

(1987) 01 MAD CK 0011
In the Madras High Court

G. Subashini and Another		APPELLANT
	Vs	
P. Lakshmi Bai		RESPONDENT

Date of Decision : 20-01-1987

Acts Referred:

Citation : (1987) 100 LW 489 : (1987) 2 MLJ 107

Hon'ble Judges : Srinivasan, J

Bench : Division Bench

Judgement

Srinivasan, J.—The defendants, who were successful in the trial Court, but defeated in the appellate Court, are the appellants in this second appeal.

2. The suit relates to a trust created by one Kankipati Kanniah Chetty in 1847, whereby he endowed two items of immovable properties, one

situated in Third North Beach Road, Madras and another in Kaladipet, Saidapet Taluk, Chingleput District. One Pasumarthy T. Krishnasamy

Chetty was the trustee in 1925 and by his will dated 21.8.1925, he appointed his wife Pasumarthy Venkamma alias Sriranganacharamma along

with three others as executors and trustees to administer the trust. He also directed the executors-cum-trustees to discharge the debt of Rs. 1,913

due to him by the trust. His will was duly probated in O.P. No. 183 of 1927 on the file of this Court. After some time, Sriranganacharamma

became the sole trustee on account of the departure of the other trustees from this world. She found that the trust properties were in a bad state of

repair and could not yield sufficient income either for the performance of the charities or for the liquidation of the debts due to Krishnaswamy

Chetty referred to earlier. She entered into an agreement with one Bysani

Krishnayya Chetty that she would appoint him if, he paid a sum of Rs.

1,650 in full satisfaction of the debt due to her late husband Krishnasamy Chetty. Consequently, a transfer deed was brought into existence on

February 2, 1931 in and by which Bysani Krishnayya Chetty became the trustee after payment of Rs. 1,650 to Sriranganacharamma. He was

administering the estate upto 1938 when he transferred his rights of trusteeship to his son Bysani Rangayya Chetty under a deed of transfer dated

4th May 1938. The said document is marked as Ex. B2. Under the said deed, Bysani Sundaramma was directed to manage the trust estate in

accordance with the provisions of the Indian Trust Act and the specific directions and terms contained in the will of Pasumarthy Krishnasamy

Chetty.

3. Bysani Sundaramma died on 3.12.1976. The plaintiff in the present suit, who is the respondent herein, and the first defendant, who is the first

appellant herein, are her daughters. The second defendant/second appellant is the son of the first defendant/first appellant. There is another

daughter by name Sujatha, who has not been made a party to these proceedings.

4. The defendants claimed to have obtained the right of trusteeship under a document alleged to have been executed by Sundaramma on

15.11.1976. The document was presented for registration before the Joint Sub-Registrar II, exercising the powers of the District Registrar,

Madras by the defendants on 25.1.1977. When notice of the same was issued to the plaintiff, she came forward with the present suit praying for a

decree "declaring the document, namely, transfer of trust dated 15.11.1976 alleged to have been executed by Bysani Sundaramma a true copy of

which as produced before the Sub-Registrar Madras is filed herewith is sham and nominal" and for an injunction restraining the defendants from.

registering the same or acting in pursuance thereof.

5. It will be necessary to extract certain portions of the plaint as most of the arguments of learned Counsel for the appellants revolved round the

same. Paragraphs 5 to 7 of the plaint read thus:

5. The plaintiff, 1st defendant and one Sujatha are the issues of the aforesaid Bysani Sundaramma. Bysani Sundaramma was living with the plaintiff

and the plaintiff's husband was helping her in the conduct of the trust and the collection of rent and the administration of the trust properties.

Sundaramma went to the first defendant's house at Tiruttani in the first week of November, 1976. Before 29.12.1976 the said Sundaramma

appears to have fallen sick seriously. The defendants, husband and wife appear to have got some documents executed, one a will and another

alleged to be a transfer of trust and a third a power of attorney to register the trust deed. The alleged power of attorney was in favour of the

second defendant. The will purported to be the last will and testament of Sundaramma and the deed of transfer purported to be the appointment of

trustees to have been made by Sundaramma in favour of the defendants and the power of attorney was claimed to have been executed by the

aforesaid Sundaramma for the purpose of enabling the second defendant to register the documents.

6. The plaintiff states that the documents said to have been executed by the late Bysani Sundaramma are not real and genuine but fabricated and

false. The execution is not by Sundaramma and she was not in a position to execute the documents her mind following the hand. The plaintiff states

that the said Sundaramma was not mentally and physically well enough to execute the documents and the defendants have taken advantage of her

sick condition and obtained her signatures by exercise of undue influence. The plaintiff states that Sundaramma died on 3.12.1976 and her death

was thereafter intimated to the plaintiff and other relatives. Sundaramma's sickness was not intimated but kept a closely guarded secret by

defendants 1 and 2.

7. The plaintiff states that the transfer of trust to the defendants is illegal and invalid. The defendants are not the beneficiaries under the original deed

of trust. The plaintiff states that there can be in law no transfer of the right of trusteeship. The alleged transfer deed dated 29.12.1976 is invalid.

