

(2002) 07 MAD CK 0087
In the Madras High Court
Case No : Appeal Suit No. 504 of 1987

Gopal Gounder

APPELLANT

Vs

Arunachala Gounder, Mannangkatti Gounder, Natesan,
Karuppan, Rajendran and Elumalai

RESPONDENT

Date of Decision : 12-07-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 96
Contract Act, 1872 — Section 16

Citation : (2002) 07 MAD CK 0087

Hon'ble Judges : N.V. Balasubramanian, J

Bench : Single Bench

Advocate : D. Rajendran, for S.M. Loganathan, for the Appellant; V.
Lakshminarayanan, for V. Raghavachari, for the Respondent

Final Decision : Dismissed

Judgement

N.V. Balasubramanian, J.—This appeal is directed against the judgment and decree in O.S.No.13 of 1985 on the file of the Subordinate

Judge, Tiruvannamalai.

2. The plaintiff, who lost the case before the trial Court, is the appellant herein. Respondents 1 to 6 in the appeal were the defendants 1 to 6 in the

suit. Plaintiff's father is the first respondent in the appeal and respondents 2 to 4 are the plaintiff's brothers and respondents 5 and 6 are the sons of

the second respondent. For the sake of convenience, the parties are hereinafter referred to as shown in the suit.

3. The case of the plaintiff is that A and B schedule properties mentioned in the schedule of property are the joint family properties of the plaintiff

and the defendants. The case of the plaintiff is that the defendants 1, 3 and 4 and himself are not worldly wise people and they are always fastened

to the agriculture avocation. It is his case that the second defendant is maintaining the entire joint family and on the basis of the directions of the second defendant, the plaintiff, father of the plaintiff and his brothers were acting. In other words, according to him, the second defendant was the manager of the joint family and he was maintaining the income and expenditure of the joint family properties. His case is that the entire joint family properties are enjoyed by the joint family without any partition. The plaintiff has stated that he was requested by the Village Official to pay kist in respect of his share of the joint family property on the score that there was a partition in his family. It is stated that the plaintiff thereafter obtained particulars and applied for copy of the document and found out that the second defendant has played a fraud on the plaintiff, his father and his brothers and created a partition deed as if there had been a partition by consent of the parties. His case is that there was not even a talk of partition in the family at any point of time and there was no occasion to effect the partition.

4. The plaintiff has also stated that prior to the institution of the suit, the second defendant took the first defendant, defendants 3 and 4 and the plaintiff to the Office of the Registrar of Assurances, Thandrapet, stating that to obtain a loan from the Land Development Bank, Thandarampattu a mortgage deed has to be executed and registered by all the parties. His case was that the plaintiff and defendants 1 to 4 went to Thandrapattu village and when they reached the Sub Registrar Office, the second defendant with his close associates, namely, Kesavalu Naidu, Pachiappa Gounder, Vediappan and Gopalakrishnan were present in the Sub Registrar Office and Karnam was also present with the document prepared already. It is stated that the plaintiff and his father and the defendants 3 and 4 were asked to sign the document and they have signed the document on the belief that a security deed had been executed in favour of the Land Development Bank, Thandrapet. It is stated that the said document was not read over to the parties and the contents were not made known to the plaintiff and others and the plaintiff and others have acted on the directions of the second defendant as they were under the domination of the second defendant. It is stated that only after obtaining the copy of the deed, the plaintiff came to know about the fraud played by the second defendant and the said deed was obtained by exercising fraud, undue

influence and misrepresentation on the first defendant and the plaintiff and his brothers. Plaintiff therefore has stated that the document dated 7-5-

1982 is a void document for the reason that it was obtained by the second defendant by playing fraud on the plaintiff and his father and the other

brothers and also by misrepresentation and undue influence. It is stated that the second defendant hatched a conspiracy with the help of his close

associates and the partition deed was not acted upon and the plaintiff and the defendants 1 to 4 are in joint possession and enjoyment of the suit

properties. It is his case that the plaintiff and the fourth defendant know only to put their signature and they do not know how to read or write. It is

also stated that the plaintiff B schedule properties were not covered in the deed of partition and were purchased in the name of the second defendant

out of the income from the ancestral properties and those properties were not included in the deed of partition. It is his case that the partition deed

was not acted upon and the same has not been come to effect and it is a void document not binding on the plaintiff and his brothers. It is stated that

omitted items are shown in the B schedule and they are also joint family properties. It is therefore stated that the plaintiff is entitled for partition and

separate possession of A and B schedule properties. Therefore, the plaintiff has filed the suit for partition and separate possession of his 1/5th

share in the suit properties.

5. The fourth defendant has filed a written statement supporting the case of the plaintiff and he has no objection for passing a decree for partition of

the suit properties.

