College Branch, to repay the loan taken from the defendants.

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23.It is the case of the plaintiffs that they are due and payable to a sum of Rs.5.50/- lakhs to the defendants and that the plaintiffs are ready and willing to pay the said amount. It had been contended that the plaintiffs were then informed by the 2nd and 3rd defendants that they required certain documents from the plaintiffs to furnish the same before the Income Tax Authorities with respect to the loan they had taken and therefore requested the plaintiffs to mortgage the property in their name for a sum of Rs.20/- lakhs. At that point of time, according to the plaintiffs, they were due and payable a sum of Rs.5.50/- lakhs to the defendants.

24.But however, it is also the case of the plaintiffs they executed the mortgage which was registered as Doc. No.1640 of 2009 in the office of the Sub-Registrar, Mylapore on 06.08.2009. The mortgage amount was shown as Rs.20/- lakhs.

25.The 1st and 2nd defendants further insisted that the plaintiffs should execute a General Power of Attorney in favour of the 3rd defendant and this document was registered as Doc. No.375 of 2009 in the office of the Sub-

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Registrar, Sowcarpet. It is contended that the plaintiffs also signed on non-judicial stamp papers on the same date. It is contended that these stamp papers were utilized to prepare a Memorandum of Deposit of Title Deeds in favour of the defendants again for a sum of Rs.20/- lakhs. It had also been contended that an agreement of sale had also been obtained by the defendants on the very same date. It is contended that the plaintiffs subsequently cancelled the Power of Attorney dated 31.12.2009 and intimated this fact to the defendants.

26.On the other hand, it is the case of the defendants that the 1st plaintiff had borrowed a total sum of Rs.40/- lakhs on two separate occasions which were paid through cheques by the defendants. In order to secure repayment, a Deed of Mortgage was executed on 06.08.2009 and registered as Doc. No.1640 of 2009 in the Sub-Registrar Office, Mylapore, for a sum of Rs.20/- lakhs and for the balance amount of Rs.20/- lakhs the plaintiffs executed a Memorandum of Deposit of Title Deeds on 12.08.2009 and deposited the original Sale Deed dated 22.04.2009 registered as Doc. No.834 of 2009 relating to the suit schedule property. It is the contention of the defendants that both the Deed of Simple Mortgage and Memorandum of

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Deposit of Title Deeds clearly stipulate that the rate of interest would be 18% per annum and that it should be paid on or before the fifth day of every succeeding month and in default in the payment of interest for three successive months, the defendants were entitled to bring the suit schedule property for auction. It had been contended that the plaintiffs did not pay any amount either towards interest or principal. A legal notice dated 27.02.2010 was issued to the plaintiffs. The defendants claimed at that stage, the suit had been filed by the plaintiffs.

27.It is thus seen that two directly contradictory statements had been made by the plaintiffs and by the defendants. According to the plaintiffs, they had borrowed a sum of Rs.5/- lakhs from the defendants. According to the defendants, on the basis of a mortgage deed dated 06.08.2009, the plaintiffs had borrowed a sum of Rs.20/- lakhs. In the plaint, the details of the mortgage had been given. The amount of mortgage loan was Rs.20/- lakhs and the rate of interest was 18% per annum. It had been stated that however the plaintiff were liable towards the earlier borrowal, a sum of Rs.5,50,000/- and Rs.49,500/- towards the interest and that the total amount due was Rs.5,99,500/-.

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28.With respect to the mortgage, PW-1, the 1st plaintiff, Prashanth Krishna Singh during his cross examination was extremely evasive and did not answer directly to the questions put to him. The mortgage deed had been marked as Ex.P5. The following questions were put to him and his answers were as follows:

"Q24:(Ex.P5 is shown to the witness) Can you tell whether the mortgage deed executed by you is a registered document or unregistered document?

A:Registered document.

Q25: Whether you only had signed or your younger brother had also signed?

A: We both had signed.

Q26: Can you tell the date when Ex.P5 was executed?

A: I do not remember the date.

Q27: What is the document which is marked as Ex.P5?

A: Mortgage deed.

Q28: For what amount the mortgage deed was executed?

A: I do not remember.

Q29: Have you read the contents of Ex.P5 and signed?

A: I have not read, just I have signed.

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Q30: Is it your practice that you sign the document without reading the contents?

A: Mostly I would read the contents of the document and sign.

Q31: What is the rate of interest specified in Ex.P5?

A: 18% per annum."

29.It is thus seen that the witness had admitted that both he and the 2nd plaintiff had signed Ex.P5 and that it was a mortgage deed and that the rate of interest specified was 18% per annum. This has to be taken as an admission of the execution of the document. The witness had however stated that he had not read the contents but had just signed the documents. That answer to question No.29 extracted above is obviously not a correct answer. It is not that the witness does not know how to read English or understand English. He had deposed in Court in English. He had signed the deposition in English. He had not given any evidence contrary to the document. In the plaint, it had been stated that the defendants had demanded interest at the rate of 24% per annum, but that pleading does not convey the correct fact. The interest was only 18% per annum.

