

**This Product is Licensed to 9, 9, 9**

JUDGMENT :

N. Sathish Kumar, J.

1. The suit is filed for preliminary decree for partition and separate possession of the plaintiffs 7/72 share in the suit properties.

2. The brief facts of the case of the plaintiff are as follows:

Originally, the suit properties were purchased by Late M.A. Sheriff under registered Sale Deeds dated 06.2.1974 and 18.8.1978 and he died intestate leaving the plaintiff and the defendants as his legal heirs. According to the plaintiff, since she is a co-owner of the suit properties along with the defendants 1 to 5, as per Mohammadden Law of Succession, she is entitled to 7/72 share in the suit properties. Similarly, the 1st defendant is entitled to 9/72 share in the suit properties and the defendants 2 to 5 are entitled to 56/72 share in the suit properties. It is stated that the defendants 2 to 5 were keeping M.A. Sheriff with them in their residence in Maharashtra. The deceased was not keeping good health both physically and mentally because of his old age and several other ailments. Taking advantage of such a position of M.A. Sheriff, the defendants 2 to 5 were interfering in all the decisions of M.A. Sheriff. Thus, the defendants 2 to 5 were in a fiduciary capacity with regard to M.A. Sheriff. Since the defendants have unduly influenced the mind of M.A. Sheriff and brought about a Deed of family Settlement dated 18.5.2005, the same is void and not binding on the plaintiff. Hence, the plaintiff filed the present suit.

3. Brief contentions of the written statement filed by the defendant:

Denying the entire allegations in the plaint, it is the contention of the defendants that the suit filed by the plaintiff is not maintainable either in law or in facts and is liable to be dismissed. According to the defendants, the deceased M.A. Sheriff, was the absolute owner of the suit properties. The deceased M.A. Sheriff, executed a Will dated 31.8.1988, bequeathing the suit properties to defendants 2 to 5, while he was in sound state of mind. In order to avoid further litigation, the deceased also executed a Settlement Deed dated 18.5.2005 settling the properties in favour of his wife and four sons, the defendants 2 to 5 herein. Subsequently, the defendant No.I executed Settlement Deed dated 03.9.2013, in favour of defendants 2 to 5 in respect of her ? share of her property. Since the deceased M.A. Sheriff executed Settlement Deed in respect of his self acquired properties in favour of the defendants, the question of succession does not arise and the plaintiff is not entitled to any share in the suit property as prayed, excepting her share in ? share of item II of the suit properties. It is stated that the deceased M.A. Sheriff was maintaining good health during his life time and he had to face health problems during last 7 months prior to his demise. Hence, the defendants prayed for dismissal of the suit.

4. On the above pleadings, the following issues were framed by this Court, vide order dated 15.12.2014:

1. Whether the plaintiff is entitled to 7/72 share in the suit properties?
2. Whether the will dated 31.08.1988 is valid and binding on the plaintiff?
- 3.Whether Settlement Deed date 18.05.2005 in Doc. No.1854 of 2005 in favour of the defendants is valid and binding on the plaintiff?

4.Whether Settlement Deed dated 03.09.2013 executed by the first defendant in favour of the defendants 2 to 5 is hit by doctrine of lis pendens?

5. Whether the plaintiff is entitled to the relief of permanent injunction?

6.To what other reliefs the parties are entitled to?

5. On the side of the plaintiff, the plaintiff herself was examined as P.W.1 and Exs.P.1 to P.4 were marked. On the side of the defendants, D.W.1 was examined and Exs.D1 to D7 were marked. The details of the document are hereunder:

Exhibits produced on the side of the plaintiff:

S.No.	Exhibits	Description of Documents	Date
1	Ex.PI	Certified copy of the Sale deed registered as Doc. 401 of 1974 on the file of SRO, Kodambakkam.	06.02.1974
2	Ex.P2	Certified copy of sale deed registered as Doc. No. 2548/1978 on the file of SRO, Kodambakkam	18.08.1978
3	Ex.P3	Family Settlement deed registered as Doc.No. 1854/2005 on the file of Anna Nagar, Chennai-40.	18.05.2005
4	Ex.P4	Death Certificate of Mohammed Abdullah Sheriff.	21.03.2013

Exhibits produced on the side of the defendants:

S.No.	Exhibits	Description of Documents	Date
1	Ex.D1	General Power of Attorney	
2	Ex.D2	Certified copy of the Sale deed registered as Doc. 401 of 1974 at SRO, Kodambakkam, Chennai.	06.02.1974