The plaintiff states that the transfer of trust could not have been at the instance of Sundaramma who was mentally incapable at that time for

executing any such deed.

6. The prayer in the plaint at the time of its presentation was one for declaring the document as "invalid and not true and genuine document." The

plaint was presented on 24.11.1977. It was returned on 25.11.1977 with the following endorsement:

Plaint relief should be valued u/s 40 of C.F. Act.

On the same day, the plaint was represented with the counsel's endorsement, which is as follows : ""The plaintiff claims relief for declaration that the

document is sham and nominal and not to set aside the same. Hence, it is valued u/s 25(d) of C.F. Act". It is seen from the original plaint that in the

prayer paragraph the words "invalid and not true and genuine document" are struck off in ink and the words "sham and nominal" are written in ink.

It is not necessary to refer to the other corrections made in the plaint.

7. The defendants filed a common written statement in which they had asserted that Sundaramma was very much attached to the first defendant,

her husband and her family members as it was the first defendant's husband who was responsible to bring about the trust transfer in the name of

Sundaramma from her husband Rangayya. It was alleged in the written statement that some time during September 1976, Sundaramma came to

live with the defendants at Tiruttani and she wanted to appoint a fit person to manage the affairs of the trust to its best advantage and that her

natural choice was the first defendant out of her two daughters. The written statement proceeded to state that the documents executed by

Sundaramma were true and valid. The plaintiff filed a reply statement reiterating the averments made in the plaint.

8. The trial Court framed the following issues:

1. Whether the plaintiff is entitled to declaration as prayed for?

2. Whether the plaintiff is entitled to injunction as prayed for?

3. Whether the suit has been properly valued for purpose of court-fees and jurisdiction?

4. To what relief?

9. A perusal of the judgment of the trial court shows that neither the parties nor the Court took note of the correction made in the plaint at the time

of representation of the same changing the prayer therein. After discussing the evidence on record, the trial Court held that the document executed

by Sundaramma was not vitiated by the circumstances set out in the plaint and that there was no reason for preventing the registration of the same.

Consequently, the trial Court dismissed the suit. It has to be pointed out that the impugned document was not produced before the Court.

10. On appeal by the plaintiff, the learned Second Additional Judge of the City Civil Court framed the point for determination as follows :

"Whether the deed of transfer of trust executed by the deceased Bysani Sundaramma in favour of the respondents dated 15.11.1976 was obtained by undue influence and if so whether it is enforceable?" Again it is seen from the judgment of the lower appellate Court that the change in the prayer in the plaint made at the time of representation was not taken note of by the counsel or the Court. The learned appellate Judge commented upon the non-production of the impugned document by the defendants, which was admittedly with them. Though there is no specific finding by the learned appellate Judge that the document in question was vitiated by undue influence, a perusal of the judgment would show that he came to such a conclusion and held in favour of the plaintiff. The learned appellate Judge has also taken the view that the power of attorney executed by Sundaramma in favour of the second appellant authorising him to present the deed of transfer" of trust for registration became inoperative on her death and the document could not be registered thereafter. In that view, the learned appellate Judge allowed the appeal and decreed the suit.

11. Learned Counsel for the appellants submitted at the outset that in the absence of a specific finding by the lower appellate Court that the deed of transfer of trust was vitiated by undue influence, the judgment under appeal was unsustainable. It is also contended by learned Counsel that the deed of transfer of trust was presented for registration not in the capacity of a power agent but as a beneficiary under the document and a legal representative of the deceased, under Clause (a) and (b) of Section 32 of the Indian Registration Act. It is further submitted by learned Counsel that the case of undue influence or fraud vitiating the document cannot be countenanced as the plaint is not in conformity with the provisions of Order 6, Rule 4, Code of Civil Procedure. In other words, learned Counsel contends that in all cases in which a party pleads undue influence, fraud or misrepresentation etc., he is bound to give full particulars in the pleading and if there is a failure to do so, the Court has no alternative but to dismiss the suit. According to learned Counsel for the appellants, the plaint does not contain the particulars of undue influence or fraud and the lower appellate Court was in error in upholding the case of undue influence. Learned Counsel went on to argue that even assuming that the

requirements of Order 6, Rule 4, CPC were in a way satisfied by the averments in the plaint, the burden was heavily on the plaintiff to establish the same and in the present case she failed to do so.