30.It is the case of the plaintiffs that they had repaid a sum of

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Rs.14.5/- lakhs to the defendants towards the principal amount. The questions and answers relating to that repayment were as follows:

> *"Q40:Have you filed any proof to show that you have repaid Rs.14.5/- lakhs to the defendants towards principal amount?*
>
> *A:Yes.*
>
> *Q41:(All the plaintiff side exhibits are shown to the witness) Which one of the document is the proof for that?*
>
> *A:After perusing all the exhibits the witness has stated "No document is filed."*

31.Once again, for reasons best known to him alone, the witness was evasive and when confronted with the documents filed by him had to admit that no proof had been produced for repayment of Rs.14.5/- lakhs. He was also asked about the interest which he claimed to have paid to a sum of Rs.1.60/- lakhs in the plaint. Again his answers were evasive and it could only be presumed that the witness was evasive only because he had no proof for repayment of Rs.1.60/- lakhs towards interest. The questions relating to that aspect were as follows:

> *"Q42:Do you remember how much interest has been*

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paid by you to the defendants?

A:I do not remember now.

Q43:I put it to you that the plaintiffs have not paid neither the principal amount or the interest amount to the defendants.

A:We paid interest but I do not remember how much interest we paid."

32.It is thus seen that PW-1 had miserably failed to substantiate the averments made in the plaint that there had been repayment of principal amount of Rs.14.5/- lakhs and interest amount of Rs.1.6/- lakhs towards mortgage. He had however admitted to the mortgage in his evidence. Thereafter, when cross examined on the next hearing, he again gave contradictory answers with respect to the amount paid towards interest. The questions and answers were as follows:

"Q59:How much amount you paid as interest?

A:Rs.14/- lakhs.

Q60:Have you filed any proof to show that you paid Rs.14/- lakhs as interest?

A:No.

Q61:I put it to you that you have not paid Rs.14/- lakhs as interest as claimed by you.

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A:I deny."

33.It is thus seen that though in the plaint and in the proof affidavit, it had been asserted that there had been repayment of the amount borrowed under the mortgage, no proof had been produced by the plaintiffs and more specifically by PW-1. He had admitted in his cross examination that there are no documents to prove repayment.

34.PW-1 was then confronted with Ex.P9 his own bank statement. The following questions were put to him and he admitted that there had been credit of a total sum of Rs.40/- lakhs in his account from the account of the defendant. The questions and answers were as follows:

> *"Q78:Ex.P9 is your bank statement, is it correct?*
>
> *A:Yes.*
>
> *Q79:(Ex.P9 is shown to the witness) Ex.P9 shows that Rs.20/- lakhs + Rs.10/- lakhs + Rs.10/- lakhs credited in your account from the defendant's account, what do you say?*
>
> *A:Yes, the defendants deposited the money."*

35. The 2nd defendant G.C.Bohra was examined as DW-1. During his

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cross examination, the following question was put to him and his answer was as follows:

> *"Q26:Did you enter into any agreement for purchase of any property?*
>
> *A:We entered into simple mortgage and equitable MOD."*

36.During cross examination, he stated that he had entered into a Simple Mortgage and Equitable Memorandum of Deposit of Title Deeds. A further question on the same aspect was put to the witness and the following was the answer:

> *"Q51:Did they deposit any Title Deeds of any property originally belonged to the plaintiffs?*
>
> *A:Yes, it was simple Mortgage and Memorandum of Deposit of Title Deeds."*

37.It is thus seen that he again asserted entering into a mortgage and Memorandum of Deposit of Title Deeds.

38.Thereafter, the following questions were put as to how the money was paid and the mode of repayment under the mortgage.

> *"Q52: How did you advance the money by way of Cash or*

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Cheque?
A: Cheques.

Q53: In which Bank and in which Branch it was drawn?
A: I issued IOB cheques, Walltax Road Branch.

Q54: What was the amount advanced?
A: Rs.40 Lakhs.

Q55: What was the mode of Repayment under the mortgage?
A: It was for the period of 6 months and interest was payable monthly.

Q56: Did you deduct any amount as Interest, when you advanced the sum of Rs.40 lakhs?
A: No."

39.It is thus seen that during cross examination he gave further specific details about the mortgage and how the amount was advanced namely by cheques drawn on Indian Overseas Bank, Walltax Road Branch. This entry is confirmed by Ex.P9 the bank statement of the plaintiffs, wherein there has been a credit of Rs.20/- lakhs and another sum of Rs.10/- lakhs and yet another sum of Rs.10/- lakhs from the account of the defendants.

40.Further again questions were put on the execution of the mortgage

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and on the Memorandum of Deposit of Title Deeds. The questions and answers were as follows:

> *"Q60: Ex:P5 is shown to the witness. On 6th August plaintiffs executed first simple Mortgage for Rs.20 Lakhs?*
> *A: Yes.*
>
> *Q61: Ex.P3 and Ex.P4 are shown to the witness. You have also obtained MOD and Agreement for Sale which are undated August 2009?*
> *A: Yes.*
>
> *Q62: There is a reference to payment of Rs.62 Lakhs, 40 Lakhs and also payment of 20 Lakhs in the Agreement for Sale would recite payment of 122 Lakhs issued to the plaintiffs? Did you make any such payment to the plaintiffs?*
> *A: We have made a payment of RS.40 Lakhs.*
>
> *Q63: Is it pursuant to the Mortgage or to the pursuant to the Agreement of Sale?*
> *A: Pursuant to Mortgage."*

41.The issues under consideration concern execution of the Mortgage Deed and the Memorandum of Deposit of Title Deeds. The execution of both those documents stand confirmed by the admission of PW-1 during his cross examination and by the answers given by DW-1 during his cross examination. The amount which had been paid had also been reiterated, namely Rs.40/- lakhs under both the documents.