3	Ex.D3	Certified copy of the Sale deed registered as Doc. 2548 of 1978 at SRO, Kodambakkam Chennai.	18.08.1978
4	Ex.D4	Certified copy of the Will registered as Doc. No 75 of 1988 at SRO Anna Nagar	31.08.1988
5	Ex.D5	Certified copy of the Will registered as Doc. No 75 of 1854 of 2005 at SRO, Anna Nagar	18.05.2005
6	Ex.D6	Certified copy of the Will registered as Doc. No 3462 of 2013 at SRO Anna Nagar	03.09.2013
7	Ex.D7	Photo Copy of Death Certificate of Mohammed Abdullah Sheriff	02.08.2010

Witnesses examined on the side of the plaintiff:

P.W.1. - Shahida Begum

Witnesses examined on the side of the defendants:

D.W. 1 -M.A. Ajmal Sheriff

6. The learned counsel appearing for the plaintiff submitted that Settlement Deed dated 18.5.2005, which is marked as Ex.D5, is the result of undue influence and hence, the same is not binding on the plaintiff, as the defendants 2 to 5 were in dominant position to control the settlor, who was admittedly aged. Hence, it is the contention of the learned counsel that entire burden lies on the defendants to establish the fact that Ex.D5, Settlement Deed is genuine and valid document. The defendants were in active confidence and fiduciary capacity with settlor. Therefore, it is the contention of the learned counsel for the plaintiff that the Settlement Deed is shrouded with suspicious circumstances and that, it is for the defendants to prove that the same is free of undue influence.

7. It is submitted by the learned counsel for the plaintiff that the evidence of D.W.I would clearly show that the settlor was residing with the defendants in Mumbai and he has also underwent heart surgery in the year 2010. It is further submitted by the learned counsel that original Settlement Deed has not been produced and that, the attesting witnesses have also not been examined. According to the learned counsel though one of the attesting witnesses is the brother of settlor, the defendants have not chosen to examine him. Further, Even though the other witness alive, he has also not been examined. It is submitted that there was no reason

whatsoever, in the said Deed to exclude the plaintiff, who is the only daughter of the settlor and the same itself would create suspicious circumstances surrounded with the Settlement.

8. The learned counsel for the plaintiff vehemently contended that the facts that defendants were in dominating position and had fiduciary capacity with settlor and excluding the plaintiff without allotting any share in the properties would clearly prove that so called Settlement was brought out by exercising undue influence on the settlor. Hence, it is the contention of the learned counsel that the Settlement Deed executed by the plaintiffs father is not binding on the plaintiff and the same is liable to be held as null and void. Therefore, it is submitted that the plaintiff, being the daughter of deceased, is entitled to share in the property as claimed in the plaint.

9. In support of his contention, the learned counsel for the plaintiff has placed reliance on the judgments reported in (1929) 29 L.W. 196 = 1929 AIR (PC) 3 Privy Council (Inche Noriah Binte Mohamed Tahir v. Shaik Allic Bin Omar Bin Abdullah Bahashuan); 1970 (3) SCC 159 (Lakshmi Amma and another v. Talengalanarayana Bhatta and another)-, 1996 (2) LW 600 (Dharman and 5 others v. D Marimuthu), 2004-2-L.W. 344 = (2004) 9 SCC 468 (Krishna Mohan Kul Alias Nani Charan Kul and another v. Pratima Maity and another) and 2008 (3) LW 660 (Suguna and anotehr v. Vinod G. Nehemiah and others).

10. The learned Senior counsel for the defendants submitted that the entire pleadings in the plaint are bereft of any materials as to the alleged undue influence over the deceased M.A. Sheriff. The learned Senior counsel for the defendants further submitted that the deceased M.A. Sheriff was a Law Graduate and was working as Manager in Reserve Bank of India (RBI) and had a legal knowledge. Merely because sons and wife were residing with him, it does not mean that they were in actual control over the deceased Sheriff.

11. It is the main contention of the learned Senior counsel for the defendants that P.W.1, in her evidence in the cross examination, did not deny the execution of the alleged Settlement Deed, besides, she has admitted that the signature found in Ex.D1, the Power of Attorney said to have executed is the handwriting of the deceased. Since the settlor himself is a legal man, he has drafted the Power of Attorney in its own handwriting, wherein he has categorically admitted the execution of document in favour of the defendants herein. It is submitted that the plaintiff has admitted the handwriting of her father in Ex.D1.