6. The second defendant filed a written statement which was adopted by defendants 5 and 6. The second defendant in his written statement has

stated that the plaintiff is suppressing the partition which has taken place by means of a registered deed dated 7-5-1982. He has also stated that

the plaintiff, defendants 1 to 4 constituted a joint family originally and the properties described in A schedule were divided as per the partition

deed. He denied that he was the Kartha and according to him, the first defendant, his father alone was the manager of the joint family. He has also

denied that the other defendants were acting according to the dictates of the second defendant. It is his case that the plaintiff used to consult his

father-in-law Swaminatha Gounder, who is well versed in Court affairs. According

to him after the partition, the plaintiff, defendants 3 and 4 are in enjoyment of the partitioned properties from the date of partition. It is his case that the properties have also been partitioned by metes and bounds in accordance with the deed of partition and the shares were also enjoyed separately by the members. His case is that the plaintiff and the defendants 1 to 4 discussed fully about the partition and finally agreed among themselves to partition the properties and he has stated that no fraud has been played by the second defendant. He has stated that the deed was executed by all the concerned parties with the knowledge of its contents and was registered voluntarily by the parties with the full knowledge that it was a partition deed. It is also stated that plaintiff only after consultation with his father-in-law had agreed for partition and agreed to execute the partition deed. He also denied that the attestors and the scribe of the partition deed were the associate of the second defendant and he also denied that he exercised domination over the plaintiff. It is his case that the deed of partition is a valid document and it is also stated that the father of the second defendant namely, the first defendant was not given any share as he was directed to be maintained by the second defendant. As far as the B schedule properties are concerned, it is denied that they are the joint family properties. His main case was that prior to the execution of the partition deed the panchayat was held by respectable members of the suit village and the members from neighbouring villages also participated in the panchayat and finally the father was brought and he gave his consent to the partition and the lands were measured and finally partition deed was prepared. It is stated that with the consent of the parties, the partition deed was executed and registered and the parties are in possession and enjoyment of their respective shares and they are also paying kist separately. It is also his case that it is not open to the plaintiff to ignore the deed of partition and file a suit for partition without the prayer seeking to set aside the deed.

7. The trial Court on the basis of the above pleadings and on the basis of the oral evidence rejected the case of the plaintiff. As far as the B schedule properties are concerned, the trial Court rejected the case of the plaintiff in so far as item Nos. 1 to 6 of the B schedule properties are concerned and granted preliminary decree for partition in respect of item Nos. 7

and 8 of B schedule properties. It is against that judgment and decree, the present appeal has been preferred.

8. Mr.D. Rajendran, learned counsel appearing for the appellant submitted that the judgment and decree of the trial Court shows that it has first came to the conclusion that the document under Ex.B.1 was a valid document and it has also concluded that the plaintiff was not acting according to the dictates of the second defendant. On the aforesaid conclusion, the trial Court arrived at a finding that no grounds have been made to ignore the said document. The learned counsel submitted that the second defendant has not established that he was enjoying the suit properties separately and other defendants are not under his control. His case is that the document Ex.B.1 was obtained by fraud and it was not acted upon and the properties were not enjoyed separately and it is open to the plaintiff to ignore the said document. His submission is that no reason was given for the findings arrived at and even before giving reasons, the trial Court has arrived at its conclusion. According to him, the second defendant is the manager of the joint family and the entire management of the joint family was under his control and it is the duty of the second defendant to prove that the deed in question was a genuine one. The second defendant has committed an act of fraud on the plaintiff and defendants 1, 3 and 4. The second defendant took the plaintiff and others to the office of the Sub Registrar of Assurance stating that for obtaining a loan, a mortgage deed has to be executed and obtained their signatures. It is also stated that there was misrepresentation and fraud played by the second defendant as he has not stated the true nature of the document and the purpose of the execution of the said document. According to him, the first defendant is aged and has lost his eye sight and he has not filed any written statement nor has he appeared in the Court proceedings and therefore even the examination of first defendant through commission would serve no purpose. He submitted that the nature of the document and its contents were not known to the parties who have signed Ex.B.1. He submitted that the document was not read over and explained and the plaintiff believing the representation of the second defendant that it was a deed of mortgage, had put his thumb impression. He also stated that only close associate of the second defendant accompanied the second defendant and it clearly shows that a fraud

has been committed on the plaintiff. He referred to the evidence of D.W.3, who did not speak anything about the panchayat and he has not stated the reason for registering the document after 15 days. According to him, Ex.B.1 is not a valid document and one of the executant of the document namely, Natesan was not examined and the evidence of all the witnesses are not similar. He has also submitted that the documentary evidence clearly shows that the parties to Ex.B.1 have not been enjoying the property separately and there is nothing to show that the partition deed was acted upon. He submitted that the plaintiff has not admitted the partition and there is no separate patta issued to the parties and there is no evidence on this aspect. The non-examination of the father of the second defendant is fatal to the case of the defendants and that would show that the document was obtained by fraud. His case is that the document was obtained by fraud and the way in which the document was executed clearly shows that the plaintiff was not aware of the contents of the document before executing the same. He also submitted that it is open to him to take advantage of the absence of the examination of the father and another executant of the deed namely, the third defendant and both of them have not filed their written statement. He referred to the evidence of D.W.1, who spoke that the document was executed on one day and registered on another day. He also submitted that the scribe was not examined and there are suspicious circumstances surrounding the execution of the document Ex.B.1 and the way in which it was signed and registered clearly shows that the plaintiff was not aware of the contents of the document and the person who conducted the panchayat were not present at the time of registration of the deed. The plaintiff was not aware as to when the document was written and even `subsequent to the partition no document was filed to show that the second defendant was enjoying the property allotted to him. He therefore submitted that the deed is a void document. He also submitted that the second defendant has not discharged the burden that he is not the manager of the joint family and is not managing the entire property of the joint family. Mr.D. Rajendran, also referred to the evidence of D.W.2 to D.W.4. He submitted that D.W.2 was a witness to the document but did not appear before the Sub Registrar. As far as the evidence of D.W.3 is concerned, he submitted that he

did not speak anything about the panchayat and there are no reasons to wait for 15 days for registering of the document after it was executed. He

also submitted that the scribe was not examined and all the witnesses of the second defendant do not speak the details of partition. He submitted

that D.W.4 was a Panchayatdar, but he did not sign the document either as a witness nor did he appear before the Sub Registrar. He submitted

that the second defendant has not discharged his burden of proof that the deed was a valid document.