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42.The learned counsel for the plaintiffs had drawn the notice of this Court to Ex.P9 which is the bank account of the 1st plaintiff in Indian Overseas Bank, Gemini Circle Branch, Chennai. The account had been opened on 10.08.2009. There has been a credit of Rs.20/- lakhs on 10.08.2009 and a debit by withdrawal by two cheques of Rs.10/- lakhs each. There has been two further credits on 11.08.2009 to a sum of Rs.10/- lakhs each and on the same day withdrawals of the said sums of Rs.10/- lakhs each. It is the contention of the learned counsel for the plaintiffs that the defendants had themselves opened the account in the name of the 1st plaintiff and had accompanied him to the bank and had handed over the sum of Rs.40/- lakhs and had immediately withdrawn the same. The questions in this regard were as follows:

> *"Q66: You are an account holder of IOB, 1st Plaintiff is not a Account Holder of IOB, Did you introduce the 1st Plaintiff to the IOB Gemini Circle Branch?*
> *A: No.*
>
> *Q67: I put it to you that In the application form, for opening the Bank Account No. 205101000028117 for the 1st plaintiff on 10.08.2009 by paying opening balance of Rs.1100/-?*
> *A: No.*

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Q68: Ex.P9 is shown to the witness. I put it to you that you took the 1st plaintiff to the IOB Gemini Circle Branch and opened the Bank Account with opening balance of RS.1100/- and deposited Rs.20 Lakhs on 10.08.2009 and asked to draw 2 Self Cheques for Rs.10 Lakhs each dated 10.08.2009 and identified their signature on the reverse of the cheques leaves and got the payment from the Bank and appropriated the funds and did not part any funds with the plaintiffs?
A: No.

Q69: Ex.P9 is shown to the witness. Kindly see the next entry another cheque for Rs.10 Lakhs and Rs.10 Lakhs and appropriated the funds for yourself?
A: No.

Q70: Ex.P9 is shown to the witness. Except these four payments are there any transactions in their Bank Account?
A:No."

43.It is the case of the plaintiffs that though it is shown that there has been credit of total sum of Rs.40/- lakhs in the account of the 1st plaintiff, on the same day the amounts had also been withdrawn. The learned counsel for

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the plaintiffs argued that it is highly improbable that there would be withdrawal of Rs.40/- lakhs by the 1st plaintiff within a period of two days from the date of deposit on 10.08.2009 and 11.08.2009. It was further pointed out that there were no further transactions in the bank account. It has been therefore contended that though the Mortgage Deed and the Memorandum of Deposit of Title Deeds could have been signed by the plaintiffs no consideration had passed under the said documents. It had been argued very vehemently by the learned counsel for the plaintiffs that the defendants had handed over Rs.40/- lakhs and had taken back the entire amount on the very same day and therefore the plaintiffs are not liable under the said two documents to repay any amount to the defendants.

44.DW-1 was then confronted with Exs.D2 and D3 which are the Statement of Accounts in Indian Overseas Bank, Walltax Road Branch in the name of G.C.Bohra / 2nd defendant and G.C.Bohra Finance / 1st defendant. In both the statements there has been both credit and debit of the accounts in the name of Prashanth Krishna Singh / 1st plaintiff. The question which had been put to DW-1 in this regard were as follows:

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“Q71:Ex.D2, Ex.D3 and Ex.P9 are shown to the witness. Do you find any entry with regard to the credit of the remittance made by you as reflected in your bank statement in Ex.D2, Ex.D3 as in Ex.P9?

A:The payments made by me are reflected.”

45.The defendants must be viewed from the perspective of the business which they claimed to be doing namely money lending. The following questions were put to DW-1:

“Q16: You are the second defendant and sole proprietor of the first defendant and third defendant is your son. Am I correct?
A: Yes.

Q17: How long you have been carrying business in money lending?
A: About 40 years.

Q18: Do you possess the license for carrying on money lending?
A: No.

46.It is thus seen that the defendants are professional money lenders.

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They know the trick of the trade. They had parted, according to them, with substantial sum of Rs.40/- lakhs. The statement of accounts in Ex.P9 and in Exs.D2 and D3 reflect that on the same day there has been credit and also debit. It is thus seen that it could also be inferred that though they had issued cheques in favour of the 1st plaintiff, the said amounts were also withdrawn on the same day.