12. It is also the contention of the learned Senior counsel for the defendants that prior to the Settlement Deed, the deceased Sheriff had executed Will bequeathing the properties to the defendants 2 to 5. Subsequently, he cancelled the said Will and registered the Settlement Deed. In the registered Will also, he had categorically mentioned about the marriage of the plaintiff and the expenses incurred by him and her marital status. In the aforementioned Will itself, the deceased has given reasons for disinheriting the plaintiff. Subsequently, the deceased has registered the document, viz., Settlement Deed, in the year 2005 on the same line of allotment made in the Will. This document executed by the settlor would clearly show that he had all along intention to settle the property only in favour of his wife and sons. Merely because the plaintiff, who is the daughter of the deceased, was disinherited in the Settlement Deed that itself cannot be a ground to hold that the same is the result of undue influence.

13. It is submitted by the learned Senior counsel for the defendants that, absolutely, there is no pleadings with regard to the alleged illness or mental condition of the settlor. Even P.W.1, in

her cross examination, did not mention that his father was suffering from any ailments. Further, she did not deny her father's conscious at the relevant time. Hence, it is the contention of the learned counsel that once the execution of the Settlement is admitted, there is no need whatsoever, for examining the attesting witnesses. Settlor himself has mentioned about the execution of the previous document. Therefore, as per Section 70 of the Indian Succession Act, no further mode is required to prove the attested documents. Hence, it is submitted that claiming partition by the plaintiff in respect of the entire properties is not maintainable.

14. However, the learned Senior counsel for the defendants fairly conceded that in respect of 1/6th share retained by the settlor during his life time, no provision has been made. Therefore, the plaintiff is entitled to 7/12 share alone in the "B" schedule property. Thus, the learned Senior Counsel prayed for dismissal of the suit. In support of his contention the learned Senior counsel relied on the judgments reported in 2016-5-L.W. 28 = (2016) 7 MLJ 280 (D.Dhanasekaran v. V.Damodharan) and AIR 1967 SC 878 (Subhas Chandra Das Mushbi v. Ganga Prosad Das Mushib and others).

15. In the light of the above submissions, now the issue has to be analysed.

Issue Nos: 1 to 6:

16. The plaintiff is the daughter of one M.A. Sheriff, the settlor. The defendant No.1 is the wife of the settlor and the defendants 2 to 5 are the sons of the settlor, i.e., brothers of the plaintiff. These facts are not disputed. It is also not in dispute that the settlor, namely, M.A. Sheriff has acquired the suit properties out of its own earnings. The evidence adduced by P.W.1 and D.W.1 would also prove the same. Admittedly, the settlor was working as Manager in RBI. It is not disputed by both sides that the settlor was a Law Graduate and he was residing at Mumbai during his service. It is also not disputed that sons and wife of the testator were also residing with him for some time and thereafter, he came and settled in Chennai. The deceased executed Settlement Deed on 18.5.2005 on the file of the sub registrar, Anna Nagar, wherein he has settled the properties in favour of defendants 1 to 5.

17. It is the main contention of the plaintiff that the defendants 2 to 5 were keeping the deceased M.A. Sheriff with them in their residence at Maharashtra for quite long time and they were taking care of him at his old age, who had several ailments, and had full control over him, defendant No.1 and taking advantage of such position, the defendants 2 to 5 were interfering in all decisions of M.A. Sheriff and due to fiduciary capacity, they have brought out the Settlement Deed dated 18.5.2005. Except making the general allegations in the plaint that her father was residing under the control of the defendants and he was not keeping good health both physically and mentally because of his old age and other ailments, no other particulars whatsoever, pleaded in the plaint with regard to the nature of physical and mental ailments the settlor suffered at the relevant time.

18. It is well settled that in a case where fraud or undue influence or coercion is put at the forefront, the complaining party should set forth the facts in full and should give essential particulars instead of making general allegations. The legal requirement to make such details is enumerated under Order 6, Rule 4 CPC. As per Order 6, Rule 4 CPC, in all cases, in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence, and in all other cases in which particulars which may be necessary, beyond such as are

exemplified in the forms aforesaid, particulars shall be stated in the plaint.

19. In this case, except making general allegations in the plaint that her father was not keeping good health either physically and mentally, no other particulars whatsoever, as to what was the nature of ailment he had both mentally and physically. Admittedly, the pleadings are totally silent in that regard.