9. Mr.D. Rajendran, learned counsel for the appellants submitted that D.Ws.2 and 4 are parties to the panchayat and there was no evidence from

the panchayatdars to show the allotment of properties to the members of the joint family. He submitted that it is not open to the second defendant

to rely on the panchayat for one purpose and ignore the same for some other purpose. He submitted that the plaintiff has established that the

partition deed is not binding and it is not necessary to challenge the document and plaintiff has never admitted the panchayat. As far the B schedule

properties are concerned, he submitted that the properties are the joint family properties and the second defendant has no other income except the

income from the joint family properties and the second defendant has not proved that he has his own source to purchase the properties. In the

absence of any evidence, items 1 to 6 of the B schedule property also should be regarded as joint family properties. He therefore submitted that

the deed is a void document. He submitted that even assuming that Ex.B.1 was valid, there was only a partial partition and all the properties of the

joint family were not included in the partition. The evidence of D.W.1 would show that there was no separate property. There is no evidence

regarding the income of the second defendant.

10. Mr. V. Lakshinarayanan, learned counsel appearing for the second defendant submitted that the plaintiff has not proved his case for setting

aside the partition deed. He referred to the evidence of P.W.3 and submitted that his statement shows that prior to the execution of the document,

there was a quarrel in the family for partition. He also submitted that when specific pleas regarding misrepresentation, fraud and undue influence

were taken, the particulars must necessarily be stated in the pleadings to substantiate the case and a general statement on this aspect is not

sufficient and it should be proved by evidence. He submitted that mere use of the expression in the pleadings is not sufficient and there is no

evidence to show that there was an undue influence, fraud etc. He also submitted that the father was not under the control of the second defendant.

The trial Court had found that the witnesses examined on behalf of the second defendant were trust worthy and the trial Court, who had the

opportunity of seeing the demeanour of the witnesses, had accepted the statements of the witnesses made on behalf of the second defendant. He

also submitted that there are independent evidence to substantiate the partition in the family. As far as the B schedule properties are concerned, the

properties were purchased only after the deed of partition and the original document was in possession of the second defendant and there is no

evidence to show that the second defendant has purchased the B schedule property utilising the family income. He submitted that the second

defendant was required to take the charge of maintenance of the first defendant and hence no property was allotted to him.

11. I have carefully considered the arguments of the learned counsel appearing for the appellant as well as the learned counsel appearing for the

second respondent. The following points arise for consideration:

(1) Whether the suit for partition would lie and whether the document Ex.B.1 is liable to be ignored by the appellant and whether it was obtained

by fraud and misrepresentation ?

(2) Whether item Nos. 1 to 6 of B schedule property are the joint family properties ?

12. I have already set out the facts and the case of the plaintiff is that the deed of partition Ex.B.1 dated 7-5-1982 was obtained by

misrepresentation and undue influence which the second defendant has exercised over his father, the first defendant and the plaintiff and other

brothers. His case as seen from the plaint is that the two years prior to the date of execution of the deed, the second defendant took the first

defendant, plaintiff and defendants 3 and 4 to the Office of the Sub Registrar of Assurance for executing a mortgage deed to obtain the loan from

the Land Development Bank, Thandrapattu. Accordingly, plaintiff, first defendant and defendants 3 and 4 went to Thandrapattu village and at

that time when they reached the Office of the Sub Registrar of Assurance, the

second defendant with his associates was present at the Office and Karnam Sundara Ganesan who had prepared the document was already there. During the course of examination of the plaintiff as P.W.1, he has stated that the second defendant went with his father to Thandrampattu and directed others to go to Thandrampattu and then they went to the Office of the Sub Registrar of Assurance, Thandrampattu. It is apparent a conflicting statement was made by the plaintiff in the plaint and the evidence given by D.W.1 as to the way in which the plaintiff along with others reached the office of the Sub Registrar Assurance at Thandrampattu. Apart from the plaintiff, who was examined as P.W.1, the fourth defendant was examined on the side of the plaintiff as P.W.2.

13. I have carefully gone through the oral evidence of P.W.1. The learned Subordinate Judge, who had an opportunity to observe the way in which p.W.1 had given evidence has made a pointed remark that P.W.1 did not give direct answer to most of the questions and he answered the questions only after carefully weighing the after effect of his answers and he has also recorded his remarks that the way in which P.W.1 had given evidence showed that he is not a person to be influenced. Though Mr.D. Rajenderan, learned counsel for the appellant submits that the learned Subordinate Judge had not recorded the remarks for which question the plaintiff has given answer after considering the probable result of the answer, the remarks made by the learned Subordinate Judge, who had opportunity to observe the demeanour of the witness P.W.1, has to be taken into account while examining the question what is the weight to be attached to the evidence of P.W.1. I am of the view that it is the duty of the plaintiff to establish by proper and satisfactory evidence that his elder brother, because of his position in the family, had exercised dominion over the free will of the plaintiff and the second defendant had been exercising control over the first defendant, plaintiff and his other brothers. The evidence of P.W.1 does not in any way indicate that the plaintiff was not aware that the document he was executing was not a deed of partition but a deed of mortgage. In this connection it is also relevant to notice the evidence of P.W.3, an independent witness, who has stated in his evidence that two years prior to the suit, the brothers have quarreled for partition and there was a demand for partition by the brothers. Though he has