12. In answer to the aforesaid contentions urged by the appellant's counsel, it is argued by learned Counsel for the respondents that the effective

plea of the plaintiff as set out in the plaint is one of non-est tactum and not merely a case of undue influence. He refers to the passage in the plaint

wherein it has been specifically alleged that the execution of the document is not by Sundaramma and that she was not in a position to execute the

document, her mind following the hand. Learned Counsel for the respondent invites the Court to draw an adverse inference against the defendants

inasmuch as they failed to enter the witness box to speak about the facts which were in their exclusive knowledge. He points out to the various

suspicious circumstances surrounding the execution of the impugned document and urges that the defendants failed to clear the suspicion by giving

evidence themselves. The fact that the impugned document was not produced before the Courts below is also relied upon by learned Counsel for

the respondent. Learned Counsel submits that P.W. 2 is a reliable witness who had no axe to grind and his evidence makes out that Sundaramma

was not in a position to understand the contents and execute the document in question. Learned Counsel for the respondents submits that even

though there is no specific finding in the judgment of the lower appellate Court to the effect that the document was vitiated by undue influence, it is

clear from a reading of the judgment that the learned Judge came to such a conclusion.

13. Before proceeding to deal with the respective contentions of learned Counsel on both sides, it is necessary to point out that neither of them

was aware of the change in the prayer in the plaint made at the time of representation of the same in the trial Court. The same was actually

discovered by the Court practically when the arguments of learned Counsel for the respondents came to an end. The typed set of papers furnished

by learned Counsel for the appellants contains a copy of the plaint but the prayer found therein was the prayer originally made at the time of the

filing of the plaint. Learned Counsel for the appellants explained the same by pointing out that the copy of the plaint served on the defendants

contained only the prayer as originally made and the correction made in the original plaint at the time of representation was not carried out in the copies. As pointed out earlier, in the Courts below, the change in the prayer was not taken out at all. Throughout the proceedings, the parties as well as the Courts dealt with the matter as if the prayer was one for declaring the document to be invalid and not true. After the discovery of the correction made in the plaint, I sent for the counsel who made the correction in the plaint and enquired him in the open Court in the presence of counsel for both sides. Mr. B. Ananthakrishnan, who was the counsel for the plaintiff at that stage, stated before me that he made the correction only after informing his client about the same. It is quite obvious that the change in the prayer was made with a view to avoid payment of Court-fee u/s 40 of the Court-Fees Act as demanded by the registry. Learned Counsel appearing for the plaintiff at that time thought that the only way in which the payment of a higher Court-fee could be avoided was to change the prayer as found in the plaint. The said counsel, however, admitted that he did not realise at that time, the implication of the prayer for declaring the document to be sham and nominal. It goes without saying that the plaintiff could not have any idea whatever about the legal implications of such a prayer or the meaning of the words "sham and nominal".

14. Learned Counsel for the appellants lost no time in urging that the prayer as found in the plaint after the representation would imply an admission on the part of the plaintiff that the document was executed by Sundaramma properly and validly though it was intended to be acted upon. I am unable to accept this argument. Though I have my own doubts as to whether the plaintiff had knowledge of the change made by the counsel in the prayer in the plaint, it is unnecessary for me to consider the question. The case of a plaintiff has to be gathered from the averments made in the body of the plaint and not from the prayer paragraph. The prayer only relates to the relief which the plaintiff seeks from the Court on the basis of the averments made in the earlier paragraphs. The appropriate relief that has to be prayed for by a plaintiff is very often decided by the counsel and not by the client. The client instructs the counsel on the facts. After setting out the facts, the counsel frames the relief that has to be obtained from the Court. It is always for the Court to decide whether on the averments made in the plaint and the evidence let in by the plaintiff, the relief prayed

for by the plaintiff could be granted or not. The power of the Court to mould the relief according to the facts established by evidence cannot be

disputed. The dictum of Natesan, J. in *Lakshmi Ammal v. Sivakamu Natesan* (1969) 82 L.W. 589, may be referred with advantage in this

connection. The learned Judge observed as follows:

It seems to me that neither of the parties, when they adduced evidence in this case, nor the courts below have kept before themselves the

principles above set out from the decided cases in coming to their conclusion as to the true relationship between the plaintiff and the defendant in

the matter of latter's occupation of the plaintiff's land. Also neither the plaintiff nor the defendant should be penalised for overstating their case and

putting exaggerated versions. If the Court can find the true and real relationship between the parties, notwithstanding some ornamentation and

some trappings in the cases of the parties, the Court should give relief according to the rights found.

In my opinion, the change in the prayer in the plaint even assuming that it was made with the knowledge and consent of the plaintiff; shall not

prevent the Court from granting the appropriate relief to the plaintiff, if she has made out a case there for. The prayer in the plaint has always to

follow the averments in the body of the plaint and the reverse cannot be true.

15. Even as the plaint stood originally, Section 40 of the Court-fees Act was not attracted as there were specific averments in the plaint that the

execution of the document was not by Sundaramma. Unfortunately, learned Counsel who appeared for the plaintiff at that stage did not think about

the correct position in law with regard to the payment of Court-fees and, hastened to change the prayer in the plaint when he found some difficulty

in getting the plaint numbered. Hence I do not find any substance in the contention raised by learned Counsel for the appellants on the basis of the

prayer found in the plaint.

16. As stated earlier, the impugned document was not produced before the Courts below. The appellants have filed an application under Order

41, Rule 27, CPC in this Court for permission to file the said document as additional evidence. The said application is before me as C.M.P. No.