47.These vital facts will have to be weighed while examining the conduct of the parties. It is an admitted case even by DW-1 that the 3rd defendant had earlier acquaintance with the 2nd plaintiff. It is also an admitted case by DW-1 that the plaintiffs and defendants had entered into a mortgage deed, Ex.P5 and a Memorandum of Deposit of Title Deeds, Ex.P4. The defendants are conversant with the implications of a mortgage deed and of a Memorandum of Deposit of Title Deeds and are also conversant with the trade involved in finance and in lending of money. The plaintiffs on the other hand are novices in this regard. They signed the documents. They have admitted to that fact truthfully. But they had denied receipt of any money. When that has been the specific case of the plaintiffs, the onus shifts on the defendants to prove that they had not exerted undue influence in the

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execution of the two documents. As between the plaintiffs on the one hand and the defendants on the other hand, the defendants were in a position to exert influence. The plaintiffs had no option but to submit such influence.

48.A Division Bench of this Court in a judgment reported in ***AIR 1961 Madras 190, M.A.Abdul Malick Saheb V. T.P.Muhammad Yousuf Sahib and others***, which judgment had been relied on by the learned counsel for the plaintiffs had examined the issue of fiduciary relationship, in that case between a parent and child and the presumption of undue influence and held that the onus lies on the donee not only to prove that the donor was emancipated but also that he had acted independently.

49.In the instant case, as earlier pointed out, the defendants held all the cards. The had the money. They knew the implications of a mortgage deed and a document reflecting Memorandum of Deposit of Title Deeds. They also knew the value of the property which was mortgaged. It was far, far more than the amount mentioned in the two documents and more importantly, the bank account shows credit and debit on the same day. Very significantly, these are the only entries in Ex.P9, the bank account of the 1st

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plaintiff. Therefore, the account had been opened only for this purpose and for none other. The needle points to the defendants having exerted influence over the plaintiffs to execute the mortgage and not reap any benefit from the amount advanced under the document.

50.In the judgment referred *supra*, it had been held by the Division Bench that, when a presumption is raised on undue influence, the Court will hold the transactions to be bad unless the presumption is rebutted by cogent evidence adduced by the donee. The facts in that case had been reduced by the Division Bench as follows:

> *"1.T.P. Ahmed Hussain Sahib a Muslim resident of Tirupattur, North Arcot Dt. died on 24th July, 1952, leaving behind considerable properties and two widows, 7 sons and 3 daughters. Zuleika Bi was one of the two surviving widows. She had 3 sons by Ahmed Hussain, the eldest of whom was T.P. Muhammad Yousuf Sahib. He was a lad of about 18 years old at the time of his father's death, and his two younger brothers were still minors. There was a partition of the estate of the said Ahmed Hussain Sahib between his heirs in which all the heirs including Zuleika Bi and Muhammad Yousuf Sahib got their legitimate share of the properties as per Muslim law. Zuleika Bi's brother was one Abdul Jabbar*

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Saheb, a merchant at Hindupur having a residence at Tirupattur also.

He evinced interest in the affairs of his sister and was instrumentral in bringing about an amicable division of the assets of the deceased Ahmed Hussain Between his heirs. Yousul Sahib was living with his mother and he executed two documents in her favour, one called a gift deed and the other a deed of release by which he completely denuded himself of all the properties he got as a sharer in the estate of his deceased father. These documents are dated 12-7-1953 and 13-7-1953. Within a few months thereafter on 1-1-1954, the mother Zuleika Bi, the donee from her son Yousuf Sahib purported to sell the properties which she got from her son to a stranger to the family, one Abdul Malik Sahib stated to be a shroff merchant at Tirupattur for an alleged consideration of Rs. 7900/-. The properties consist of a building with a rice mill, machinery and plant, which was leased out by the late Ahmed Hussain himself during his lifetime to one Ramalingam Pillai for a monthly rental of Rs. 125/-.

51.It is thus seen that a young boy of 18 years had executed a Gift Deed and a Deed of Release, by which he completely denuded himself of all the properties he got as a sharer in the estate of his deceased father, in

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favour of his mother Zulaika Bee and within a few month thereafter, she purported to sell the properties which she got from her son to a stranger to the family. These two transactions were then challenged by filing a suit by the donor stating that the documents were obtained by exerting undue influence. The Division Bench of the High Court had further discussed the issue as follows:

> *"14.It is obvious that the plaintiff began to look round and then realised the full effect and fatuity of the transactions entered into by him with his mother. It is possible that having come to realise that he had been tricked into entering in to these transactions by his uncle Jabbar Sahib, he became infuriated and wild. ...."*

52.The evidence on record had been examined and the discussion of the Division Bench was as follows:

> "*19.Two questions fall to be considered. The first is whether the gift and release deeds executed by the plaintiff in favour of the 1st defendant are vitiated by undue influence. The second is whether the second defendant, the alienee from the first defendant, is protected on the ground that he is a bona fide transferee for value, without notice of the circumstances affecting the impugned transaction.*

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20.Section 16 of the Indian Contract Act defines 'undue influence' in the following way:

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

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another — (a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or (b) where he makes a contract with a person whose mental capacity is temnorarily or permanently affected by reason of age, illness or mental or bodily distress;

(3) ....