stated that the brothers were not enjoying the property separately, he has stated in the Chief examination that prior to two years they were enjoying the property jointly. The implication of his admission is that after that period the brothers were enjoying the properties separately. Though, he denied this statement in his cross-examination, where he has stated that the brothers were not enjoying the properties separately, I am of the view that the statement regarding joint enjoyment of the property was made by P.W.3 in his cross-examination realising the consequences of the statement earlier made during the chief examination that prior to two years the brothers were enjoying the property jointly. It is significant to note that P.W.3 has not stated anything about Ex.B.1 partition deed.

14. Another important aspect is that the evidence of P.W.2. He is one of the brothers and is the fourth defendant in the suit and has supported the case of the plaintiff. He completely denied that there was a partition deed but has not given the details. In so far as P.W.2 is concerned, he is an interested witness and has supported the case of the plaintiff. It is curious to note that the plaintiff has not taken steps to examine any of the witnesses to the deed of partition or the scribe or any one of the panchayatdars to establish that there was no panchayat at all.

15. The evidence of P.W.1 shows that he has merely reiterated the averments made in the plaint and there is no independent evidence to corroborate the evidence of the plaintiff. It is also found that he has gone even to the extent of giving false evidence. He did not know who wrote the document Ex.B.1. The learned Subordinate Judge in more than one place has recorded that the plaintiff has given a false evidence and the plaintiff is not a person who would have acted had there been misrepresentation about the nature of the document.

16. In my view, it is the duty of the plaintiff to establish that he was totally ignorant of the contents of the documents which he signed. The plaintiff has not taken steps to examine the Sub Registrar and also the scribe or the witnesses to the document Ex.B.1. But on the other hand, the witnesses examined on behalf of the defendants namely, D.W.2 to D.W.4, who are either parties to the panchayat or attestors to the deed have spoken about the Panchayat, the division of the properties and the attestation of the document. The plaintiff was not able to establish that the evidence on

the side of the defendants lack credibility and their evidence should be ignored. On the other hand, the learned Subordinate Judge, who had an opportunity to observe them when they gave evidence, found that their evidence was inspiring and fit for acceptance by the Court. Though the plaintiff may not have any documentary evidence to prove the case, it is for him to prove by evidence that he was not aware of the contents of the document. D.W.2, who gave evidence in support of the second defendant stands in the same relationship to the plaintiff as that of the second defendant. D.W.2 has spoken about the panchayat and also about the execution of the document though he was not able to give the precise nature of the property allotted to each brothers, but, there is nothing to disbelieve the statement of D.W.2. There was no suggestion at all that there was a quarrel between the plaintiff and D.W.2, while he gave evidence against the plaintiff. He is a close relative of the plaintiff and the plaintiff was not able to establish that D.W.2 has given evidence in favour of the second defendant on some extraneous consideration. As far as the evidence of D.W.3 is concerned, he was also a party to the panchayat and he has also signed the document as attestor. He has spoken about the partition and he was also present in the office of the Sub Registrar of Assurance and identified the parties. He denied the suggestion that the parties were misled that they should go to the Sub Registrar Office in connection with the execution of a deed of mortgage and he has given evidence that the Sub Registrar has stated that it was a deed of partition and after ascertaining the consents of the deed, the parties have signed the deed of partition. As far as D.W.4 is concerned, he has also spoken about the panchayat and his evidence discloses that the way in which the properties were allotted.

17. The submission of D. Rajendran, learned counsel for the appellant that the second defendant has obtained the document by fraud is not acceptable as there is absolutely no evidence to show that a fraud has been committed on the plaintiff.

18. As far as the non-examination of the first defendant is concerned, it is seen that he remained exparte. But the plaintiff has not taken steps to examine the first defendant on commission. It is the case of the plaintiff that his father, the first defendant, was bed-ridden and the non-examination of first defendant by the second defendant is understandable when the plaintiff himself has stated that the first defendant was bed-ridden. Hence it

is not open to the plaintiff to take advantage of the non-examination of the first defendant. The plaintiff, in my view, has taken a calculated risk in not taking steps to examine his father in the trial Court and hence it is not open to him to complain that the first defendant was not examined by the second defendant and it is also not open to him to take advantage of the absence of examination of first defendant. Though the father might be the best witness, the plaintiff has not taken any steps to examine the father. Another curious factor is that the other brother of the plaintiff namely, the third defendant has neither supported the case of the second defendant nor the Plaintiff and the plaintiff has not taken steps to examine either the first defendant or the third defendant. The other important aspect is that the plaintiff has not established that the properties were enjoyed in common even after the partition. The plaintiff has not let in any evidence to show that even after the deed of partition the parties have been enjoying the properties in common by examining any of the witnesses. On the other hand, the plaintiff's complaint was that it is the duty of the second defendant to establish that the properties were enjoyed separately. In my view, the case of the plaintiff cannot be accepted. It is for him to prove by evidence that the partition deed was not acted upon. The plaintiff has also not produced the patta nor examined any neighbour to show that the properties were enjoyed in common even after the partition. Another important aspect is that the plaintiff came to the Court nearly after two years from the date of partition claiming partition. His case was that after the Village Official questioned him to pay the kist in respect of the suit property separately by him, he filed the suit. The plaintiff has obviously come with a false case because the Village Officials would not have demanded kist for the entire suit properties from the plaintiff separately. If his case was that there was a demand for kist for the property allotted to him, the case pleaded that there was no separate enjoyment of the properties after partition would be belied by his own statement and probably because of the same, he has stated that the village officer demanded kist for the suit properties. In his evidence, he has stated that "Maniam" has demanded kist for which he has replied that the properties were not divided. Mr.D. Rajendran, learned counsel also submitted that the way in which the document was written shows that the parties are not enjoying the properties separately. I am unable to accept the said submission of the learned counsel for