17092 of 1986. As the entire case relates to the validity and the genuineness of the document, it is necessary for a just disposal of the case. Hence, I

am admitting the said document as evidence and the same will be marked as Ex. B15 in the case.

17. In view of the unsatisfactory manner of disposal by both the Courts below, learned Counsel on both sides requested me to exercise my

powers u/s 103 of the CPC and determine the issues in the case by considering the evidence on record. I have already set out the relevant

paragraphs in the plaint in which it is alleged that the deceased Sundaramma went to the first defendant's house at Tiruttani in the first week of

November 1976 and before that she was living with the plaintiff. Though it is contended by the defendants that Sundaramma went to Tiruttani in

September, 1976, the fact that she was living with the plaintiff prior to her going to Tiruttani is not disputed. Whether she went to Tiruttani in

September, 1976 or November, 1976 does not matter very much. It is clear from the evidence that Sundaramma was living for some time with the

plaintiff and for some time with the defendants. Nothing has been brought out in the evidence that Sundaramma had any quarrel with either the

plaintiff or the defendants, or that she had any occasion to dislike one of them. There is absolutely no evidence with reference to the attitude of

Sundaramma towards her other daughter Sujatha. The plaintiff has examined herself as P.W. 3 and her husband as P.W. 1. P.W. 2 is a person

known to the family for about 15 years and he was living in the house opposite to that of the plaintiff. The defendants contended themselves with

the examining of one of the attestors to the impugned document by name Rajarathnam and another person who claimed to have taken care of,

Sundaramma's affairs between 1964 and 1972.

18. From the very nature of things, the plaintiff will not be in a position to give full particulars as to what happened at Tiruttani when the document

was executed. Admittedly, Sundaramma was in Tiruttani at the time when the document was executed and she died soon thereafter. The document

in question is dated 15.11.1976 and Sundaramma died on 3.12.1976. The argument that the plaint does not satisfy the requirements of Order 6,

Rule 4, CPC and has to be rejected on that ground, cannot be accepted on the facts of this case. It is no doubt true that Order 6, Rule 4, CPC

enjoins a party pleading misrepresentation, fraud, breach of trust, wilful default or undue influence to set out all the necessary particulars in the

pleading. It may be noted that the grounds referred to in the said rule would only make a document voidable and not void. In such cases, it will be necessary to seek the relief of setting aside the documents. A relief based upon misrepresentation, fraud or undue influence presupposes that the party claiming the relief is himself the victim of such misrepresentation, fraud or undue influence or the party claiming the relief is doing so by stepping into the shoes of such a victim. If the victim of misrepresentation, fraud or undue influence seeks to be relieved from the effects of such misrepresentation, fraud or undue influence, he will be in a position to give full particulars regarding such misrepresentation, fraud or undue influence. He cannot seek the aid of the Court without disclosing the same. The position, will not be the same with reference to a third party who seeks to set at naught a transaction on the ground that it is vitiated by the circumstances mentioned in the rule. In that case, he will be able to give only such particulars as are within his knowledge. If he is able to prove before the Court circumstances from which a reasonable inference could be drawn by the Court, as to the existence of any of the grounds mentioned in the rule, the Court cannot throw out the plaint on the ground that the exact particulars have not been given in the plaint. The provisions of Order 6, Rule 4, CPC would only mean that where a party is in a position to give all the particulars regarding the grounds set out in the rule, he shall set out the same in the pleading itself. The object of the rule is to enable the opposite party to know what case he has to meet and thus to prevent a surprise at the trial. But, it must always depend upon the facts of each case as to what degree of particularity is required. Vide *Philips v. Philips* 4 Q.B.D. 127. The general rule that full particulars must be given in the pleading cannot be made applicable to a case where the concerned party is not in a position to know the full particulars.

19. Learned Counsel for the appellants relied upon the following decisions of the Supreme Court in support of the proposition that in the absence of

full particulars in the pleading, the case of a party shall not be accepted:

Bishundeo Narain and Another Vs. Seogeni Rai and Jagernath, *Ladli Prasad Jaiswal Vs. Karnal Distillery Co. Ltd. and Others*, *Subhas*

Chandra Das Mushib Vs. Ganga Prasad Das Mushib and Others, and *Varanasaya Sanskrit Vishwavidyalaya and Another Vs. Dr. Rajkishore*

Tripathi and Another, .

In all those cases, the plea was fraud, undue influence and coercion. It is not necessary to refer to the aforesaid decisions in detail in view of the

facts and circumstances of the present case which I will set out below. Learned Counsel for the appellants also relied upon the decision of a

Division Bench of this Court in P. Saraswathi Ammal Vs. Lakshmi Ammal alias Lakshmi Kantam, , which lays down that the burden is heavily,

upon the complainant to establish that a transaction is tainted by undue influence and that it is unconscionable,. Bat, in that case itself, the Bench has

taken care to issue a note of caution that the standards of proof regarding undue influence or coercion may be slightly different in cases where a

person suffers from infirmity or backwardness. The Bench has also observed that each case has to depend on its own facts.