20. It is pertinent to point out that the plaintiff is not a stranger. She, being the daughter of the deceased M.A. Sheriff, suppose to know the alleged mental as well as physical condition of her father but she has not made any specific pleadings as required under law.

21. Be that as it may, the plaintiff assailed the document namely, the Settlement Deed dated 18.5.2005 registered on the file of the Sub Registrar Anna Nagar, on the ground that it was obtained by undue influence and the same has not been proved in the manner known to law and that, it is shrouded with suspicious circumstances, as the plaintiff was totally disinherited from the entire suit property.

22. In this regard, it is useful to extract Section 16 of the Contract Act, 1872 which reads as follows:

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

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

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

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

(3) Where a person who is in a position to dominate the Will of another, enters into a contract with him, and the transaction appears, on the fact 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. "

23. From the reading of the above Section, it makes it clear that there are two things to start with, namely, (1) are the relations between the donor and the donee such that the donee is in a position to dominate the will of the donor and (2) has the donee used that position to obtain an unfair advantage over the donor? Sub-section (2) of the section is illustrative as to when a person is to be considered to be in a position to dominate the will of another. Sub-section (3) of the section throws the burden of proving that a contract was not induced by undue influence on the person benefiting by it when two factors are found against him, namely that he is in a position to dominate the will of another and the transaction appears on the face of it or on the evidence adduced to be unconscionable. Burden of proving such contract was not induced by undue influence is to lie upon the person who was in a position to dominate the Will of the other.

24. Therefore, it is clear that when the plaintiff was able to prove the fact that defendants were holding real or apparent authority over the settlor herein or where they stood as a fiduciary relationship with the settlor and the settlor mental capacity is temporarily or permanently affected

by reason of age, illness, or mental or bodily distress, then there is no difficulty in placing the burden on the defendants to establish the fact that the Settlement Deed was not influenced by undue influence. For placing such burden on the defendants, this Court is of the view that the plaintiff has to establish two essential aspects, viz., (a) that the defendants were actually holding real or apparent control over the settlor or the settlor stood in a fiduciary relation with the defendants besides, settlor was not keeping good health and his mental capacity is affected either temporarily or permanently by reasons of age, illness, any other distress. Without establishing the above facts, this Court is of the view that the burden cannot be shifted on the side of the defendants to prove that the document was not influenced by undue influence.

25. In the above background, when the evidence of P.W.1 is carefully perused, it is seen that the same is nothing but replica of the plaint. Except general allegations about the defendants' conduct over her father, she has not specifically stated with regard to the nature of ailment or illness, which her father suffered at the relevant time. In the cross examination, she has admitted that her father was employed as a Manager in RBI and he was a Law Graduate. Besides, he has also admitted that while her father was in service, she got married and her father only arranged and conducted her marriage and he alone had met all the expenses including jewels and Sreedhana properties. She also admitted that her father died only in the year 2010 and all the properties are self acquired properties of her father. Further, in her cross examination, nowhere she has pleaded ignorance as to whether her father executed Settlement Deed 5 years prior his death. A specific suggestion was put to P.W.1 to the effect that Settlement Deed dated 18.5.2005 was executed by her father while he was in sound state of mind, on his own volition without any coercion. The above suggestion was also not denied by P.W.1. In fact, she has pleaded ignorance to the above said suggestion. Further, she has also admitted that Ex.D1 was written by her father. Similarly, she has also admitted in the cross examination that she is not aware of the execution of the Settlement, although he has a right to execute such a Deed. From the entire cross examination, this Court finds that P.W.1 has not even denied the specific question that settlement was executed in sound state of mind and on his own volition.

26. When Ex.D1, General Power of Attorney, is seen one Mr. M.A Afsar Sheriff, who is the 3rd defendant in the suit said to have given Power of Attorney in respect of the property stands in his name, as he was away from India since he was working at Qatar. Power of Attorney purported to be executed by the 3rd defendant herein in favour of father. Ex.D1 is the handwriting of Power of Attorney. The same clearly shows that draft has been prepared to give power in the name of the settlor by one of the beneficiary in the Settlement Deed dated 18.5.2005. The entire document was written in his own handwriting, i.e. The settlor. From the evidence of P.W.1 and D.W.1 it is very clear that the deceased M.A. Sheriff was a Law Graduate and he was working in RBI and he himself drafted the Power of Attorney executed by 3rd defendant in his favour during December 2005. The handwriting of the settlor has been admitted by P.W.1. P.W.1 did not even deny this document Ex.D1. Ex.D1 clearly show that settlor himself has written Power of Attorney, wherein also he made a reference to the settlement executed by him in favour of his wife and sons. This fact clearly show that the settlor himself admitted the execution of the document.