the appellant. The trial Court relied upon the evidence of P.W.3 and D.Ws.1 to 4 and recorded the finding that the properties were divided and the parties were enjoying the properties separately in accordance with the deed of partition. I am of the view, that the plaintiff has not established that there is a joint possession and common enjoyment of the properties even after the date of partition. The second defendant has also established by evidence that the document could not be registered on the date of execution and there is nothing to disbelieve the statement given by the second defendant. Though Mr.D. Rajendran, learned counsel for the appellant submitted that the parties who were at Panchayat were not present as an attesting witness of Ex.B.1 and they were not present at the Sub Registrar Office, I find that the second defendant has taken steps to examine one person from Panchayat, one person who signed the document as witness and a person who identified the parties before the Sub Registrar. In my view, it is not the quantity of evidence that is material but the quality of evidence that would be material. Mr.D. Rajendran, learned counsel for the appellant submitted that D.W.3 did not speak anything about the panachayat. I find that the evidence of D.W.3 was let in as an attester to the document. The non-examination of the scribe is also not material when the plaintiff has not established that he did not have knowledge that it was a deed of partition.

19. Mr.D. Rajendran, learned counsel for the appellant submitted that since some of the properties were not included in the deed of partition it will show suspicious circumstances surrounding the execution of the deed of partition. I am not able to accept the said submission because the case of the second defendant throughout was that all the properties covered under B schedule property were his separate properties and under those circumstances, the non-inclusion of some of the B schedule properties in the deed of partition is not a suspicious circumstance to doubt the genuineness of the document. D.W.2, the attesting witness to the document Ex.B.1, has deposed that the Karnam has read over the document and the above statement of D.W.2 was also corroborated by the evidence of D.W.3, who was also a witness to the document and he has also stated that Sundara Ganesan wrote the document and after the document was written, the document was read over to the parties and then the signature

or the thumb impression was obtained. The scrutiny of evidence of D.W.1, the second defendant and the evidence of D.Ws.2 and 3 which was accepted by the trial Court clearly shows that the document was read over to the parties and thereafter the parties have put their thumb impression or signature, as the case may be, after it was read over. There is nothing to disbelieve the statements of D.Ws.2 and 3. As already stated, D.W.2 is a close relative of the plaintiff and his evidence was found acceptable by the trial Court and there are no reasons for D.W.2 to give a false statement against the plaintiff. The defects pointed out by Mr.D. Rajendran, learned counsel appearing for the appellant are not material and the entire deposition of the witnesses examined on behalf of the second defendant altogether cannot be discarded on that ground. The plaintiff has also not established that the second defendant was acting as the manager of the joint family and he was in a position to dominate over the will of the plaintiff and other members of the family. The evidence of the plaintiff is not sufficient to hold that the second defendant was in a position to dominate the will of the plaintiff and other members of the family. There is no evidence to show that all the coparceners consented for a junior member to act as the Kartha of the family. The second defendant has denied that he was in a position to dominate the will of the other members of the family and when the averment was denied, it is for the plaintiff to establish by some independent evidence that the second defendant has dominated the will of the members of the family. There is no direct evidence upon which the plaintiff could rely to prove undue pressure from his elder brother. In my view, the existence of relationship though relevant, the reality of life cannot be overlooked. It is no doubt true that it is possible for an elder member of the family to exercise undue influence in family matters in indefinite and various ways. But, the mere pointer that the second defendant is his elder brother is not sufficient, unless there is some evidence from any member of the family or a relative or even a third party who is conversant with the family to show that the second defendant has dominated the will of other members of the family. Further, even assuming that from the existence of relationships, it is open and free to draw the presumption of undue influence, but it is open to other party to let evidence that the allegation of undue influence was not proved. That is precisely what had happened in this case. The plaintiff's own evidence discloses the

quarrel for partition prior to two years before the suit and the second defendant had proved by evidence that there was no undue influence. P.W.2

examined on behalf of the plaintiff has also not spoken about the details of dominating will exercised by the second defendant and the way in which

he has influenced the will of the other members of the family. Except the statement of the plaintiff there is nothing to show that the second defendant

had influenced the free will of the plaintiff and other members of the family. The plaintiff has stated that he has not studied, but it was found by the

learned Subordinate Judge that he seems to be a person who is capable of understanding the nature of the transaction. When the second defendant

was examined, he was not even cross-examined with respect to the statement that all the members of the family were acting at the instruction of the

second defendant. It was also not suggested that the second defendant has committed fraud and obtained the signature of the plaintiff and others in

Ex.B.1. The plaintiff has not established that the second defendant was in a position to dominate the will of the plaintiff and other members of the

family. I also held that the plaintiff has failed to establish that it was a void document obtained by fraudulent misrepresentation. The suit instituted for

partition is liable to be dismissed as the plaintiff has not sought for any relief to set aside the document in question. I accept the submission of Mr.V.