20. Turning to the facts of the present case, the following suspicious circumstances are glaring at us. The impugned document which is styled as

"appointment in execution of a power" purports to have been executed on 15th November, 1976. The entire document is typed and in the last

page, it is written in ink ""typed by"" and below that it is signed by "G.N. Raj". The said G.N. Raj is none other than the second appellant. That is

evident from the document itself when he has signed before the Joint Sub-Registrar at the time of presenting the document. Beneath his signature,

he has given his name, his father's name and address wherefrom it can be gathered that the typist of the document is the second appellant. All the

stamp papers are purchased in his name. On the same day, i.e., on 15.11.1976 another document styled as ""Special Power of Attorney"" purports

to have been executed by late Sundaramma. That document also bears the endorsement ""typed by"" and below that it is signed by G.N. Raj. The

stamps for this power of attorney have also been purchased in the name of the second appellant. This Special Power of Attorney recites that

Bysani Sundaramma appoints the second appellant as her true and lawful attorney and agent for procuring registration of a deed of appointment in

execution of power dated 15.11.1976 for a market value of Rs. 60,000 (Rupees sixty thousand only) executed by her in favour of the appellants.

The agent is authorised to present the document to the registering officer in the Registrar's office at Madras. This power of attorney has been

registered by the Sub-Registrar, Tiruttani on 15.11.1976 at the residence of the appellants. This power of attorney is also attested by the same persons who have attested the deed of appointment of execution of power viz., N. Rajarathinam (D.W. 1) and M. Munnuswamy Reddy. The identifying witnesses before the Sub Registrar are the same attestors. Curiously, another special power of attorney purports to have been executed on 19.11.1976 in favour of the second appellant himself for the very same purpose of presenting the document dated 15.11.1976 for registration in the office of the Registrar at Madras. The later Power of Attorney, however, sets out the reason for executing the power of attorney while the same was absent in the earlier power of attorney. This document exhibits an anxiety to fill up the lacuna in the earlier one. This power of attorney purports to have been executed in the presence of the Sub Registrar at the residence of the appellants and once again the identifying witnesses are the same two persons. There is absolutely no evidence on record explaining as to why two special powers of attorney were executed for the same purpose appointing the same person as the agent. Both the powers of attorney and the appointment in execution of power are all typed in the same machine. While two of the documents bear the signature of the typist under the endorsement ""typed by"", the last of the documents dated 19.11.1976 does not disclose the name of the typist. One significant circumstance is that in all the three documents, the signatures of the executants are found to be shaky. One can easily say that whoever executed the documents was either very old or not keeping good health. Admittedly Sundaramma was about 70 years old. The stamp paper for the last document dated 19.11.1976 has been purchased on 16.11.1976 itself in the name of the second, appellant. While the executant of the two documents dated 15.11.1976 has merely signed the documents without giving the date, the last document significantly gives out the date below the signature of the executant. It is very clear from the document that the date is not written by the executant as the same is written with a firm hand while the signature is shaky. The endorsement relating to the execution in the presence of the Sub Registrar in the last document reads thus:

Executed in my presence at the private residence of Bysani Sundaramma, No. 44 Old Bazaar Street, Tiruttani, this 19th day of November, 1976

by Bysani Sundaramma whose identity is proved by.

In the aforesaid endorsement, the words ""at the private residence of Bysani Sundaramma, No. 44 Old Bazaar Street, Tiruttani"" are written in a different ink. It appears as if they have been written subsequently.

21. Neither the first appellant nor the second appellant has chosen to enter the witness box to give evidence with regard to the exact state of health

of Bysani Sundaramma and the execution of the documents by her. Learned Counsel for the appellants states that the burden being on the plaintiff

to prove the case of undue influence and fraud, there was no necessity for the defendants to give evidence. I cannot accept this contention of

learned Counsel. It has been repeatedly laid down by the Privy Council and the Supreme Court that it is the bounden duty of a party personally

knowing the whole circumstances of the case to give evidence on his own behalf and submit to cross-examination and if he fails to do so, an

adverse inference should be drawn against him. In AIR 1927 230 (Privy Council) , the Privy Council laid down the above proposition in

unequivocal terms and held that the non-appearance of a party knowing the full circumstances of the case as a witness would be the strongest

possible circumstance going to discredit the truth of his case. Speaking for the Judicial Committee, Lord Shaw observed thus:

Their Lordships think it unnecessary to repeat the numerous details of the story, but, as it involves a general and important question of procedure

and practice, they think it expedient to make the following reference to what occurred at the trial of this civil suit. At the Bar of the Board it was

admitted by the respondents that she, Bhagwan, had been present in Court when the evidence was being taken, and that she did not go into the

witness box, and was not examined as a witness on her own or her alleged son's behalf.

Notice has frequently been taken by this Board of this style of procedure. It sometimes takes the form of a manoeuvre under which counsel does

not call his own client, who is an essential witness, but endeavours to force the other party to call him, and so suffer the discomfiture of having him

treated as his, the other party's own witness.