***21.** The section broadly embodies the classes of cases which cannot be described better than in the following words of Cotton, L.J., in Allcard v. Skinner, (1887) 36 Ch D 145 at p. 171:*

"First, where the court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose; second, where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a

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presumption that the donee had influence over the donor. In such a case the court sets aside the voluntary gift, unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justifies the court in holding that the gift was the result of a free exercise of the donor's will. The first class of cases may be considered as depending on the principle that no one shall be allowed to retain any benefit arising from his own fraud or wrongful act. In the second class of cases the court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relation which existed between the parties and the influence arising therefrom being abused."

This case is an illustration of the second category of cases referred to therein. Transactions in the nature of bounty from a child to a parent are in equity regarded with great jealousy. Special relationships like parent and child, solicitor and client, doctor and patient, guardian and ward, Spiritual adviser or clergyman and parishioner constitute 'protected classes' as they may be called, because the law throws a mantle of protection round them by raising a rebuttable presumption of undue influence.

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“If a gift is made to a parent or guardian, soon after the donor attains twenty-one, the presumption is that the influence of the parent or guardian is still dominant, and the parental influence has been held to exist in the case of sons of 25 and 23 who resided with and were maintained by the father. The influence is deemed to exist in the language of the cases, until the child becomes emancipated.” (Ashbumer's Principles of Equity, 2nd Edn., p. 302).

The donee must show (and the onus is upon him) that the donor was either emancipated or was placed in a position equivalent to emancipation by the possession of independent advice. (Powell v. Powell, 1900-1 Ch 243). Independent advice is not the only way in which the presumption can be rebutted. The donee must prove that the gift was the result of the free exercise of independent will. The court must be satisfied that the donor was acting independently of any influence from the donee and with the full annrpciation of what he was doing: Inche Noriah v. Shaik Allie, 1929 AC 127 : (AIR 1929 PC 3).

22.The decision reported in Lakshmidas v. Roop Loll, ILR 30 Mad 189 (FB), is also in point. Then it was held that there is a presumption of undue influence in cases of this description which is available in favour of the donor.”

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53.It had been further held as follows in paragraph 23:

"23. ....The mere existence of the fiduciary relation raises the presumption of undue influence and the court will hold the transaction to be had unless the presumption of undue influence is rebutted by cogent evidence adduced by the donee. We are satisfied that defendants 1 and 2 have failed to discharge the onus which rests upon them in this case."

54.In paragraph 25, the Division Bench had considered Section 89 of the Trust Act and had held as follows:

"25.The position of the 2nd defendant has now to be considered. Section 89 of the Trusts Act is as follows:
"Advantage gained by exercise of undue influence: Where, by the exercise of undue influence any advantage is gained in derogation of the interests of another, the person paining such advantage without consideration, or with notice that such influence has been exercised, must hold the advantage for the benefit of the person whose interests have been so prejudiced."

Undue influence which undoubtedly Operates against the 1st defendant will also operate against every volunteer who claims under her and also against any person who claims under her with notice of the equity thereby created or with notice of the

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circumstances from which the court infers the equity. See Bainbrigge v. Browne, (1881) 18 Ch D 188. ....”

55.In the instant case, the evidence shows that the defendants have not discharged their onus that they were not in a position of influence over the plaintiffs and that the documents had been entered into with consensus ad idem by the plaintiffs voluntarily and that the plaintiffs had benefited to the entire amount advanced under Ex.P4 and P5. It is clear that they had not obtained the advantage since the amounts had been withdrawn on the very same day.

56.The judgment referred *supra* ***(AIR 1961 Mad. 190)*** had been relied on by a Division Bench of this Court in a judgment reported in ***2008(2) CTC 433, Suguna and another v. Vinod G.Nehemiah and others***, wherein the Division Bench had held as follows:

*“**35.** Under Section 16(2)(a) of the Indian Contract Act, 1872, a person is deemed to be in a position to dominate the will*

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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. A fiduciary relationship arises between the parties when one of them stands in a position of a trust to the other and equally when the latter reposes confidence with the other person to an extent that the influence grows out of such a confidence. 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 and confidence placed on the other, thus facilitating him to influence the former. In such a situation, 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. It may be seen that the mere existence of a fiduciary relationship raises the presumption of undue influence - Abdul Malick v. Md. Yousuf, AIR 1961 Mad. 190. Considering the presumption raised, a person standing in a fiduciary relationship to another has a duty to protect the interest given to his care. In the case on hand, when

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respondents-1 to 4 have questioned the settlement deed alleged to have been executed showing such a relation, the presumption under law is there against such a transaction. 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 Krishna Mohan Kul v. Pratima Maity, 2004 (9) SCC 468, 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 document to prove due execution of the document in accordance with law, even de hors the reasonableness or otherwise of the transaction, to avail of the benefit or claim rights under the document irrespective of the fact whether*

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such party is the defendant or plaintiff before the Court.

17. The logic is equally applicable to an old, illiterate, ailing person who is unable to comprehend the nature of the document or the contents thereof. It should be established that there was not mere physical act of the executant involved, but the mental act. Observations of this Court, though in the context of a pardahnashin lady in Kharbuja Kuer v. Jang Bahadur Rai are logically applicable to the case of old, invalid, infirm (physically and mentally) and illiterate persons."