27. Though the Power of Attorney draft shows as if 3rd defendant was, in fact, giving power to settlor, the recital was written by the settlor himself admitting the settlement. Once the settlor

himself admitted the execution of the document, this Court is of the view that there is no necessary whatsoever, for proving the document by examining the attesting witnesses. As per Section 70 of the Indian Evidence Act, admission of executant himself is sufficient proof of execution. Similarly, P.W.1 in her cross examination not even denied the execution of the document. Even in the pleadings, she has not denied the execution of the document. But her only contention is that the document is the result of undue influence. Therefore, once the execution of the document, Ex.P3, Deed of Settlement, is not denied, examining the attesting witnesses is not necessary. Hence, the contention of the learned counsel for the plaintiff in this aspect cannot be countenanced.

28. It is to be noted that the document Exs.P3=D5 is executed on 08.5.2005 in which one of the attesting witnesses is the brother of the settlor. This fact is also admitted in the evidence of D.W.1. Though both the witnesses were alive, in view of the fact that the very nature of the document itself is admitted by the settlor and the execution of the document is not denied by the plaintiff, this Court is of the view that no further mode is required to prove the same as per proviso to Section 68 of the Indian Evidence Act.

29. It is to be noted that Ex.D4 Will was executed by the settlor bequeathing the properties only in favour of the defendants herein as early as on 31.8.1988. The said Will is also registered one. In the said Will also, the plaintiff was disinherited. The deceased has narrated the reason for such disinheritance in the year 1988 itself. It is clearly stated that since the plaintiff got married and she is living happily with her husband, she was not given any share. Though Ex.D4 is not germane for consideration in this suit, as per Section 32 of the Indian Evidence Act, the statement made by the family Head in the Will is also relevant with regard to the family affairs. This fact clearly indicate that settlor had intention to give his immovable property only to his wife and sons from the very beginning. Therefore, merely because, P.W.1, namely, the plaintiff herein, was disinherited in the document itself cannot be stated that the same is the result of undue influence.

30. Admittedly, the plaintiff got married while his father was in service. The wife and sons living with the settlor is quite natural. Therefore, mere living together, at no stretch of imagination, would not amount to dominating the Will of the head of the family.

31. In this regard, it is useful to refer the judgment in *Subhas Chandra Das Mushib v. Ganga Prasad Das Mushib and others*, (cited supra) wherein the Hon'ble Supreme Court has held as follows:

8. It must also be noted that merely because the parties were nearly related to each other no presumption of undue influence can arise. As was pointed out by the Judicial Committee of the Privy Council in *Poosathurai v. Kannappa Chettiar* [47 IA p 1 at p 3]:

"It is a mistake (of which there are a good many traces in these proceedings) to treat undue influence as having been established by a proof of the relations of the parties having been such that the one naturally relied upon the other for advice, and the other was in a position to dominate the will of the first in giving it. Up to that point 'influence' alone has been made out. Such influence may be used wisely, judiciously and helpfully. But whether by the law of India or the law of England, more than mere influence must be proved so as to render influence, in the language of the law, 'undue'."

9. The law in India as to undue influence as embodied in Section 16 of the Contract Act is based on the English common law as noted in the judgment of this Court in *Ladli Prasad Jaiswal*

v. Kamal Distillery Co. Ltd. [ (1964) 1 SCR 270 at 300] According to Halsbury's Laws of England, 3rd Edn., Vol. 17, p. 673 Article 1298, "where there is no relationship shown to exist from which undue influence is presumed, that influence must be proved". Article 1299 p. 674 of the same volume shows that "there is no presumption of imposition or fraud merely because a donor is old or of weak character". The nature of relations from the existence of which undue influence is presumed is considered at pp. 678-81 of the same volume. The learned author notes at p. 679 that "there is no presumption of undue influence in the case of a gift to a son, grandson, or son-in-law, although made during the donor's illness and a few days before his death". Generally speaking the relation of solicitor and client, trustee and cestui que trust, spiritual adviser and devotee, medical attendant and patient, parent and child are those in which such a presumption arises. Section 16(2) of the Contract Act shows that such a situation can arise wherever the donee stands in a fiduciary relationship to the donor or holds a real or apparent authority over

10. Before, however, a court is called upon to examine whether undue influence was exercised or not, it must scrutinise the pleadings to find out that such a case has been made out and that full particulars of undue influence have been given as in the case of fraud. See Order 6, Rule 4 of the Code of Civil Procedure. This aspect of the pleading was also given great stress in the case of Ladli Prasad Jaiswal [ (1964) 1 SCR 270 at 300] above referred to. In that case it was observed (at p. 295):

"A vague or general plea can never serve this purpose; the party pleading must therefore be required to plead the precise nature of the influence exercised, the manner of use of the influence, and the unfair advantage obtained by the other."

