

(1989) 02 MAD CK 0016

In the Madras High Court

Case No : O.S.A. No's. 74 and 77 of 1979

Bhupendrakumar R. Parikh and another	APPELLANT
Vs	
M.K. Lakshmi and others	RESPONDENT

Date of Decision : 02-02-1989

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 2
Contract Act, 1872 — Section 16(3)
Evidence Act, 1872 — Section 101, 104, 111
Transfer of Property Act, 1882 — Section 41

Citation : AIR 1990 Mad 46 : (1989) 2 LW 294

Hon'ble Judges : Mohan, O.C.J.; David Annoussamy, J

Bench : Division Bench

Advocate : U.N.R. Rao and N.C. Raghavachari, for N.S. Varadachari, for the Appellant; M.R. Narayanaswami and V. Swaminathan, for the Respondent

Judgement

David Annoussamy, J.—The first appeal is by defendants 3 and 4.

The second appeal was preferred by the first defendant, who is now represented by his legal heirs, appellants 2 to 7. Respondents 1 to 4 in that

appeal are, respectively the plaintiff and defendants 2 to 4 in the suit.

2. The case of the plaintiff may be summarized as follows:

The plaintiff is the second wife of one Alagappa Chettiar and out of that wedlock she had two sons and one daughter. On account of

misunderstanding between her husband and her mother Kannammal, she left her husband and came to Madras with their children in the year 1951

and resided at No. 1. Shanmugha Mudali Street, Royapettah Madras, which house belonged to her mother. She used to work as a musician and

film artiste. Her children also contributed to the family expenses as film artistes. When her mother was alive, the first defendant who was then

manager of a Cinema theatre became known to the plaintiff's mother and was frequenting her residence. Later he became unemployed. Finding

that the plaintiff was well off, he wormed himself into her confidence and affection; representing that there was misunderstanding between him and

his wife, he took permanent residence with the plaintiff in the year 1959. The plaintiff was not acquainted with English language and was quite

ignorant of business affairs and hence she allowed him to manage all her affairs and entrusted to him all her papers and monies. The first defendant

used to obtain her signatures either in blank or with some written matter or typewritten matter representing that they were required in connection

with her affairs. The plaintiff used to sign whenever she was asked to do so, believing his representations. She even allowed him to represent herself

as her husband in all dealings with the outside world since he persuaded her that such a status would command respect. On 6-5-1959 the

plaintiff's mother settled her property at No. 1, Shanmuga Mudal Street Royapettah, Madras, on the plaintiff absolutely under a settlement deed.

The first defendant represented that there was an attractive property at Gandhinagar, viz, the suit property, which had been allotted to one

Pundarikshakha Naidu by the Madras Co-Operative House Construction Society Ltd and that the transfer of the same could be got in plaintiff's

favour if she could pay Rs. 15,000/- to the said Naidu and Rs. 14,900/- to the said Society. The first defendant further persuaded the plaintiff to

borrow a sum of Rs. 20,000; - on mortgaging the property at No. 1, Shannniga Mudall Street, Royapettah, Madras, to the Purasa-walkara

Saswatha Sangha Nidhi and thus she executed a mortgage deed on 24-6-1959. A sum of Rs. 2,001/- was paid by cash to the said Naidu and

subsequently a cheque for Rs. 12,999/- was issued by the plaintiff in his favour. There was some litigation between the said Naidu and the plaintiff,

which was ultimately compromised. As per the compromise she paid the balance amount to the society. As a result of such payment, the plaintiff

became a member of the society and entered into a hire purchase agreement with the society on 19-4-1961. As per the agreement, she was to get

a conveyance executed in her favour or in favour of her nominee by the said society, which is now represented by the second defendant.

3. After payment of Rs. 45,030-82 in full discharge of all her liabilities under the hire purchase agreement to the society, she became entitled to a

conveyance. The entire consideration was met from her own earnings and those of her children. The plaintiff had been residing in the suit premises from 1961 along with her children and the first defendant. Subsequently the first defendant's father-in-law brought the first defendant's wife and children to the suit premises and out of compassion, the plaintiff did not object to it. The first defendant had conceived a fraudulent intention to somehow obtain the transfer of the suit property in his name with a view to appropriate it for himself exclusively. The plaintiff learnt later that with this end in view, he had made an application even as early as May 1971 to the Corporation of Madras for mutation of the suit property in his name in the assessment register, in which the property was standing in the name of the plaintiff. The plaintiff had paid the property tax all along and is even now continuing to pay the same. The first defendant appears to have obtained the plaintiff's signature to a letter or used a blank paper signed by her for a request to the second respondent to execute a sale deed in respect of the suit property in favour of the first defendant as her nominee without her knowledge. It appears that the said request letter is dated 12-7-1971. On the same day D. 1 obtained a conveyance in his favour from the second defendant. It appears also that the sale deed was presented before the Registrar on 12-7-1971 and registered on 19-7-1971. The plaintiff became aware of the above fraudulent acts of the first defendant only towards the end of 1972, when she observed some person calling at the plaintiff's residence on two occasions and being closeted with the first defendant. On the last occasion when the said person came, from the manner in which he was talking to the first defendant, the plaintiff understood that he was a money lender and that he came to make a demand for payment towards loan. She enquired with the first defendant, but the latter gave an evasive reply. This aroused her suspicion that he would have borrowed money by mortgaging the suit property and started enquiring the second defendant to find out whether there was any encumbrance on the suit property. In January 1973 she was surprised and shocked to learn from the second defendant that a conveyance deed had been executed in favour of the first defendant on the strength of an authorisation by her. On 1-2-1972 the plaintiff made an application for a copy of the conveyance and thus became aware of the fraud committed by the first defendant. This caused estrangement between the first defendant and the

plaintiff.

4. She also applied for an encumbrance certificate and came to know that the suit property was mortgaged with defendants 3 and 4 under three

separate documents for an aggregate sum of Rs.40.000/- She also obtained registration copies of those deeds and found that they contained

several false recitals, particularly the recital that the superstructure in the suit property had been put up by the first defendant out of his own funds.

There was no necessity to borrow money, inasmuch as the plaintiff had been giving funds to the first defendant from time to time and she had also

the sale proceeds of the plaintiff's house at No. 1, Shanmuga Mudali Street, Royapettah, Madras, which was sold by her on 12-7-1967 for a sum

of Rs. 50,000/-.

5. As per the plaint averments, the first defendant was also collecting rents from the shops and outhouses in the suit property and retaining them.