57.The learned counsel for the plaintiffs further relied on the judgment of the Hon'ble Supreme Court reported in ***(1982) 1 SCC 4, Smt.Gangabai w/o Rambilas Gilda v. Smt. Chhabubai w/o Pukharajji Gandhi***, with specific reference to the observations of the Hon'ble Supreme Court on the scope of the Section 92 of the Indian Evidence Act, 1872.

58.In that case, the respondents before the Hon'ble Supreme Court had filed a suit stating that she had purchased a house and thereafter, she had also made improvements to the property. She was then in need of

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money and she entered into an agreement with the appellant for loan. It was decided that simultaneously she should execute a nominal document of sale and a rental agreement. These documents were then executed. She then alleged that the documents were never intended to be acted upon and that the rent paid by her was in fact repayment of interest at 18% of the loan. She continued to be in possession of the house property and also carried on the repairs from time to time. The appellant admitted to enforce the document as a sale deed by filing a suit for recovery of the rent. Both the suits ended in grant of decree and therefore, the respondent filed a subsequent suit which finally landed in the portals of the Hon'ble Supreme Court for a declaration that she was and continued to be the owner of the house property. The appellant maintained that the Sale Deed had been registered and that it was a genuine transaction and that ownership had passed to her. The trial Court held that the sale deed was never intended to be acted upon and decreed the suit. The first Appellate Court held that the transaction was a mortgage and modified the decree in accordance with that finding. The High Court of Bombay did not agree with the findings of the first Appellate Court and affirmed the findings of the trial Court that the sale deed and the rent note were sham documents. In those circumstances, when an argument

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was presented before the Hon'ble Supreme Court that under Section 92 of the Indian Evidence Act, 1872, oral evidence could not be introduced with respect to a written document, the Hon'ble Supreme Court held as follows:

*"**11.** The next contention on behalf of the appellant is that sub-section (1) of Section 92 of the Evidence Act bars the respondent from contending that there was no sale and, it is submitted, the respondent should not have been permitted to lead parol evidence in support of the contention. Section 91 of the Evidence Act provides that when the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself. Sub-section (1) of Section 92 declares that when the terms of any contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms. And the first proviso to Section 92 says that any fact may be proved which would invalidate any document, or which would entitle any*

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person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law. It is clear to us that the bar imposed by sub-section (1) of Section 92 applies only when a party seeks to rely upon the document embodying the terms of the transaction. In that event, the law declares that the nature and intent of the transaction must be gathered from the terms of the document itself and no evidence of any oral agreement or statement can be admitted as between the parties to such document for the purpose of contradicting or modifying its terms. The sub-section is not attracted when the case of a party is that the transaction recorded in the document was never intended to be acted upon at all between the parties and that the document is a sham. Such a question arises when the party asserts that there was a different transaction altogether and what is recorded in the document was intended to be of no consequence whatever. For that purpose oral evidence is admissible to show that the document executed was never intended to operate as an agreement but that some other agreement altogether, not recorded in the document, was entered into between the parties (Tyagaraja Mudaliyar v. Vedathanni [AIR 1936 PC 70 : 63 IA 126 : 1936 All LJ 136 : 40 Cal WN 353]). The trial court was right in permitting the respondent to lead parol evidence in support of her plea that the sale deed dated January 7, 1953 was a sham

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document and never intended to be acted upon. It is not disputed that if the parol evidence is admissible, the finding of the court below in favour of the respondent must be accepted. The second contention on behalf of the appellant must also fail."

59.The Hon'ble Supreme Court had very clearly held that the first proviso to Section 92 gives leverage to prove any fact which would invalidate any document or which would entitle any person to any decree or order owing to fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want of failure of consideration or mistake in fact or law.

60.In the instant case, it is the specific case of the plaintiffs that though they had entered into a Mortgage Deed and a Memorandum of Deposit of Title Deeds, they had not received any consideration under both the documents. That fact is established by the extremely strange entries found in Ex.P9 of both deposit and withdrawal of a huge sum of Rs.40/- lakhs in just two days.

61.I hold that the documents had never been intended to be acted

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upon and that no consideration had flowed under Exs.P4 and P5. The defendants have also not examined any witness to the documents to prove that consideration had passed to the plaintiffs. Merely stating that the amounts had been paid by cheque would not be sufficient since the amounts had also been withdrawn by cheques. There were just four transactions in the account in Indian Overseas Bank, Gemini Circle Branch in the name of the 1st plaintiff. No further transactions had been done by the 1st plaintiff. The account was opened on 10.08.2009 and there were no further transactions after 11.08.2009. The transactions were only for two days. A sum of Rs.40/- lakhs was deposited and the same had been withdrawn. The presumption is strong that it had been withdrawn only at the behest of the defendants.

62.In view of these reasons, with respect to Issue No.1, I hold that Mortgage Deed Ex.P5 dated 06.08.2009 registered as Document No.1640 of 2009 in the office of the Sub-Registrar, Mylapore, is neither legal nor valid and definitely not binding on the plaintiffs.