From the above judgment, it is clear that mere living together in the same house itself is not a ground to presume that every document executed by the head of the family in favour of others is the result of undue influence. The question whether the transaction was brought out by the exercise of undue influence must be decided upon the facts and circumstances of that case. In the given case, from the evidence and pleadings, this Court is unable to find any materials to presume that the defendants were in the position to dominate the Will of the settlor. The way in which Ex.D1 was written by the settlor in his own handwriting would clearly indicate that settlor had legal knowledge besides he was working in RBI. Therefore, this Court does not find any materials to countenance the contention of the plaintiff.

32. Similarly, in the case of D. Dhanasekaran v. V. Damodharan, this Court has held as follows:

"..... 15. Only because of the relationship between the parties, it cannot be concluded that the appellant/D1 was in a position to dominate the plaintiff. The fact that the appellant/first defendant was in a dominating position is to be established only by the plaintiff. Even if that fact is established, the next factor that the execution of the settlement deeds was due to undue influence made by the appellant has to be established.....

....19. Regarding mental illness, the plaintiff pleaded that he was mentally unsound from the middle of the year 1996 till the end of 1999 and during that period, settlement deeds were got executed without his knowledge. Ex.D.31 is the certified copy of the sale deed, dated 19.02.1997. Through this sale deed, property was purchased by D4 and her husband. In this, the plaintiff identified the parties and signed before the Sub-Registrar in Salem. Thus, it is seen from the

records that the plaintiff was able to travel from Chennai to Salem and also put his signature as a witness before the Sub-Registrar. Therefore, the plea that the plaintiff was unsound from 1996 to 1999 is not acceptable. To establish his mental illness, the plaintiff filed O.P. Chits as Ex.P.3 series, dated 11.07.1996 and 26.07.1996. The appellant/first defendant issued lawyers notice under Ex.D.16. The plaintiff sent a reply, dated 16.09.2002 under Ex.P.17. In the reply, the plaintiff admits the execution of the two settlement deeds, dated 21.07.1998 and 31.07.1998. There is no whisper about the mental illness in this reply notice.

20. The settlement deeds in question are dated 21.07.1998 and 31.07.1998. Though as per Ex.P.3, he took some treatment as out patient in Psychiatric clinic in July 1996, he became alright and went to Salem and signed as witness in the sale deed in the year 1997. Therefore, the disputed settlement deeds, dated 21.07.1998 and 31.07.1998 got executed when he was mentally ill cannot be correct.

21. It is argued on the side of the plaintiff that the appellant/first defendant having filed the suit along with other defendants against the plaintiff averring that the plaintiff was mentally ill, cannot resile now and say that the settlement deeds were executed on his own volition by the plaintiff.

22. The appellant/first defendant pleads that he had no knowledge about the suit filed against the plaintiff in O.S.No. 5645 of 1997. Only the plaint and the summons issued to the first defendant in that suit, who is the plaintiff in this suit alone have been filed as Ex.P.4 and Ex.P.5. Suggestion has also been put to D2, who was examined as D.W.1 when cross-examined by the appellant/first defendant that the above O.S.No. 5645 of 1997 was filed by the second defendant in collusion with other defendants. When there is denial of filing of the above said suit, it is to be established that suit was filed by the appellant/first defendant. The available documents are not suffice to establish so. Therefore, the averments of the plaint in the above suit cannot be taken as that of the appellant/first defendant. Thus, the mental illness of the plaintiff at the time of execution of disputed settlement deeds has not been established."