Becoming aware of the acts of fraud of the first defendant, the plaintiff sought the help of one Dr. M. Sanihosham, her family doctor in the

beginning of 1974, to persuade the first defendant to set right the matters. The said doctor had a discussion with the first defendant in the plaintiff's

presence in the suit house and the first defendant told him that he would set right the matters within 3 or 4 months. However, the first defendant

failed to keep up his words.

6. Defendants 2 to 4 have not acted in good faith since the recitals in the mortgage deeds show that the entire consideration for the property had

been paid by the plaintiff in full discharge of her liabilities and obligations under the hire purchase agreement dated 19-4-1961. There was also a

marble slab embedded in one of the gate pillars of the suit property only with her name on it. There was another marble slab bearing the name of

her daughter. Padma. She accordingly prayed for the following reliefs:-

(a) declaring the plaintiff as the owner of the suit property;

(b) granting a permanent injunction restraining defendants 1,3 and 4 from interfering in any manner with the ownership, possession and enjoyment

of the property by the plaintiff and defendants 3 and 4 from exercising any right under the deeds of mortgage in their favour;

(c) directing the first defendant to account to the plaintiff for all rental collections made by him in respect of the suit property after the date of the

plaint;

(d) declaring the first defendant not entitled to remain in the suit premises along with his family and directing him to quit the premises along with his

family members; and

(e) for costs of the suit,

7. The main contesting defendant is the first defendant and his case is as follows :---

The plaintiff does not disclose any cause of action as against the first defendant. He denied that the plaintiff is the absolute owner of the suit property

or that she paid the money due to the society from out of her own funds. The plaintiff has not been residing in the suit house for the past two years

and has been residing at No. 4. Halaraman Street. Adyai. The property was conveyed to him by the second defendant under a registered sale

deed dated 12-7-1971 with the consent and upon the direction of the plaintiff. The plaintiff voluntarily desired the property should be registered in

the first defendant's name as the lawful owner. The plaintiff's sons marriages were celebrated in the suit property, after such transfer and the first

defendant had met all the marriage expenses. The estrangement started between the plaintiff and the first defendant when the first defendant insisted

that the plaintiff's daughter should marry and lead a respectable life.

8. The plaintiff does not plead 11011 est factum. No allegation such as undue influence misrepresentation, pressure or coercion on the part of the

first defendant was alleged, continues the first defendant. No actual positive act of fraud is alleged. The plaintiff does not come forward to deny

having signed the letter dated 12-7-1971. or sending it to the second defendant, nor is it complained that it is a forgery. She does not also any

where state that she executed the transfer unwillingly or out of fear or out of fear of unpleasant consequences. The plaintiff had not impugned it at

any time by any notice even after the alleged discovery of fraud, until the date of suit. She had by her conduct elected to unequivocally affirm and

ratify it. The document, in the circumstances, is a valid one until it is set aside.

9. Immediately after the sale in his favour the first defendant had borrowed from defendants 3 and 4 a sum of Rs. 40,000 - under three different

mortgage deeds over the suit property, to the knowledge of the plaintiff for constructing a few shops in the front. The plaintiff never objected

thereto. Those shops did not spring up overnight, but took considerable time to be completed. She was fully aware that the shops were with the funds borrowed by mortgaging the suit property. She stood by and allowed the first defendant to construct the said shops at a huge cost of over Rs. 40,000. - without any protest whatsoever. The plaintiff is estopped from questioning the conveyance of the suit property in his favour. Before the conveyance of the property to the first defendant, the suit property did not fetch any income by way of rents. Only after construction of shops with borrowed monies, the property started yielding rents; such rents were hardly sufficient to pay interest due on the mortgages. The plaintiff is not entitled to the rents from the shops and outhouses and cannot seek an account from this defendant. In any event, the plaintiff must pay the defendant compensation for the improvements effected on the property, which the 1st defendant estimated at a lakh of rupees. The property bearing No. 1, Shan-muga Mudali Street, Royapettah. Madras, was purchased in the name of plaintiff's mother with the funds of the first defendant and improvements were effected by him. The first defendant denied that the plaintiff and her children had sizable earnings as musicians and artistes. The plaintiff and her mother came under this defendant's protection in or about 1952 and at that time the first defendant was a bachelor. The first defendant succumbed to plaintiff's amorous approaches and her mother's machinations. The plaintiff was under his protection till about 1960. On account of his association with the plaintiff, the first defendant, incurred displeasure of his employer, the proprietor of Kamadhenu Theatre, and that of his wite, whom he married in 1954, who, left for her parent's house. It is true that the plaintiff's mother settled her property at No, 1, Shanmuga Mudali Street, Royapettah, Madras, on the plaintiff, just before her death. The name of the plaintiff was entered in the registers of the second defendant as a nominee of the first defendant as per the desire and with the knowledge of the plain tiff. The en tire amount for the allotment of the property was paid by the first defendnt and not by the plaintiff. The plaintiff voluntarily gave the letter of transfer of name in the registers of the society and requested the society that the sale deed may be effected in the name of the first defendant. The plaintiff is now instigated by some interested persons to undo, if possible, what was lawfully and justly done. The plaintiff was equally aware of all the

transactions and the mutation of the name in the Revenue and Corporation registers, as and when they took place and that the so-called enquiry was only to explain the delay in filing the suit.

10. As regards the borrowings made from defendants 3 and 4, the first defendant had every right to make such dealings as he was the absolute owner of the property. He also denied the other allegations.

11. The case of defendants 3 and 4 is as follows:--

These defendants were not aware of the exact nature of the relationship between the plaintiff and the first defendant. These defendants were not at

all aware of the alleged sizable earnings of the plaintiff. The plaintiff became a member of the Madras Co-operative House Construction Society

Limited, only at the instance of the first defendant, and for his own benefit. The plaintiff's name was used as a benami as the first defendant himself

had arranged to pay the money out of his own income. Such benami entry was made in the registers of the society in view of the close relations

which existed between the plaintiff and the first defendant. The fraudulent intention of the first defendant as alleged by the plaintiff is only made for

the purpose of the suit. The transfer of the suit property in favour of the first defendant made by the second defendant society, was effected openly

with the plaintiff's full knowledge and consent. The allegations that the 1st defendant took advantage of the plaintiff's ignorance and implicit

confidence in him are made only to cloud the issue. The property stands duly registered in the 1st defendant's name in the office of the Corporation

of Madras. The father of these defendants, at the request of the first defendant, inspected the suit property more than once and had occasion to

meet the plaintiff living in his house, when terms of loan were discussed with the first defendant. At those times, the plaintiff never questioned the

first defendant's right to mortgage the house and to raise loans thereon nor did she assert any right in herself. She was also aware of the fact that

the money which was being lent was for the purpose of putting up shops in the suit property. These defendants acted in good faith and there was

nothing suspicious nor was there any other circumstance putting these defendants on notice of any claim that may possibly be set by the plaintiff.