63.In view of the answer given to the Issue No.1, Issue No.2

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becomes redundant, as it would invite an answer, only if Issue No.1 had been answered in the affirmative.

64.With respect to Issue No.4, I hold that Ex.P4 the Memorandum of Deposit of Title Deeds dated 06.08.2009 is neither legal nor binding on the plaintiffs. Issues No.1, 2 and 4 are answered in favour of the plaintiffs.

Issue No.3:

65.This issue surrounds an agreement of sale dated 04.08.2009 which had been entered into by the plaintiffs and the 3rd defendant. This agreement of sale had been marked as Ex.P3. During the course of discussion while answering Issue Nos.1, 2 and 4, this Court had categorically held that the defendants were in a position to exert undue influence over the plaintiffs. The answer to this issue will also have to be examined under the background of such definite finding. The agreement of sale is not registered. It is dated 06.08.2009, the same day when Exs.P4 and P5, the Mortgage Deed and the Memorandum of Deposit of Title Deeds had also been entered. It is to be noted that in the agreement of sale, the purchaser namely, the 3rd defendant, Rohit Bohra had stated that he had paid the entire sale

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consideration of Rs.1.22/- crores in the following manner, (i)Rs.62/- lakhs paid by cash on several dates, (ii)Rs.40/- lakhs which is due to be paid to the 1st and 2nd defendants by the plaintiffs would be paid by him and (iii)Rs.20/- lakhs paid by cash.

66.DW-1 was also questioned about the agreement of sale and about the payment of Rs.1.22/- crores as stated in the agreement of sale and his answer was that the defendant had paid only Rs.40/- lakhs. The question and answer is as follows:

> *"Q62:There is a reference to payment of Rs.62/- lakhs, 40/- lakhs and also payment of Rs.20/- lakhs in the agreement of sale would recite such payment to the plaintiffs?*
>
> *A:We have made a payment of Rs.40/- lakhs."*

67.It is very evident that the document had been fraudulently prepared. No dates had been given when the huge sum of Rs.62/- lakhs had been paid by cash by the 3rd defendant to the plaintiffs. It had also been stated that possession of the property had been handed over, which is factually not correct. There is also no reference to Exs.P4 and P5 except for stating that the plaintiffs are due and payable to the 1st and 2nd defendants a

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sum of Rs.40/- lakhs and that the 3rd defendant would pay to the 1st and 2nd defendants that amount. It is to be noted that the 3rd defendant is the son of the 2nd defendant and it is inconceivable that he would actually pay a sum of Rs.40/- lakhs towards the purchase of the property of the plaintiffs to his father and to the 1st defendant in which he is a partner and adjust the account. I hold that the entire transaction is sham, is unlawful and is illegal.

68.To dispel this assertion by the Court, the 3rd defendant should have grazed the witness. He had not done so. He should have come forward to prove that the document was executed out of free will and consent by the plaintiffs. He had failed to discharge that burden to prove the document. The document had been witnessed by two individuals, D.Prakash and A.Rajendran. They had also not been examined as witnesses. It is an unregistered document. The document is inadmissible in law. It had not been proved. It had been fraudulently prepared. It has no value at all. I hold with respect to Issue No.3 that the agreement of sale dated 06.08.2009 which had been stated wrongly in the issue as framed as 04.08.2009 is neither legal nor binding on the plaintiffs. This issue is answered in favour of the plaintiffs.

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Issue No.5:

69.This issue is whether the cancellation of the Power of Attorney on 31.12.2009 executed by the plaintiffs in favour of the 3rd defendant is valid. The cancellation deed had been marked as Ex.P6. The General Power of Attorney had been marked as Ex.P8. In Ex.P6, the plaintiffs have stated that they are cancelling the General Power of Attorney executed by them on 06.08.2009 in favour of the 3rd defendant which had been registered as Document No.375 of 2009 on 06.08.2009 in the Office of the Sub-Registrar, Sowcarpet. The 3rd defendant is directly affected by such cancellation. The defendants had not filed any counter claim stating that the said cancellation is void in the eyes of law and calling upon the Court to declare that it is void. The 3rd defendant had also not grazed the witness box to protest such cancellation. The 2nd defendant alone had tendered evidence. He was questioned about the cancellation and he admitted that it had been cancelled by the plaintiffs. The questions are as follows:

"Q64:On the very same day you got the Power of Attorney under Ex.P8 is your favour or in favour of your son.

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A:It was in favour of my son.

Q65:Ex.P8 was cancelled under Ex.P6?

A:Yes, by the plaintiff."

70.It had been held that the defendants had exercised undue influence on the plaintiffs and their credibility is under question insofar the suit transactions are concerned. I hold that since the 3rd defendant had not grazed the witness box to protest against cancellation of the Power of Attorney and since the defendants had also not filed any counter claim seeking a declaration that such cancellation is void, the said indenture of cancellation marked as Ex.P6 dated 31.12.2009 is a valid and binding document. The issue is answered in favour of the plaintiffs.

Issue No.6:

71.This issue is whether the plaintiffs are entitled for permanent injunction restraining the defendants from enforcing the claims under the mortgage. This Court had already held that the mortgage deed is not binding on the plaintiffs. Naturally, they are now entitled to permanent injunction to

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protect possession and ownership of the property. This issue is answered in favour of the plaintiffs.