33. The learned counsel for the plaintiff has placed much reliance on the judgment report in 1929 AIR PC 3 (cited supra). In the said judgment, taking into consideration the illiterate aged woman, the document was assailed on the ground of undue influence. The learned counsel for the plaintiff also placed reliance in the case of Lakshmi Amma and another v. Talengalnarayana Bhatta And Another cited supra, wherein the Hon'ble Supreme Court has held as follows:

"...11. On behalf of the plaintiff certain doctors were produced. The trial court, had, while deciding the question whether the suit should be permitted to proceed in forma pauperis, recorded an order on March 15, 1957. In those proceedings Dr Kambli had been examined as a witness. That doctor treated Narasimha Bhatta from March 6, 1956 to March 12, 1956 and he had issued a certificate Exhibit A-1 wherein it was stated that Narasimha Bhatta was in a weak condition and was subject to loss of memory attended by mental derangement and dotage. The observation of the trial court itself was that when Narasimha Bhatta, under its directions, was brought to the Court on March 11, 1957, he looked blank and did not answer when the Court asked him what his name was. According to what Narasimha Bhatta stated he was 25 or 30 years of age, at that time. He could not tell the name of his wife and he was bodily carried by two persons to the Judge's chamber. It was, therefore, found that he was a person of weak mind and was incapable of making his own decisions and conducting his affairs. It may be that the condition of Narasimha Bhatta on

March 11, 1957 may not throw much light on what his condition was in December 1955 but the evidence of Dr Kambli who had examined him only a couple of months after the execution of the document shows that Narasimha Bhatta was suffering from various symptoms which are to be found in a case of advanced senility particularly when a person is also suffering from a disease like diabetes-a wasting disease.

12. We are satisfied that Narasimha Bhatta who was of advanced age and was in a state of senility and who was suffering from diabetes and other ailments was taken by Respondent 1 who had gone to reside in the house at Sodhankur village a little earlier in a taxi along with Lakshmiamma to the Nursing Home in Mangalore where he was got admitted as a patient. No draft was prepared with the approval or under the directions of Narasimha Bhatta nor were any instructions given by him to the Scribe in the matter of drawing up of the document Exhibit B-3. An application was also made to the Joint Sub-Registrar, Mangalore for registering the document at the Nursing Home by someone whose name has not been disclosed nor has the application been produced to enable the Court to find out the reasons for which a prayer was made that the registration be done at the Nursing Home. Lakshmiamma, the wife of Narasimha Bhatta who was the only other close relation present has stated in categorical terms that the document was got executed by using pressure on Narasimha Bhatta while he was of an infirm mind and was not in a fit condition to realise what he was doing. The hospital record was not produced nor did the doctor who attended on Narasimha Bhatta at the Nursing Home produce any authentic data or record to support their testimony. Even the will was not produced by Respondent 1 presumably because it must have contained recitals about the weak state of health of Narasimha Bhatta. The dispositions which were made by Exhibit B-3, as already pointed out before, were altogether unnatural and no valid reason or explanation has been given why Narasimha Bhatta should have given everything to Respondent 1 and even deprived himself of the right to deal with the property as an owner during his lifetime. All these facts and circumstances raised a grave suspicion as to the genuineness of the execution of the document Ext. B-3 and it was for Respondent 1 to dispel the same. In our opinion he has entirely to do so with the result that the appeal must succeed and it is allowed with costs in this Court. The decree of the High Court is set aside and that of the trial court restored...."

In the above judgment, the Hon'ble Supreme Court, taking into consideration the weak health and advanced age of the testator, found that the document was as a result of undue influence. But in this case, admittedly, there is no evidence to show that the settlor was in weak health and was suffering from any physical or mental illness etc., Ex. D1 clearly show that in the year 2005, when the Settlement was executed, he was hale and healthy and had good mental capacity. The nature of writing and draft made by the settlor would clearly prove the fact that he had very good mental faculties at the relevant time. It is also admitted that the settlor died five years after the execution of the document in question. During his life time, there was no dispute with regard to that. Therefore, the above judgment cited by the learned counsel for the plaintiff is not applicable to the facts of the present case.

34. Likewise, in the case of Dharman and 5 others v. Marimuthu (cited supra), this Court, after taking into consideration of the ill health of the testator at the time of executing the Gift deed, disbelieved the document.