They also denied the other allegations made by the plaintiff. Accordingly, all defendants prayed that the suit should be dismissed.

12. From the above pleadings, the following issues were framed for trial:--

- (1) Is the plaintiff the sole and absolute owner of the suit property and the 1st defendant only a benamidar as claimed by her?
- (2) Did the 1st defendant obtain the transfer of the suit property in his name in the manner contended by the plaintiff?
- (3) Did the 1st defendant find the consideration for the purchase of the suit properly as contended by him in paragraph 19 of his written statement?
- (4) Is the suit not maintainable as contended by the 1st defendant in paragraph? of his written statement?
- (5) Is the plaintiff aware of the execution of the the mortgages by the 1st defendant in favour of defendants 3 and 4. If so, is the plaintiff disentitled on that account from questioning the said mortgages?
- (6) Are the mortgages executed by the 1st defendant in favour of the 3rd and 4th defendants binding on the plaintiff?
- (7) Is the plaintiff in possession of the suit property?
- (8) Is the plaintiff entitled to the reliefs of injunction and declaration against defendants 1, 3 and 4 as prayed for in the suit?
- (9) Is the 1st defendant liable to account to the plaintiff for all rental collections from the suit property from the date of the plaint?
- (10) Is the second defendant not a necessary or proper party to the suit?
- (11) To what reliefs are the parties entitled?

Additional Issue:--

- (12) In any event, is the plaintiff liable to pay compensation for the improvement; effected?

The plaintiff examined herself as I.W. 1 and also examined eight other witnesses and filed documents marked as Fxs. P.I to P.107. The first

defendant examined himself and produced documents marked as F.xs. DI and D32. Defendants 3 and 4 examined their father as D.W.2.

13. The trial Judge, after perusing the evidence adduced and hearing both parties, answered Issues 1,3,5,6 and 8 to 10 in favour of the plaintiff.

Issues 2 and 4 against the 1st defendant, and Issue No; 12 in favour of the 1st defendant and did not give any finding on Issue No. 7. Accordingly

decree is given : (a) declaring the plaintiff as the owner of the suit property and that the mortgages executed by the 1st defendant in favour of

defendants 3 and 4 are not binding on the plaintiff: (b) directing the first defendant and members of his family to deliver possession of the suit

property to the plaintiff on or before 25-11-1979; (c) restraining defendants 1, 3 and 4 by way of permanent injunction from interfering in any

manner with the ownership, possession and enjoyment of the suit property by the plaintiff and also from exercising any right under the deeds of

mortgages; (d) directing the plaintiff to pay to the first defendant a sum of Rs. 40,000 - towards improvement with interest at 12% per annum from

22-8-1974 till date of perfect payment, by creating a charge on the suit property for the said payment; (e) declaring the first defendant not liable to

render accounts to the plaintiff for the rental collections; (f) discharging the first defendant appointed as Receiver, subject to his filing final accounts

and passing of the same; (g) declaring the plaintiff to be entitled to the amounts collected by the Receiver from the suit property, subject to the

Receiver's remuneration and other amounts payable to him and (h) ordering the defendants to pay costs of the suit to the plaintiff. Aggrieved by

that judgment and decree dated 25-4-1979, the first defendant (since dead) has preferred O.S. A. No. 77 of 1979 and defendants 3 and 4 have

preferred O.S. A. No. 74 of 1979.

14. Learned counsel for the appellants contended that the doctrine of non est factum did not have application to the facts of the case, that the plea

of undue influence was not properly pleaded and proved, that the trial Judge has shifted wrongly the burden of proof on the defendants, that there

was no specific plea of fraud, that the finding of the trial Judge that the suit property was purchased exclusively with the money of the plaintiff was

not sustainable and that more particularly the Judge has taken into account evidence contrary to the pleas.

15. Learned counsel appearing for the plaintiff 1st respondent contended that in the circumstances of the case the relation of active confidence

justified the presumption of undue influence, that there were certain admissions by the first defendant in public documents which were fatal to his

case, that defendants 2 and 3 cannot have better title than the first defendant and that they were in addition lacking bona fides.

16. As far as the plea of non est factum is concerned, learned counsel for the first defendant contended that this doctrine does not apply where the

case is that the plaintiff has signed a blank paper. He pointed out that the essence of the doctrine is that there should be misrepresentation as to the contents and nature of the documents. He further added that the defence of non est factum was available only in respect of documents which as signed imposed some liability to the signatory and not to documents signed in blank. In support of his above argument, he placed before us the following authorities:

One case which deserves special mention is that of a document signed blank, which is intended by the signatory to be an offer, and the signatory hands over the signed document to another to fill in the details, but details are inserted which are not in accordance with the instructions of the signatory, and the document is then preferred to a third person for his acceptance." (Halsbury's Laws of England Volume 9, page 171. para 295]

I do not understand how in such a case any question of non est factum can arise, I agree with Person, L. J. that in the present case there is no

evidence that Phelan represented either by words or conduct that the defendant was signing documents which related to a mortgage transaction,

(Mercantile Credit Co. Ltd. v. Hamblin. 1964) 3 A.T.R 592:

The plea of non est factum can only rarely be established by a person of full capacity and although it is not confined to the blind and illiterate, any

extension of the scope of the plea would be kept within the narrow limits and that in particular it is unlikely that the plea would be available to a

person who signed the document without informing him-self of its meaning.

Placing full reliance on the above propositions, learned counsel for the first defendant appellant argued that in the present case the clear stand of the

plaintiff is that she signed either on a blank paper or on none other written paper the contents of which were unknown to her. Such being the plea,

it was added, there is no room for the plea of non est factum.

17. In fact, the plaintiff did not invoke the doctrine of non est factum nor the learned counsel for the plaintiff placed his argument on such a plea. It

is the first defendant who in his written statement ventured to say that the case is not one covered by the plea of non est factum. The trial Judge has

also not rendered a finding against the plaintiff on the basis of that doctrine. Therefore, it is not necessary in this case to consider this point.