Lakshminarayanan, learned counsel for the second respondent that though there is specific plea of undue influence there are no particulars

regarding the alleged fraud committed by the second defendant. The evidence of P.W.3 clearly shows that the parties have been quarrelling

regarding the division of the property and when there is a quarrel, I am not able to accept the case pleaded that the plaintiff has signed the

document on the basis of the representation of the second defendant.

20. It is in the light of the facts, the various decisions relied on by the parties should be considered. In K.M. Madhavakrishnan Vs. S.R. Sami and

Others, a Division Bench of this Court has held as hereunder:

The general rule of law is that a party of full age and understanding is normally bound by his signature to a document whether he reads it or

understands it or not. Equity does not save people from the consequences of their own folly but will save them from being victimised by other

people.

Whenever a person of full age and understanding puts his signature to a legal document without taking the trouble of reading it or without asking the document to be read and explained to him but signs it relying on the word of another as to its character, contract or effect, he cannot be heard to say that it is not his document.

It is settled law that a vague and general plea of undue influence will not be sufficient when the plaintiff comes forward with an action to set aside a contract on that ground or for fraud. It is the duty of the Court to scrutinise the pleadings to find out that a plea has been made and full particulars thereof have been given before considering whether undue influence has been made out or not.

I am of the view that that the ratio laid down by the Division Bench will squarely apply to the facts of the case.

21. In *M. Sambandam Vs. M. Chockalingam*, this Court has laid down the law, which reads as follows:

It has been laid down in the decision reported in *Mst. Rukhmabai Vs. Lala Laxminarayan and Others*, that though prima facie document clearly expressing the intention to divide brings about a division in status it is to a party to prove that the said document was a sham and nominal one not intended to be acted upon but was conceived executed for an ulterior purpose. Therefore, the plaintiff cannot be stopped from putting forward a case that the partition deed under Ex.B.38 was sham and nominal document not intended to be acted upon but was conceived and executed with an ulterior object of defeating the provisions of the Land Ceiling Act. When we consider the case on hand, it cannot be stated that the plaintiff has to prove the case and the defendant need not establish that there is a division. The plaintiff's specific case is that on account of the undue influence exercised by his brother, he had been a party to the partition deed. In such circumstances, when the plaintiff's case is based on Sec. 16 of the Contract Act, even though ordinarily onus of proving undue influence is on the plaintiff who sets up that plea in view of the fact that the defendant is a person who is standing in the position of active confidence of the plaintiff, it is for him to prove good faith of the transaction. The case on hand is an exception to the general rule that the onus of proving undue influence ordinarily rests on the party who sets up that plea, since it is for the

defendant who is enjoying the respect and regard from the plaintiff to establish that there was good faith. But the defendant has not discharged his

burden to the satisfaction of the Court. It has been laid down in the decision reported in A. Venkappa Bhatta and Others Vs. Gangamma and

Others, that, where the partition deed is brought about by undue influence and misrepresentation, the party to such deed cannot be estopped from

filing a suit for partition and the bona fides and good faith on the part of the party seeking to enforce the document must be proved by the party

who relies upon the document. It has been held in the above decision that

Where the proof of good faith was not forthcoming from the defendants particularly from the kartha of family and the elder brother of plaintiff's

husband and was in a position to dominate the Will of the plaintiff who was an illiterate person it could be stated that the partition deed was

brought about by undue influence and misrepresentation and that it was not intended to be acted upon.

The decision in M. SAMBANDAM Vs. M. CHOCKALINGAM cited above is not applicable to the facts of the case as the plaintiff has not

proved that the second defendant had exercised his domination and will over the plaintiff. More over, the second defendant has proved to the

satisfaction of the Court that the document written was a partition deed and it was read over to the plaintiff and other members of the family, and

after satisfying with themselves that it was a deed of partition the parties have put their thumb impression or the signature. I have already held that

the trial Court found that the evidence given on behalf of the second defendant was inspiring and acceptable and since the second defendant has

discharged his burden that there was a good faith in the transaction, the case of the plaintiff has to fail.

22. In AIR 1940 98 (Privy Council) the Privy Council has held as hereunder:

The party alleging fraud is bound to establish it by cogent evidence and suspicion cannot be accepted as proof. Unless therefore the proved

circumstances are incompatible with the hypothesis of the person charged with fraud having acted in good faith, they cannot be accepted as

affording sufficient proof of fraud.

On the facts of the case, I hold that the plaintiff has not proved that there are no circumstances to show that a fraud has been committed against the

plaintiff in execution of the document.

23. In a recent decision, the House of Lords in ROYAL BANK OF SCOTLAND Vs. ETRIDGE (No.2) 2001)4 All ER 449 considered the

question when the presumption of undue influence can be drawn where there was manifest disadvantage in the transaction and held as under:

Whether a transaction was brought about by the exercise of undue influence is a question of fact. Here, as elsewhere, the general principle is that

he who asserts a wrong has been committed must prove it. The burden of proving an allegation of undue influence rests upon the person who

claims to have been wronged. This is the general rule. The evidence required to discharge the burden of proof depends on the nature of the alleged

undue influence, the personality of the parties, their relationship, the extent to which the transaction cannot readily be accounted for by the ordinary

motives of ordinary persons in that relationship and all the circumstances of the case.