This is thought to be clever, but it is a bad and degrading practice. Lord Atkinson dealt with the subject in *Lal Kunwar v. Chiranji Lal* (1910) 20

M.L.J. 182 : L.R. 37 IndAp 1 : ILR All. 104, calling it ""a vicious practice, unworthy of a high-toned or reputable system of advocacy.

The present case, however, is a pointed instance of the evil which"" flows from such a practice. Bhagwan's case had been the subject of prolonged

investigation in the Revenue Courts, and had been pronounced by them a bogus case. She had appeared and told a story there, and it had not

been believed. She was, however, also present in this civil suit, the issue in which was the legitimacy of the boy that she was putting forward as the

Jaghirdar of the estate. Her non-appearance in answer to the challenge, that is to say, to disclose the actual fact as to her condition shortly after her

husband Jawala's death, her disappearance into a foreign State, and all the other circumstances mentioned, had been established. If her story

were, notwithstanding all this, a true story, it was her bounden duty to give evidence in the suit, telling the whole facts in support of her and her

alleged son's case; but she did not. If under advice she did not do so, that advice was of the worst description, and worthy of the animadversion

above made. But in any view her non-appearance as a witness, she being present in Court, would be the strongest possible circumstance going to

discredit the truth of her case.

22. A similar view is expressed by the Supreme Court in Gopal Krishnaji Ketkar Vs. Mahomed Haji Latif and Others, , wherein their Lordships

observed that even if the burden of proof does not lie on a party, the Court may draw an adverse inference if he withholds an important document

in his possession which would throw light on the facts at issue. The Supreme Court went on to observe as follows:

...It is not, in our opinion, a sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the best evidence

which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof.

In Murugesam Pillai v. Gnana Sambandha Pandara Sannadhi 1917 32 M.L.J. 369 : (1917) 44 Ind. App. 98 : ILR Mad. 402 : AIR 1917 P.C. 6 ,

Lord Shaw observed as follows:

A practice has grown up in Indian procedure of those in possession of important documents or information lying by, trusting to the abstract

doctrine of the onus of proof, and failing, accordingly, to furnish to the Courts the

best material for its decision. With regard to third parties, this may be right enough they have no responsibility for the conduct of the suit but with regard to the parties to the suit it is, in their Lordships' opinion, an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the written evidence in their possession which would throw light upon the proposition.

This passage was cited with approval by this Court in a recent decision *Biltu Ram v. Jainandan Prasad* Civil Appeal No. 941 of 1965 dt.

15.4.1968 (S.C.). In that case, reliance was placed on behalf of the defendants upon the following passage from the decision of the Judicial

Committee in *Mt. Bilas Kunwar v. Desraj Ranjit Singh* 1915 29 M.L.J. 335 : (1915) 44 Ind. App. 202 : AIR 1915 P.C. 96 :

But it is open to a litigant to refrain from producing any documents that he considers irrelevant if the other litigant is dissatisfied it is for him to apply for an affidavit of documents and he can obtain inspection and production of all that appears to him in such affidavit to be relevant and proper. If he fails so to do, neither he nor the Court at his suggestion is entitled to draw any inference as to the contents of any such documents.

But Shah, J., speaking for the Court stated:

The observations of the Judicial Committee do not support the proposition that unless a party is called upon expressly to make an affidavit of documents and inspection and production of documents is demanded, the Court cannot raise an adverse inference against party withholding evidence in his possession. Such a rule is inconsistent with illustration (g) of Section 114 of the Evidence Act, and also an impressive body of authority.

23. In *K.C. Kapoor Vs. Smt. Radhika Devi (Dead) by Lrs. and Others*, , the Court made the following observation to a similar effect:

And then the failure (referred to above) of plaintiff No. 1 to step into the witness box is enough for the Court to raise another presumption, namely, that her deposition would not have supported the plaintiff's case. The onus of proof of the issue on the defendant was, therefore, very light and stood amply discharged by the facts noted in that behalf by the trial Court....

24. I am entirely in agreement with the contention of learned Counsel for the respondent that an adverse inference should be drawn as against the

appellants from their failure to examine themselves as witnesses in this case. As stated earlier, Sundaramma was at Tiruttani with the appellants

during the relevant period. Her state of health when she left Madras for Tiruttani is spoken to by P.Ws. 1 to 3. Even if the evidence of P.W. 1 and

P.W. 3 is rejected on the ground that both of them are interested parties, the evidence of P.W. 2 cannot be assailed on that ground. He was a

person living in the house opposite to that of the plaintiff and he had known the family for about 15 years. He has given definite evidence that at the

time when Sundaramma left Madras, she was not in a position to speak properly and that she was almost in a fainting condition. In his cross-

examination, he has repeated the assertion that she used to swoon very often and could not walk. He has also stated that he had a doubt whether

Sundaramma would reach Tiruttani. Nothing has been elicited in his cross-examination as to why he should speak against the defendants. The

defendants who were the best witnesses to speak about the state of health of Sundaramma on 15th and 19th of November, 1976, have refrained

from entering the witness box. Obviously, they were not willing to face the cross-examination by the plaintiff's counsel.