18. Therefore, the points which arise for our consideration in this case are as

follows: -

- (a) Whether there was undue influence by the first defendant on the plaintiff?
- (b) Whether there was fraud played by the first defendant on the plaintiff?
- (c) Whether the sale consideration was paid by the plaintiff or the first defendant exclusively?
- (d) To what relief the parties are entitled?

19. Point No. I : - The case of the learned counsel for the plaintiff is that the rule in Section 111 of the Evidence Act was different from the one

embodied in Section 16(3) of the Contract Act, that it applied to a variety of relations, whenever it is shown that there was a possibility of exercise

of dominion and influence by one party on the other and that In such cases there will be a presumption of undue influence and the burden of

proving the contrary would lie on the stronger party. In support of this stand, the learned counsel placed before the Court the following

propositions with the corresponding authorities:--

The onus is on the party in whom confidence is reposed to show that the party to whom he owed the duty in fact acted voluntarily, in the sense

that he was free to make an independent and informed estimate of the expediency of the contract or other transaction.

(Cheshire and Fifoot's Law of Contract Tenth Edition page 279, under the head duress and undue influence)

The presumption applies to substantial gifts or benefits provided by an intended wife for her intended husband and this is so even if she is no longer young.

(Snell's Principles of equity 28th Edition page 541; under the head (Fraud):

Where the relations between the donor and the donee have at or shortly before the execution of the gift been such as to raise the presumption that

he had influence over the donor. In such a case the court will set aside the voluntary gift unless it is proved that in fact the gift was the spontaneous

act of the donor acting under circumstances which enable him to exercise an independent will and which justifies the court in holding that the gift

was the result of free exercise of the donor's wish.

(Inche Noriah v. Shaik Alii, 1929 MWN 105 : AIR 1929 PC 3.

The relation of paramour and mistress may be one of the cases where the

possibility of exercising influence exists from confidence created or established. In such cases, when a person obtains any benefit from another by exercising his influence which, in the opinion of the Court, prevents the grantor from exercising an independent judgment in the matter, the Court can set aside the contract or recover the gift.

(Shivgangawa Madiwalappa Vulavi Vs. Basangouda Govindgouda Patil, .

Where a wife is clearly under the influence of her husband owing to her youth, comparative illiteracy "and lack of intelligence and executes a document for the benefit of her husband" there "is a presumption that under these circumstances such document is null and void.

(Tungabai Pui;ushottam v. Yeshwant Dunkar (1945) 1 LR Bom 189 ;.AIR J945, PC 8

In such transactions as those involving" a "deed of arrangement or settlement (as distinct from an extravagant gift of a ring) made between an engaged couple, where the transaction appears on its face to be much more favourable to one party than to the other, the court may, in the circumstances of the case, find that a fiduciary relationship existed such as to cast an onus on the party benefited to prove, if [he transaction^ to stand, that it w as completed by the other party after full, free and informed thought about it.

(Zamet v. Hyman, 1961 (3) AER 933"

A minor who is under the influence of his de facto guardian during his-minority cannot be expected to come out of that influence merely on attaining majority Or within a short time thereafter. Where there is question of good faith of a transaction between the parties one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence.

(Pannalal Biswas Vs. Dilip Kumar Mondal and Others,)

Any relationship in which one party enjoys the active confidence of another party who is to lean on him and is inclined to repose implicit confidence in him is enough to approximate to the kind of relationship which may attract the provisions of S. 111 of the Evidence Act with regard to the rule of burden of proof.

(Daya Shankar Vs. Smt. Bachi and Others,).

20. Learned counsel for the first defendant on his side first contended that undue influence should be specifically pleaded, that without a specific

plea no finding of undue influence can be given and that therefore in this case the plaintiff who failed to"" plead undue influence cannot pray the

Court to extend to him the benefit arising out of undue influence. He placed before the Court in support of his contention the following propositions

with corresponding decisions:

Though pleas of undue influence and coercion may overlap in part in some cases they are separable categories in law and must be separately pleaded.

In cases of fraud, undue influence and coercion, the parties pleading it must set forth full particulars and the case can only be decided on the

particulars as laid. There can be no departure from them in evidence.

(Bishundeo Narain and Another Vs. Seogeni Rai and Jagernath,)

A plea of undue influence must be precise and all necessary particulars in support of that plea must be embodied in the pleading.

(Ladli Prasad Jaiswal Vs. Karnal Distillery Co. Ltd. and Others,)

21. Learned counsel for the first defendant then contended that the plea of undue influence does not arise whenever there is some relationship

between the parties. In this connection, he placed before the Court the following propositions and the correspondent authorities:--

To hold a contract as vitiated by undue influence two conditions must be satisfied. Firstly the relationship subsisting between the parties must be

such that one party is in a position to dominate the will of the other and secondly, that the person so placed should have used that position to obtain

an unfair advantage over the other.

On the application of this principle, it was held on facts that the gift deeds executed by the lady were made voluntarily having fully understood the

implications of the transactions being a person of strength of will and business mind and not one unfamiliar with the business ways or could be

easily led away (Sathi Sattemma Vs. Sathi Subbi Reddy and Another,).

The court trying a case of undue influence must consider two things to start with, namely, (1) are the relations between the donor and the donee

such that the donee is in a position to dominate the will of the donor, and (2) has the donee used that position" to obtain an unfair advantage over

the donor? Upon the determination of these issues a third point emerges, which is that of the onus probandi. If the transaction appears to be

unconscionable, then the burden of proving that the contract was not induced by undue influence is to lie upon the person who was in a position

to dominate the will of the other.

(Subhas Chandra Das Mushib Vs. Ganga Prosad Das Mushib and Others,).

22. Lastly, the learned counsel for the first defendant contended that undue influence, as contemplated u/s 16 of the Contract Act, would not apply

when the relationship is that of husband and wife and placed reliance on the following decisions:

(1) Howes v. Bishop 1909 (2) KB 390; (2) Zamet v. Hyman 1961 (3) All ER 933; (3) Ladli Prasad Jaiswal Vs. Karnal Distillery Co. Ltd. and

Others, ; (4) Shivgarigawa : v. Basangouda (AIR 1938 Bom 304).

23. Turning back to the facts of the case, we have first to take note of the fact that undue influence was not pleaded at all by the plaintiff, that she

pleaded instead fraud. It is the first defendant, who in his written statement, has contended that the transaction was not vitiated by undue influence.