Proof that the complainant placed trust and confidence in the other party in relation to the management of the complainant's affairs, coupled with a

transaction which calls for explanation, will normally be sufficient, failing satisfactory evidence to the contrary, to discharge the burden of proof. On

proof of these two matters the stage is set for the court to infer that, in the absence of a satisfactory explanation, the transaction can only have been

procured by undue influence. In other words, proof of these two facts is prima facie evidence that the defendant abused the influence he acquired

in the parties' relationship. He preferred his own interests. He did not behave fairly to the order. So the evidential burden then shifts to him. It is for

him to produce evidence to counter the inference which otherwise should be drawn.

I hold that for applying the above principle, the plaintiff should prove that he reposed complete trust and confidence in the second defendant. I hold

that the plaintiff has failed to prove this aspect except stating that the second defendant is an elder brother and he managed the entire family affairs.

Secondly, he should also prove that the second defendant acquired a ascendancy over the plaintiff, which also he failed to prove. The plaintiff has

failed to prove that in the partition so effected, a lion's share was allotted to the second defendant and the property allotted to the plaintiff in

partition was so insignificant compared to the properties allotted to the second defendant which calls for an explanation. In other words, there must be proof that the transaction was wrongful in that the second defendant has taken an unfair advantage by the exercise of his influence over his younger brothers. The plaintiff on the facts of the case has not proved that there was some manifest disadvantage in the transaction. On the other hand, the second defendant has proved that there was a prior quarrel among the brothers for partition and there was a proof of outside advise from panchayat consisting of third parties who mediated before the parties entered into the transaction and the document was read over and explained to the parties and there was no unfair advantage gained by the second defendant in the transaction.

24. In Bhupendrakumar R. Parikh and another Vs. M.K. Lakshmi and others, this Court held that where the plaintiff was not able to understand the transaction or was unable to resist the defendant, the suit based on the ground of fraud and undue influence has to fail. As I have already held that the evidence of D.Ws.2 and 3 clearly show that the contents of the documents were explained to the parties and then the parties have signed or put their thumb impression in the document. The plaintiff has also not established that the second defendant was dominating the will of the plaintiff. As far as the decision of the Supreme Court in Smt. Dularia Devi Vs. Janardan Singh and others, is concerned, it was found on the facts that misrepresentation was made making him to believe that he was executing a will in favour of his daughter, while he was executing a sale deed and under these circumstances the Supreme Court held that the deed was a void one. But in the case on hand the plaintiff has not established that the deed executed by him was not a deed of partition, but a deed of mortgage.

25. In R. Sankaranarayanan Vs. Anandhavalli, it was held by this Court that the non-disclosure or suppression of vital factor would amount to concealment and where a consent has been obtained by fraud the document can be ignored. On the other hand, I have already held that the plaintiff has not established that the contents of the document were not disclosed before the plaintiff put the thumb impression and that a fraud has been committed on him.

26. In POOSATHURAI Vs. KANNAPPA CHETTIAR & ORS. (XLVII Indian Appeals, 1)

it has been held as follows:

When a party to a contract seeks to set it aside on the ground of undue influence, it is not sufficient for him u/s 16 of the Indian Contract Act,

1972, to establish that the other party was in a position to dominate his will. He must also prove that the other party has used that position to

obtain an unfair advantage over him.

Here the plaintiff has not established that the second defendant has obtained unfair advantage in the transaction. It is to be remembered that in a

partition of the joint family, the allotment of the property need not be equal and there can be an unequal partition also. The mere fact that some

more properties were allotted in favour of the second defendant is not a ground to hold that he had obtained an unfair advantage. It is the case of

the second defendant that there was an understanding that he must maintain his father during his life time and only after the life time of the father he

will be able to enjoy the property absolutely. Since I have held that the document for partition was not a void one, I hold that it is not open to the

plaintiff to claim the relief of partition without seeking a declaration to set aside the document. The decision in Shamsheer Singh Vs. Rajinder

Prasad and Others, is to the effect that in a suit filed by the son for declaration that the mortgage decree against the father was not binding upon

him, it is essential for him to set aside the decree. Here also the plaintiff should have filed the suit to set aside the deed of partition.

27. Gurusamy Naicker and others Vs. G. Jayaraman and others, is a case where the Kartha has asserted that partition has already been effected

but the evidence discloses that it was partial and grossly unfair and unjust to coparcener seeking partition. This Court therefore held that the

partition would not bind the coparceners. The decision has no application at all as it is not a case of kartha effecting partition, but is a case where

the members of the family including kartha joined together and effected the partition. Therefore, Gurusamy Naicker and others Vs. G. Jayaraman

and others, has no application to the facts of this case.

28. Learned counsel for the appellant relied upon the decision in GURUVAMMAL AND ANR. Vs. SUBBIAH NAICKER & ORS. 2000 1

L.W.488 wherein the learned Judge held that from the mere fact that there was a separate enjoyment of the brothers would not by itself show that

there was any completed partition between the brothers. This decision hardly has any application to the facts of the case on hand as in that case,

the case pleaded was there was a partition and that was sought to be proved by separate possession. Hence, this decision has no application to

the facts of the case on hand.

29. In *Mulam Chand Chhoteylall Modi Vs. Kanchhendilall Bhaiyalal and Others*, , the Madhya Pradesh High Court held that where a document

does not bind a party it is not necessary for him to sue for cancellation. In my view, this case has no application as I have already held that the

document binds the plaintiff and hence it is necessary for him to sue for cancellation of the deed of partition.