Issue No.7:

72.I hold that the plaintiffs are entitled for a judgment and decree that the Mortgage Deed executed on 06.08.2009 registered as Document No.1640 of 2009 in the office of the Sub-Registrar, Mylapore, is illegal, invalid and nonest in the eyes of law are not binding on the plaintiffs and on the said property.

73.I further hold that the agreement of sale dated 06.08.2009 is also not binding on the plaintiffs.

74.I also hold that the Memorandum of Deposit of Title Deeds dated 06.08.2009 is illegal, invalid and nonest in the eyes of law and not binding on the plaintiffs.

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75.I would also grant permanent injunction restraining the defendants from enforcing any right under either the Mortgage Deed or Memorandum of Deposit of Title Deeds or under any other instrument as the entire transactions between the plaintiffs and the defendants are sham and unlawful.

76.I further hold that the plaintiffs are entitled for a mandatory injunction directing the defendants to return all the instruments as described below in the schedule – II to the plaint within a period of two weeks from the date of this judgment, failing which the plaintiffs are at liberty to proceed further to enforce the decree of mandatory injunction in manner known to law.

SCHEDULE - II	
1	Mortgage Deed, dated 06.08.2009, registered as Doc.No.1640 of 2009 in the office of SRO, Mylapore.
2	Agreement of sale dated 06.08.2009.
3	Power of Attorney dated 06.08.2009, registered as Doc. No.375 of 2009 Volume III, in the office of the Sub-Registrar, Sowcarpet.
4	Memorandum of Deposit of Title Deeds.
5	Cheques bearing Nos.510509 to 510513 drawn on

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SCHEDULE - II	
	State Bank of India, Gopalapuram Branch bearing A/c.No.10712776843
6	Promissory notes (five numbers)
7	Blank stamp papers (eight numbers)

77.In the result, the Suit is decreed by holding that,

(i)The Mortgage Deed dated 06.08.2009 registered as Document No.1640 of 2009 in the office of the Sub-Registrar, Mylapore, is illegal, invalid and not binding on the plaintiffs.

(ii)The Agreement of Sale dated 06.08.2009 is not binding on the plaintiffs.

(iii)The Memorandum of Deposit of Title Deeds dated 06.08.2009 is illegal, invalid and not binding on the plaintiffs.

(iv)The plaintiffs are entitled for permanent injunction restraining the defendants from acting on the aforementioned documents or on the basis of any other document in their possession including, cheques, promissory notes and blank stamp papers as described in schedule – II of the plaint.

(v)The plaintiffs are entitled for mandatory injunction directing the

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defendants to return the documents mentioned in schedule – II of the plaint within a period of two weeks from this judgment.

(vi)The plaintiffs are entitled for costs of the suit.

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smv
Index: Yes/No
Internet: Yes/No
Speaking order: Yes/No

List of witnesses examined:

P.W.1 – Mr.Prashanth Krishna Singh

D.W.1 – Mr.G.C.Bohra

Plaintiffs' side Documents:

S.No	Exhibits	Description of documents

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1	P1	Printout of the certified copy of the sale deed executed by K.V.Chandrasekar and Jaishree Chandrasekar in favour of plaintiffs 1 and 2 dated 22.04.2009.
2	P2	Certified copy of the sale deed executed by the plaintiffs 1 and 2 to S.Syed Azam Mohamed dated 19.09.2008.
3	P3	Photocopy of the agreement of sale entered between the plaintiffs 1 and 2 and Mr. Rohit Bohra dated 06.08.2009.
4	P4	Photocopy of the Memorandum of Deposit of Title Deed.
5	P5	Certified copy of the first simple mortgage deed executed by the plaintiffs 1 and 2 in favour of the 1st defendant dated 06.08.2009.
6	P6	Original cancellation of power of attorney executed by the plaintiffs 1 and 2 to the 3rd defendant dated 31.12.2009.
7	P7	Printout of the encumbrance certificate dated 21.12.2009.
8	P8	Certified copy of the General power of attorney executed by the plaintiffs 1 and 2 to 3rd defendant dated 06.08.2009.
9	P9	Certified copy of the bank statement from 01.08.2009 to 18.12.2009.

<u>Defendants' side Documents:</u>

1	D1	Original pro note executed by the plaintiffs in favour of the 2nd defendant dated 06.08.2009.
2	D2	Certified copy of the statement of account in the name of G.C. Bohra in Indian Overseas Bank for the period 01.08.2009 to 31.08.2009.
3	D3	Certified copy of the statement of account in the name

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		of G.C. Bohra Finance in Indian Overseas Bank for the period 01.08.2009 to 31.08.2009.
4	D4	Office copy of the legal notice issued by the defendant counsel on behalf of the 1" defendant to the plaintiffs dated 27.02.2010.
5	D5	Office copy of the legal notice issued by the defendant counsel on behalf of the 2nd defendant to the plaintiffs dated 27.02.2010.

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C.V.KARTHIKEYAN,J.

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Pre-delivery Judgment in

C.S.No.201 of 2010

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