Secondly, undue influence would in normal circumstances presuppose some knowledge of the transaction by the influenced person. She would

have been aware of what happened and given her consent; that consent would be vitiated by undue influence and would not be a real consent as

required by law, for various reasons like lack of information, impossibility to resist, non-availability of independent advice, etc. In the present case,

the first defendant and the plaintiff have been living as husband and wife and their relations were excellent. The plaintiff is not a house-wife confined

to her house. She is an artist musician and film actress. She was first married to another person and has left him to come and live with the first

defendant. Though she said that she had abandoned the entirety of the administration of the business of the family in the hands of the first defendant

she did not come forward to say that she had to accept whatever the first defendant said. On the contrary she was perfectly able to understand

what is what. As per her own averment, when the property was to be purchased she had to be persuaded with adequate reasons. The steps she

has taken in respect of the transaction, viz. once she has decided to jump into action, in this matter, shows that she is capable of understanding the nature of the transactions and resisting the first defendant if need be. Her case was clearly that she was not aware on the transaction at all and that the signature was obtained from her without her being informed of the nature of the transaction and it is for that reason that she pleaded fraud. We have, therefore, to conclude that this is not a case of undue influence in which the principles of S. 111 of "the Evidence Act would apply.

24. In the result, the first point is answered in the negative.

25. Point No. 2:-- As far as fraud is concerned, a specific plea was taken in the plaint. In paragraph 12 of the plaint it is stated that after the

plaintiff and the first defendant came to live in the suit premises, the latter had evidently conceived a fraudulent intention of somehow obtaining a

transfer of the suit property in his name with a view to appropriate it for himself as it now transpires. Later in the same paragraph it is stated as

follows: ""Since 1st defendant was attending to all the plaintiff's affairs, as stated in paragraph 7 above the plaintiff has now come to believe that he

must have taken advantage of her ignorance and implicit confidence in him either to get her signature in an application for transfer or used a blank

paper signed by her for that purpose."" This allegation is in respect of an application made in May 1971 to the Corporation of Madras for transfer

of the suit property in his name in the Property Tax Register in which the property had stood in the name of the plaintiff. The plaintiff states further

in paragraph 13 of the plaint" as follows: ""In the same manner the 1st defendant appears to have obtained the plaintiff's signature to a letter or

used a blank paper signed by her for a letter requesting the 2nd defendant to execute a sale deed in respect of the suit property in favour of the 1st

defendant as plaintiff's nominee without her knowledge.

26. The case of the first defendant was that fraud is not a matter of presumption, that no positive act of fraud was alleged and that the allegations

made in the plaint were bereft of the essential particulars. Learned counsel for the first defendant reiterated his objections very strongly raised at the

time of arguments before the trial Judge. He particularly relied on the following decisions: Bishundeo Narain and Another Vs. Seogeni Rai and

Jagernath, ; Bira Jena Vs. Tauli Dei and Another, and The Union of India (UOI)

Vs. Pandurang Kashinath More, . His case was that in case of fraud; the plaint should set forth full particulars, that the case can be decided only on the particulars as placed, that general allegations are not sufficient even to amount to an averment of fraud, that when particulars of fraud are not pleaded no evidence should be allowed on the matter of fraud and that if allowed it would be inadmissible and no finding can be based thereupon. This argument was rejected by the learned single Judge. He particularly observed that in the circumstances of the case where both parties were living as husband and wife and the plaintiff reposed full confidence on the first defendant it would be totally unjust to non suit the plaintiff merely on the ground that the particulars of fraud were not described in detail in the plaint.

27. From the plaint allegation that the signature on Ext. A-2 could have been obtained in a routine manner without her being put on notice about the nature of the document, it is clear that she is not able to say as to how she happened to affix signature on Ex.D- 2. It is even alleged that it was usual for her to affix signature on many documents without enquiring or without knowing the contents thereof. The plaintiff has gone to the extent of saying that she used to sign on blank papers. In such a case and taking into account the relation between the parties, we cannot apply the ratio embodied in the judgments relied on by the learned counsel for the first defendant. We have to ascertain from the circumstances of the case what her plea, however, vague it may be, as put forth by the plaintiffs has any truth in it.

27A. In her evidence, the plaintiff has come forward to say that she would have affixed her signature on Ex.B-2 probably on the day when her daughter was, about to proceed for a programme in the year. 1971 since at that time, according to her the first defendant brought some papers and asked her to sign, them. As she was in a hurry to proceed to her daughter's programme, she simply signed all those papers. Apart from the above details, she was not able to say anything else nor was she able to remember the date. This would however, suggest that she was not used to sign papers without ascertaining the contents as a matter of course. But she happened to do so in certain exceptional circumstances like the one referred to by herself. In this background, we have to find out the truth in

respect of the plea taken by the plaintiff and, so doubt the burden, is upon her.

28. In this case we have got her own sworn statement which is neutralised by the sworn statement of the first defendant. Learned single Judge

however came to the conclusion that there was fraud in scrutinising very minutely the evidence of the first defendant in the course of his cross-

examination regarding all that he had done on the day he took the signature and had the name changed in his favour upon the letter of request to

that effect from the plaintiff. No doubt the first defendant was not able to satisfactorily answer regarding his whereabouts and his activities on that

day. But that will not clinch the issue especially when the burden is on the plaintiff to prove the case. When we scrutinise closely the statements

and depositions of the plaintiff, we find the following facts: In the statement (plaint) in paragraph 15 she says as follows: "Towards the end of 1972

the plaintiff observed some person calling at the plaintiff's residence on two or three occasions and being closeted with the first defendant. On the

last occasion when the said person came, from the manner in which he was talking to the 1st defendant, plaintiff suspected that he was a money

lender and had come to make a demand for payment towards loan. She thereupon made enquiries with the 1st defendant who gave evasive

replies. This aroused her suspicion that he had probably borrowed on the security of the suit property and she therefore made enquiries in the

office of the 2nd defendant society to find out whether there was any encumbrance on the property". This would show that at the first instance she

had some doubt about the plaintiff, she was aware that the property was already transferred in his name, because what she suspected was that he

has borrowed on the security of the suit property which he could not have done, if the property continued to stand in her name. Secondly when she

goes to the second defendant Society, it is not to ascertain in whose name the property stands, but to ascertain whether there was any

encumbrance on the property, which again would show that she was already aware that the property stood in the name of her husband and

therefore, her signature for transfer was not obtained without her knowledge, as contended now. But in her evidence in pages 15 and 16 she