35. In the case of Krishna Mohan Kul Alias Nani Charan Kul and another v. Pratima Maity and others, cited supra, the Hon'ble Supreme Court has observed as follow:

".....12. As has been pointed out by the High Court, the first appellate court totally ignored the relevant materials and recorded a completely erroneous finding that there was no material regarding age of the executant when the document in question itself indicated the age. The court was dealing with a case where an old, ailing illiterate person was stated to be the executant and no witness was examined to prove the execution of the deed or putting of the thumb impression. It has been rightly noticed by the High Court that the courts below have wrongly placed the onus to prove execution of the deed by Dasu Charan Kul on the plaintiffs. There was challenge by the plaintiffs to the validity of the deed. The onus to prove the validity of the deed of settlement was on Defendant 1. When fraud, misrepresentation or undue influence is alleged by a party in a suit, normally, the burden is on him to prove such fraud, undue influence or misrepresentation. But when a person is in a fiduciary relationship with another and the latter is in a position of active confidence the burden of proving the absence of fraud, misrepresentation or undue influence is upon the person in the dominating position, and he has to prove that there was fair play in the transaction and that the apparent is the real, in other words, that the transaction is genuine and bona fide. In such a case the burden of proving the good faith of the transaction is thrown upon the dominant party, that is to say, the party who is in a position of active confidence. A person standing in a fiduciary relation to another has a duty to protect the interest given to his care and the court watches with jealousy all transactions between such persons so that the protector may not use his influence or the confidence to his advantage. When the party complaining shows such relation, the law presumes everything against the transaction and the onus is cast upon the person holding the position of confidence or trust to show that the transaction is perfectly fair and reasonable, that no advantage has been taken of his position. This principle has been ingrained in Section 111 of the Indian Evidence Act, 1872 (in short "the Evidence Act"). The rule here laid down is in accordance with a principle long acknowledged and administered in the Courts of Equity in England and America. This principle is that he who bargains in a matter of advantage with a person who places confidence in him is bound to show that a proper and reasonable use has been made of that confidence. The transaction is not necessarily void ipso facto nor is it necessary for those who impeach it to establish that there has been fraud or imposition, but the burden of establishing its perfect fairness, adequacy and equity is cast upon the person in whom the confidence has been reposed. The rule applies equally to all persons standing in confidential relations with each other. Agents, trustees, executors, administrators, auctioneers, and others have been held to fall within the rule. The section requires that the party on whom the burden of proof is laid should have been in a position of active confidence. Where fraud is alleged, the rule has been clearly established in England that in the case of a stranger equity will not set aside a voluntary deed or donation, however improvident it may be, if it be free from the imputation of fraud, surprise, undue influence and spontaneously executed or made by the donor with his eyes open. Where an active, confidential or fiduciary relation exists between the parties, there the burden of proof is on the donee or those claiming through him. It has further been laid down that where a person gains a great advantage over another by a voluntary instrument, the burden of proof is thrown upon the person receiving the benefit and he is under the necessity of showing that

the transaction is fair and honest.....

..... 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 [AIR 1963 SC 1203] are logically applicable to the case of old, invalid, infirm (physically and mentally) and illiterate persons "

There is no dispute with regard to the proposition laid down by the Hon'ble Supreme Court. In the above case, the Hon'ble Supreme Court, taking into consideration the age of the executant, who was aged more than 100 years at the relevant time, and the fact that he was paralytic and his mental and physical conditions were not in order and also the fact that there was no evidence to show that he has put thumb impression, has held that the document is unconscionable. Since, in this case, as stated above, there is no evidence to show that at the time of executing the document, the settlor was not in good health and he lost his mental capacity. Therefore, the said judgment is also not applicable to the facts of the present case.

36. In the case of Suguna and another v. Vinod G. Nehemiah and others, this Court, based on the evidence adduced by both sides to the effect that the testator had lost his mental condition at the relevant time, has held that the document is not valid. Therefore, the said judgment is not useful to the plaintiff.

37. In the background of the facts projected and the evidence let in, I am of the view that the plaintiff has miserably failed to establish the plea of undue influence. In Ex.D4, Settlement Deed, item 1 of the suit schedule property stood in favour of defendants 2 to 5. Insofar as Item 2 of the suit property is concerned, the settlor has settled ? share in the suit properties and he retained remaining ? share. Since Settlement Deed is found to be true, genuine and valid in law, as discussed above, the plaintiff, at the most, is entitled to 4/16 share retained by her father in respect of item 2 of the suit schedule property. The plaintiff, being daughter of the settlor, as per Muslim law, is entitled to 7/72 share in the aforesaid ? share retained by her father under Ex.D4.

38. Accordingly, the preliminary decree is passed dividing item 2 of suit properties and to allot 7/72 share, out of ? share retained by her father under Ex.D4. In respect of other aspects, the relief claimed by the plaintiff cannot be granted and the suit is dismissed. No costs.