25. Of the two attestors, one has been examined and there is no explanation as to why the other has not been examined. D.W. 1 the attestor, who

has been examined, is living in Old Bazaar Street, Tiruttani and he has got a bunk shop about five or six houses off the defendants' residence. He

claims that he knows the defendants' family for about 20 years and that he has seen Sundaramma several times. He states that he signed as a

witness in Ex. B4 and Ex. B6. He speaks as if both Exs. B4 and B6 were executed on the same day, but actually Ex. B4 purports to have been

executed four days after Ex. B6. He states that there was an advocate by name Venkatarathnam, who translated the document in Telugu and

explained to the executant. That itself shows that Sundaramma did not know English and all the documents were typed in English. The said

advocate Venkatarathnam has not been examined and there is no explanation therefor. The witness claims to have signed another document on the

next day. But, we do not find any document dt. 16.11.1976. Significantly, the stamp paper for the last document was purchased on 16.11.1976

but it purports to have been executed on 19.11.1976. The witness proceeds to say that Sundaramma was in good state of health when she signed

Exs. B4 and B6. According to him, she was able to walk and she had been going to the temple in the evenings. If that was her condition of health, there is no reason why the Sub Registrar was brought to the residence of the defendants for registering the power of attorney. The witness also says that 20 days after the registration of Exs. B4 and B6, Sundaramma died on account of some trouble in clearing the bowels, and that a Doctor had seen her. In the cross-examination he states that Sundaramma had no disease at the time when she came to Tiruttani and that she was in perfect health. He states in the cross-examination that the document was signed by Sundaramma in her bed room. His evidence shows that he has been prepared by the second appellant for supporting his case. His evidence that Sundaramma was hale and healthy when she came to Tiruttani and when she executed the documents is believed by the recital in Ex. B4 which states that she was not able to go to the concerned office of the Sub Registrar for registering the document. It is for the defendants to have let in evidence as to the nature of the illness of Sundaramma. When their case is that she was quite healthy during the relevant period, when the documents were executed, they must have at least disclosed to the Court the cause of her death within a few days after the execution of the document.

26. The evidence of D.W. 2 has nothing to do with either the condition of Sundaramma at the time of the execution of the documents or the execution of the documents themselves. He has been examined only for the purpose of proving that Sundaramma used to live at Tiruttani also for some periods. It is the definite case of the plaintiff in paragraph 6 of the plaint that the documents said to have been executed by Sundaramma are not genuine but fabricated and false. The plaint also states that the execution is not by Sundaramma and she was not in a position to execute the documents, her mind following hand. No doubt, the plaint proceeds to speak about the exercise of undue Influence by the defendants. That does not mean that the plaintiff has admitted the execution of the documents by Sundaramma. In fact some of the averments in the written statements of the defendants are to the effect that Sundaramma was very much attached to the first defendant and her husband and her family members as the first defendant's husband was responsible to get the trusteeship transferred to Sundaramma by her husband Rangayya. The averments in the

written statement may give an impression that Sundaramma was indebted to the first defendant's husband and would act according to his wishes.

Whatever it may be, the evidence does not disclose that Sundaramma had more affection - towards one daughter than the other. Nothing has been

brought it out in the evidence as to why Sundaramma should favour one daughter and her son to take over the trusteeship.

27. Having regard to the facts and circumstances of the case, the burden is on the defendants to prove the execution of the documents by

Sundaramma. In view of the fact that Sundaramma died within a few days after the dates of the documents, her evidence regarding the same is not

available to the Court. Nor can there be any evidence with regard to her conduct after the dates of the documents which would have been

available if she had lived for long thereafter. Hence, in this case, the standard of proof required for establishing the genuineness and validity of the

document in question will be the same as that of a will. The Supreme Court has dealt with the matter of proof of wills at some length in *H.*

Venkatachala Iyengar Vs. B.N. Thimmajamma and Others, and has laid down as follows:

What is the true legal position in the matter of proof of wills? It is well-known that the proof of wills presents a recurring topic for decision in

Courts and there are a large number of judicial pronouncements on the subject. The party propounding a will or otherwise making a claim under a

will is no doubt seeking to prove a document and, in deciding how it is to be proved, we must inevitably refer to the statutory provisions which

govern the proof of documents. Sections 67 and 68, Evidence Act are relevant for this purpose. u/s 67, if a document is alleged to be signed by

any person, the signature of the person must be proved to be in his handwriting, and for proving such a hand writing under Sections 45 and 47 of

the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68, deals with

the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until

one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of

proof which must be satisfied by the party who relies on a document in a Court of law. Similarly, Sections 59 and 63 of the Indian Succession Act

are also relevant. Section 59 provides that every person of sound mind, not being a minor, may dispose of his property by will and the three

illustrations to this section indicate what is meant by the expression "'a person of sound mind'" in the context. Section 63 requires that the testator

shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and that the signature or mark

shall be so made that it shall appear that it was intended thereby to give effect to the writing as a will. This section also requires that the will shall be

attested by two or more witnesses as prescribed. Thus the question as to whether the will set up by the propounder is proved to be the last will of

the testator has to be decided in the light of these provisions. Has the testator signed the will? Did he understand the nature and effect of the

dispositions in the will? Did he put his signature to the will knowing what it contained? Stated broadly it is the decision of these questions which

determines the nature of the finding on the question of the proof of wills. It would prima facie be true to say that the will has to be proved like any

other document except as to the special requirements of attestation prescribed by Section 63 of the Indian Succession Act. As in the case of proof

of other documents so in the case of proof of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the

usual test of the satisfaction of the prudent mind in such matters.

However, there is one important feature which distinguishes wills from other documents. Unlike other documents the will speaks from the death of

the testator, and so, when it is propounded or produced before a Court, the testator who has already departed the world cannot say whether it is

his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is

proved to be the last will and testament of the departed testator. Even so, in dealing with the proof of wills the Court will start on the same enquiry

as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the will was signed by the

testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the

dispositions and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the will is disinterested,

satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, Courts would be

justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of

the essential facts just indicated.

There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances. The alleged signature of the

testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature in question is the signature of the

testator may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble

and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions

made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances, or, the will may otherwise indicate that" the

said dispositions may not be the result of the testator's free will and mind. In such cases the Court would naturally expect that all legitimate

suspensions should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious

circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, Courts would be reluctant to treat the

document as the last will of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the

execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a

doubt as to whether the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus

to remove any such legitimate doubts in the matter.

Apart from the suspicious circumstances to which we have just referred in some cases the wills propounded disclose another infirmity.

Propounders themselves take a prominent part in the execution of the wills which confer on them substantial benefits. If it is shown that the

propounder has taken a prominent part in the execution of the will and has received substantial benefit under it, that itself is generally treated as a

suspicious circumstance attending the execution of the will and the propounder is

required to remove the said suspicion by clear and satisfactory evidence. It is in connection with wills that present such suspicious circumstances that decisions of English Courts often mention the test of the satisfaction of judicial conscience. It may be that the reference to judicial conscience in this connection is a heritage from similar observations made by ecclesiastical Courts in England when they exercised jurisdiction with reference to wills; but any objection to the use of the word "conscience" in this context would in our opinion, be purely technical and academic, if not pedantic. The test merely emphasises that, in determining the question as to whether an instrument produced before the Court is the last will of the testator, the Court is deciding a solemn question and it must be fully satisfied that it had been validly executed by the testator who is no longer alive. It is obvious that for deciding material questions of fact which arise in applications for probate or in actions on wills, no hard and fast or inflexible rules can be laid down for the appreciation of the evidence. It may, however, be stated generally that a propounder of the will has to prove the due and valid execution of the will and that if there are any suspicious circumstances surrounding the execution of the will the propounder must remove the said suspicions from the mind of the Court by cogent and satisfactory evidence. It is hardly necessary to add that the result of the application of these two general and broad principles would always depend upon the facts and circumstances of each case and on the nature and quality of the evidence adduced by the parties. It is quite true that, as observed by Lord Du Pareq in *Harmos v. Hinkson* (1946) 2 M.L.J. 156 : 50 C.W.N. 895 : 59 L.W. 489 : AIR 1946 P.C. 156, where a will is charged with suspicion, the rules enjoin a reasonable scepticism, not an obdurate persistence in disbelief. They do not demand from the Judge, even in circumstances of grave suspicion, a resolute and impenetrable incredulity. He is never required to close his mind to the truth. It would sound platitudinous to say so, but it is nevertheless true that in discovering truth even in such cases the judicial mind must always be open though vigilant, cautious and circumspect. The above tests should be applied to the document on hand though it is not a will.

28. As pointed out already, the second appellant stands in the position of a

propounder and he has taken a large part in bringing about the document in question. It is significant to note that the impugned document under which the defendants claimed their rights to trusteeship was not produced by them in either of the Courts below. Learned Counsel for the appellants submitted that the document was presented for registration and it was with the Registrar till the registration was completed, and therefore, it could not be produced in Court. But, I find that the registration was completed on 11.7.1980 after the disposal of the suit by the trial Court. The appeal before the lower appellate Court was disposed of only on 26.3.1981. But, the appellants herein did not choose to produce the documents before the lower appellate Court. When the second appellant has not chosen to enter the witness box and clear the suspicion created by the various circumstances referred to already, it is not open to harp upon the onus of proof being on the plaintiff. I have no hesitation in holding that Ex. B15 has not been proved to be the document executed by Bysani Sundaramma in the sense that she understood the contents and signed the same willingly.

29. In fine, the conclusion of the lower appellate Court has to be upheld, though for different reasons. The second appeal fails and is dismissed. In the circumstances of the case, there will be no order as to costs.