would state as follows:-- "After my eldest son's marriage the first defendant

shifted to the outhouse from the main building. I overheard the first defendant talking with some other persons about some arrangements over the property. I got suspicion immediately and met the first defendant and made enquiries. He told me that he was doing everything for my benefit only. However I had suspicion and went to the society and enquired from the society". It is found that she makes (sic) in her evidence a deviation from her statement in the plaint, having probably realised that her statement in the plaint, (having probably realised that her statement in the plaint) has disclosed truth against her will and that it would be a damage to her stand. But the truth has come out again in the evidence at the later stage in page 39 where she deposed; on the same day, I was overhearing the talk between the first defendant and two strangers about some transaction about the loan. I got suspicious and enquired the first defendant as to the transactions talked about himself and the said strangers. He said, it is none of your concern. I need not worry. Then. I asked him, you assured me to have the document transferred in my name. He said, he will do it in due course. "This statement makes it clear that when she started entertaining suspicion, she was aware that the transfer was already made in the name of the first defendant and that what she was expecting was only re-transfer of the property in her name. This again makes clear that she affixed her signature on Ex.;D-2 to execute the sale deed in the name of the first defendant with full awareness, for reasons "better known to herself and on account of some understanding between the plaintiff and the first defendant, the plaintiff has signed Ex.D-2 with full knowledge of its content. Since no specific act of fraud, except absence of knowledge, has been alleged and since that she is found to have had full knowledge, her plea of fraud has necessarily to fail.

29. In the result, this point is answered in the negative.

30. Point No. 3 :-- This point arises out of an alternate plea taken by the plaintiff. In fact, she stated that in case the court was not inclined to the view that the latter requesting the 2nd defendant to execute the sale deed in favour of the first defendant as her nominee was not obtained by fraud, the plaintiff would in any event be entitled to a declaration that she was the owner of the property since she had paid the entire consideration and the first defendant, if at all would be only a benamidar for her, the beneficial

ownership remaining vested in her. The first defendant on his side has also stated in his written statement that from the very beginning of the contract with the Gandhi Nagar Co-operative House Construction Society the whole money for the purchase of the suit property was paid by him.

31. It is to be noted that the present plea of the plaintiff is somewhat inconsistent with the plea of fraud. If there is no fraud, as it has been held the plaintiff should have stated why she has consented for the transfer and for what reason the first defendant has been made a benamidar. The first defendant, who took a symmetrical plea, has come forward to explain that the property belonged to one Pundarikaksha Naidu, who was a close relation of his, that the said relation approached him for a loan to discharge the dues to the society or to have a transfer of the property in his name; that he having then pleaded inability felt it delicate to have thereafter transfer of the property in his name when the society put pressure on Pundarikaksha Naidu and that therefore he had the transfer for Pundarikaksha Naidu effected in the name of the plaintiff as his benamidar. This is the back ground in which this issue comes for examination.

32. At the outset the learned counsel for the first defendant pleaded that there was variation between the statements in the plaint and the depositions in the course of evidence by the plaintiff. He pointed out that in the plaint it is stated that the plaintiff paid Rs. 2001 - to Pundarikaksha Naidu on 20-4-1959, that she issued a cheque for Rs. 12,999 -. (admittedly not encashed), that thereafter she paid another amount of Rs. 14,936.66 and a further sum of Rs. 20,000 - to the second defendant Society by way of instalments and that she paid all the taxes. But in her evidence she changed the case saying that she did not pay these amounts, that the first defendant effected factually the payments and that the payments were made out of her fund. Learned counsel for the first defendant contended that the plaintiff is not entitled to change her stand in such a manner and that therefore it is to be held that she has not proved her case and the suit should be dismissed. In support of his contention, he placed reliance on the decisions. First is the one rendered by the Andhra Pradesh High Court in Allam Gangadhara Rao Vs. Gollapalli Gangarao, where it was held as follows (Para 7):--

It is, trite to say that a party is expected and is bound to prove the case as

alleged by him, and as covered by the issue framed. This is in accordance with the main principle of practice that a party can only succeed according to what was alleged and proved *secundum allegata et probata*. He should not be allowed to succeed on a cause which he has failed to set up. He should not be permitted to change his case or set up a case which is inconsistent with what he had himself alleged in his pleading except by way of amendment of the plaint.

Second is the one by the Supreme Court in *Vinod Kumar Arora Vs. Surjit Kaur*, where it was held as follows: (Para 11)

The pleadings of the parties form the foundation of their case and it is not open to them to give up the case set out in the pleadings and propound a new and different case.

It is true that the plaintiff has shifted the case as pointed out by the learned counsel for the first defendant. After having said in the plaint she has paid all the money, she turned to say in the evidence that all payments not only in respect of this property but also in respect of other transactions and family affairs were made by the first defendant, but that all those payments were made only out of her fund.

33. In this particular case, we cannot overlook the fact that the parties have been living as husband and wife and that in case of such situation it is not uncommon to find husband effecting actually the operations on behalf of his wife with the money belonging to the wife. Therefore, we do not think that in this case it is proper to discard the direct evidence of the plaintiff on this technical ground and reject her case on that ground.

However, we have to bear in mind that the first defendant was somehow prejudiced in the trial by the fact that the plaintiff took a stand in the plaint and changed her course in the trial stage.

34. On the other side, the learned counsel for the plaintiff very vehemently contended that the plea that he paid the consideration for the purchase of the suit property was not at all open and available to the first defendant, because in the sale deed. Ex. P-86. executed on 12-7-1971 by the Society in the name of the first defendant on the strength of Ex. D-2 and also in the mortgage deeds executed by the first defendant to various parties in succession, viz. Ex. P-50, P-51 and P-52 dated respectively 22-12-1971, 5-6-1972 and 20-3-1972, there is a clear recital to the effect

that the entire consideration has been paid by the plaintiff. He contended that these documents contained an unequivocal admission by the first

defendant that the entire consideration was paid by the plaintiff and therefore it was not necessary even to look at the other pieces of evidence to

decide the controversy. It is true that in the sale deed, Ex. P-S6. there is a recital as follows:

Whereas Smt. M. K. Lakshmi member No. 2174 from 19-4-1961 T. S. Krishnaswamy Hony, Secretary the Gandhinagar Co-operative House

Construction Society Ltd., XNC 494 (Seal) The Gandhinagar Co-operative House Construction Society Ltd., ENC Madras-20 has observed,

performed and satisfied the said terms covenants conditions and by laws and paid to the vendor in the aggregate the sum of Rs. 45,030.82 (Rs.

forty five thousand thirty and paise eighty two only) in full discharge of all her liabilities and obligations to the vendor under the said Indenture of

Hire Purchase and whereas the Chairman State Housing Board (Co-op, wing) Madras-35 has released the property from Government Mortgage

in his D. No, 8119/79 G. dated 4-7-1971. Whereas by the letter dated 12-7-1971 Smt. M, K. Lakshmi the member has requested the vendor

society to execute the sale deed in favour of her husband Sri C. K. Deenadayalu the purchaser aforesaid as her nominee in terms of the aforesaid

Hire Purchase Agreement.....

35. Learned counsel for the first defendant contended that if the statement contained that the documents are to be considered as an admission then

the whole statement should be taken into account and therefore the statement that the plaintiff requested the vendor society to execute the sale

deed in favour of her husband should not be a matter of dispute. In this connection, learned counsel relied on a decision of the Supreme Court in

Hanumant Vs. The State of Madhya Pradesh, where it has been held as follows:-- (Para 23)

An admission made by a person whether amounting to a confession or not cannot be split up and part of it used against him. An admission must

be used either as a whole or not at all.

Even without going to that extent, it is to be noted that the recitals in Exs. P-50 to P-52, mortgage deeds, are merely the reproduction of the recital

found in Ex. P-86, sale deed. The sale deed recites all the operations relating to

the sale of the property. It is quite natural that in the sale deed executed by the Society there is a mention that the money was paid by the Plaintiff, since the contract was in her name, even though factually the payment was made by the first defendant. Therefore, this recital in Ex. P-86 is not a decisive proof that the money, which was used for the payment to the society, belonged exclusively to the plaintiff. If there was any document between the plaintiff and the first defendant in which the first defendant admitted that she has paid the money for the transaction such document would certainly exclude the possibility of oral evidence to the contrary. It is not so in this case. Therefore, this contention of the learned counsel for the plaintiff cannot be accepted.

36. As far as this point is concerned, the trial court has shifted entirely the burden of proof on the first defendant on the consideration that the plea of benamidar taken by the plaintiff was only an alternate one. We do not see any reason for such a course. The plaintiff having taken the plea of benami has first to discharge her burden and the same will shift on the first defendant only upon the plaintiff proving her case to a certain extent.

37. We shall now proceed to analyse the evidence adduced by both the parties as far as the point is concerned. The case of the first defendant is that he paid all the money and the plaintiff, who stated that the money was paid by her, has admitted that factual payment was effected by the first defendant, but that the money belonged to her. In this connection, each party has adduced evidence in respect of their sources of income. The plaintiff examined nine witnesses including herself and exhibited documents, Exs. P-1 to P-107. The first defendant examined himself as D.W. 1 and defendants 3 and 4 examined their father as D.W. 2 and on the side of the defendants 32 documents were exhibited. The total amount paid was R.s. 45,030.82. The parties have been living together amicably as husband and wife from 1959 to 1971. Ex. D-2. transfer letter, executed by the plaintiff in favour of the first defendant and Ex. P-6, sale deed, executed by the Society in favour of the first defendant, took place in the year 1971 when they were so living.

38. As per the evidence of the plaintiff. P.W. 1 was a musician and her children, P.Ws. 3 and 4. were cine artistes, who have acted in several films. P.W. 1 was musician popular to some extent, as would be described by the

trial Judge, and she acted in some films. The plaintiff's daughter also gave several dance performances. The plaintiff was also getting rents from the house bearing door No. 1, Shanmugha Mudali Street. Royapattah, from 19-4-1961. when she moved to the suit property, till 18-6-1967 when the said Royapettah property was sold. But, as far as the amount realised by the plaintiff and her children, there is no clear and convincing evidence.

39. On his side, the first defendant has produced evidence to show that he was assisting his friend in Calcutta in securing artistes for dance performance and music recital there, that he was having the Kulachara milk trade, touring cinemas, morning shows held in Kamadhenu theatre, decoration work in the said theatre, that he was sending talkies to foreign places and that he was also the Manager of Kamadhenu theatre, Mylapore. Further, he was having a rental income from the property bearing door No, 94, T.S.V, Koil Street, Mylapore. Again, in his case also, there is no clear evidence about the quantum of money realised.

40. Each party has been attempting in their evidence to exaggerate his own income and to belittle that of the other party. The only safe conclusion that can be drawn from their evidence in respect of their source of income is that both of them were having sources of income without any possibility of exactly ascertaining the quantum of their income. One fact is however clear, money was not spent only for the purpose of acquiring this property and for household expenses, but also for some other specific items exclusively for the benefits of the plaintiffs and her children. In fact properties were acquired at Karaikudi in the name of the plaintiff for Rs. 4500, - and other properties of the total value of Rs. 15,000:- (vide Ex. P-47) in respect of which the plaintiff admits that the first defendant paid the money, but that the money belonged to her. The plaintiff's daughter also purchased 412 acres of land, a scooter was purchased for the plaintiff's son; Rs. 10,000/- was spent in the year 1971 for the plaintiff's son's marriage. The money for all the above is also admitted by the plaintiff to have been paid by the first defendant, but with the rider that it was out of her own fund. The case of the first defendant of course would be that all the money belonged to him and that he spent the money out of love for the plaintiff. Whatever may be the exact position, the above facts indicate that, apart

from the purchase of the suit property, large amounts have been spent for the exclusive benefit of the plaintiff and her children out of the total earnings of the family.

41. Let us now turn to the evidence regarding some specific amounts which have been paid towards the discharge of the dues to the Society for

the purchase of the house. P.W. 1 obtained a settlement from her mother in respect of the property bearing door No. 1, Shanmugha Mudali

Street, Royapettah, Madras, under Ex. P-36 and almost immediately thereafter she mortgaged the said property to Purasawakkam Hindu Suntha-

thar Sanga Nadhi 1st Branch Limited, under Ex. P-37. As per that exhibit, the purpose for which the loan was raised was to purchase a house

bearing door No. 26, I Main Road, Gandhi Nagar, Adyar, Madras (suit property) and for family maintenance expenses. The first defendant has

identified the witnesses to the document at the time of the registration of the suit mortgage in the office of the Sub Registrar, Mylapore, The

mortgage deed, Ex. P-37, is dated 24-6-1959. In the course of her evidence, the plaintiff who stated that the money was raised to pay

Pundarikaksha Naidu later on admitted that the money so raised was not paid to that person and the Society, and that the amount was paid to that

person and the society out of the money realised by mortgage of the property of the first defendant.

42. D.W. 1 on his side mortgaged his property, 94, T.S.V. Koil Street, Mylapore, Madras-4, with one Manali Ramakrishna Mudaliar, raised a

loan of Rs. 20,000 - and out of the said sum of Rs. 20,000 - payment was made to the second defendant Society. This fact is not disputed by the

plaintiff. However, there is controversy regarding the person who discharged the said mortgage, each party claiming that the mortgage was

discharged out of his own fund and deposing to that effect on oath. As per Ex. P-102, registration copy of the receipt granted by Ramakrishna

Mudaliar, there was a part payment of Rs. 1000. - in the first instance and a second payment of Rs. 23,000. - by cheque. D.W. 1 did not have

any bank account, but the plaintiff did have one. Ex. P-102 dated 20-8-1962. The 1st defendant in his affidavit of documents, under document

No. 7 has listed the plaintiff's pass book the bank for the period from 20-6-1959 to 1-11-1962. That document was not produced by the first

defendant and he stated that the said document was missing. Learned single Judge drew an adverse inference on account of the non-production of

document No, 7, because he presumed that in all probability the said document would contain the cheque referred to in Ex.P-102. But this

inference is absolutely impossible on account of the unambiguous admission made by the plaintiff in the witness box as follows:

Before I met him. I was in the habit of depositing the money into bank and after I had contact with him. I gave my earnings and children's

earnings to him.

The first contact between the plaintiff and the first defendant started in the year 1957 and they have been living together from the year 1959.

Therefore, the amount of Rs. 20,000. -towards discharge of the mortgage would not have come out of the bank account of the plaintiff. Therefore,

the fact that the first defendant raised a loan of Rs. 20,000 - by mortgaging his own property and paid that sum of Rs. 20,000. - to the second

defendant-Society is admitted by the plaintiff herself, even though she contends that the mortgage was discharged with her own money, without

adducing any adequate proof to that effect. On the other side, it is found from Ex. D-11 that a sum of Rs. 2782 - was paid on 17-5-1960 to the

Society and that the said amount was borrowed by the plaintiff from Manali Ramakrishna Mudaliar upon executing a promissory note, Ex. P-103.

There is also a recital in Ex. P-103 that the borrowal was made for remitting the amount to the second defendant-Society. There is also another

document. Ex. P-104, copy of the letter issued by the plaintiff to Manali Ramakrishna Mudaliar requesting him to give her the abovesaid loan of

Rs. 2782 .

43. It results from what has been said earlier that there is clear evidence to the effect that the amount of Rs. 20,000, - has been paid to the Society

out of the money realised by D.W, 1 mortgaging his property and that an amount of Rs.2782/- has been paid to the Society by the plaintiff out of

the money received by executing a pro-note in favour of Manali Ramakrishna Mudaliar.

44. To sum up the plaintiff has not also disclosed the reason why benami transaction was resorted to, but the first defendant has given a convincing

version why he took the plaintiff as benamidar. There is evidence to the effect

that a property of the plaintiff was mortgaged for the purpose of paying consideration for the suit property, but the money so realised was not utilised for that purpose. There is evidence that a substantial amount has been paid by D.W. 1 towards the acquisition of the suit property by mortgaging his property and that a smaller amount has been paid by the plaintiff towards that end. There is no adequate evidence as to what was the quantum of income and the extent of expenses by each one of them during the relevant period. Therefore, the plea taken by the plaintiff that the property was acquired with her own money in the name of D.W. I which was sought to be established by the overwhelming balance of income over expenses of the plaintiff is far from being proved. The counter-plea of the first defendant that he alone paid the entirety of the money is not also established. This point is answered accordingly.

45. Point No.4:- The evidence makes clear that the parties, though not married, have been living as husband and wife from 1959 to 1971 that

D.W. 1 has been looking after the affairs of the whole family as the father, that he has been incurring all expenses for the family, for the household

needs, for the artistic performances for the family ceremonies of the children of the plaintiff and also for the purchase of the properties" in "the

names of the plaintiff and her children. It is in that background that the suit property was first sought to be purchased in the name of the plaintiff

and then a transfer was effected in the name of the first defendant and the property was ultimately purchased in the latter's name. In view of the

relation existing between the parties at that time, none of them has thought that there would be any dispute regarding the property. They have not of

course thought of equipping themselves on each occasion with all proofs necessary for establishing their case, in case of dispute. All acts were

done as if they were one soul. It would be artificial at this stage to scan the evidence let in after dispute has crept in in order to find out the real

truth. The fact remains that the plaintiff has not established her case nor the first defendant. It is also true that overall control of the family matters

was with the first defendant, who was having all the paper, connected with the suit transaction, but the manner in which the parties were behaving

and the way in which the interest of the members of the plaintiff's family were looked after would show that the first defendant was not in and

manner acting detrimental to the interest of the plaintiff and that of her children and there is nothing to suggest that the plaintiff had any doubt on the sincerity of the D.W. I in the interest for her family evinced by him. There is no evidence establishing that any one of them has exclusively contributed to the acquisition of the suit property. Undue influence and fraud alleged have not been proved. We have to consider therefore that the property was acquired by the joint efforts of the plaintiff and the first defendant. Though they are not husband and wife, we are convinced that it is just and proper that the property belongs to both of them and not exclusively to the plaintiff or the first defendant as claimed by each of them.

46. In tact, in *Cooke v. Head*, (1972) 2 All FR 38 it has been observed as follows:

I he constructive or resulting trust imposed by the Courts on the legal owner in the case of a husband and wife who by their joint efforts acquired property to be used for their joint benefit, applied to a man and his mistress who acquired property by their joint efforts with the intention of setting up home together.

Accordingly, it was held in that case that [he man was holding the property on trust for himself and his mistress. We are of the opinion that the same principle can be applied to the facts of the case. Regarding apportionment, in the absence of any definite evidence, we have to decide that it is just and proper that each one of them is declared to be entitled to half in the suit property.

47. As far as the mortgages are concerned, the learned single Judge has held that the money was borrowed and spent by the first defendant for the purpose of improvements to the suit property and that finding has not been challenged by the plaintiff. Therefore, the mortgages will be binding on the two owners of the property equally.

48. In the result, the appeal. O.S.A. 77 of 1979 is allowed in part; the judgment of the learned single Judge is set aside and a decree shall issue on the following lines - "The plaintiff is declared to be the owner of half of the suit property and the mortgages executed by the first defendant in favour of the defendants 3 and 4 are binding on her for half of their value. The suit is dismissed in all other respects. O.S.A. 74 of 1979 is allowed. Each party will bear his own costs.

O.S.A. 74 of 1979-- Consequent to our judgment concerning the money in Court

deposit or any other directions that may be required the parties are at liberty to move the learned single Judge on the Original Side.

49. Order according.