30. As far as B schedule properties are concerned, the trial Court recorded a finding that the plaintiff is entitled to a share in items 7 and 8 therein

and granted decree to that effect and the defendants have not preferred any appeal or cross objection and that part of the decree has become final.

As far as item Nos.9 to 11 in B schedule properties are concerned, the claim of the plaintiff was rejected by the trial Court and there is no serious

dispute about the non-availability of those properties. The question in the appeal relates to the rest of items in B schedule properties in the suit. The

properties were purchased by the second defendant on 5-7-1983 from one Mohammed Mahaboob Sahib, subsequent to the deed of partition

dated 7-5-1982. The trial Court found that the sale deed dated 5-7-1983 covers items 1 to 6 of the B schedule property. The case of the

appellant is that those properties are also liable for partition as the joint family income was utilised by the second defendant to purchase those

properties. According to the learned counsel for the appellant even assuming that the partition deed dated 7-5-1982 is true, since there was no

complete partition, there is presumption that out of the income of the joint family properties the B schedule properties were purchased. Learned

counsel for the appellant in this connection relied upon the following decisions:

(i) *Kandasami and Another Vs. Adi Narayanan and Others*, ;

(ii) *Thambiran Naicker and Another Vs. Duraiswamy Naicker and Others*, ;

(iii) *Jayaramachandra Iyer Vs. Thulasi Ammal and Others*, ; and

(iv) *Gurusamy Naicker and others Vs. G. Jayaraman and others*,

31. In so far as the decision of this Court in Kandasami and Another Vs. Adi Narayanan and Others, is concerned, this Court while dealing with a case of acquisition by the manager or kartha of joint family and if the properties were acquired by the manager or father or Kartha of the joint family in his name, the Court held that the burden will be on the manager or father or kartha to explain that the acquisitions were made out of his separate funds. I have already held that the plaintiff has not established that the second defendant was the manager or the kartha of the family and on the facts of the case it is clear that the father, first defendant is alive and unless there is strong evidence from the side of the plaintiff to indicate that the father is not the manager, the normal presumption is that the first defendant continues to be the manager of the family. Therefore, the decision in the case of Kandasami and Another Vs. Adi Narayanan and Others, does not apply to the facts of the case.

32. In so far as the decision in THAMBIRAN NAICKER Vs. DURAISWAMY NAICKER (1996(2) MLJ,207) is concerned, that was a case where the junior members of the family were managing the family properties and this Court therefore held that the onus of proving that these properties were not acquired out of surplus family fund is on the junior members managing the properties. I have already held that there is absolutely no evidence to show that the second defendant was managing the affairs of the family and in the absence of such evidence the decision in the case of Thambiran Naicker and Another Vs. Duraiswamy Naicker and Others, does not apply to the facts of the case on hand.

33. In so far as the decision in Jayaramachandra Iyer Vs. Thulasi Ammal and Others, is concerned, there was a sale of joint family property and soon thereafter the property was purchased. This Court therefore held that the plaintiff was able to establish not only the existence of sufficient nucleus for the purchase of the property and there was a close proximity from the date of sale to the date of purchase of the property to hold the same as the joint family property. This decision has no application at all as the plaintiff has not established the source for the purchase of B schedule property. This Court in Kotikelapudi Venkatramayya Vs. Digavalli Seshamma and Others, has held that the person claiming the particular property himself must prove that it was acquired from the joint family nucleus and he must show that the family was possessed of some property

with the aid of which the property in question might have been acquired. In Mudi Gowda Gowdappa Sankh Vs. Ram Chandra Ravagowda

Sankh, the Supreme Court has held that only after the possession of adequate nucleus is shown, the onus shifts to the person who claims the

property might have been acquired without any aid from the family estate.

34. In R. SUBBIAH & ANR. Vs. P. ANANDAM @ PANCHALI 1999 2 L.W. 652 the property was purchased in the younger brother's name

and it was found that there was no evidence that the family possessed of joint family nucleus to acquire the property for the joint family. In the

absence of evidence to show that the property was purchased out of the joint family funds, it was held that the conclusion was irresistible that the

property was a separate and self acquired property of the younger brother. I am of the view that the above decision would apply to the facts of

this case as the plaintiff has not established that the family had sufficient nucleus to acquire the property. The trial Court upheld the partition and

found that items 1 to 6 of B schedule property were purchased subsequent to the date of partition. On the facts of the case, the plaintiff has not

established that the family had certain income and out of the same the properties covered under Ex.B.1 might have been purchased. The partition

deed is dated 7-5-1982 and the said deed stipulates except those properties which were partitioned there are no other properties available for

partition. Even assuming that there was certain income from the property left over to be partitioned, there is no evidence regarding the income from

the joint family properties. I have already rejected the case of common enjoyment of the suit A schedule properties after the deed of partition.

Then it is for the plaintiff to establish that the family had income from some other source which was utilised for the purchase of items 1 to 6 of B

schedule properties, which he miserably failed to do. I hold that the fact that the earlier partition is a partial partition is not sufficient to hold that the

subsequent purchases are from the income of joint family properties when there is no evidence regarding the joint family nucleus for the purchase of

items 1 to 6 of B schedule property. It is not the case of the plaintiff that there was certain income from the joint family properties which was kept

apart and from out of the income the properties covered in Ex.B.2 were purchased by the second defendant and there is no such pleading also in

the plaint and the plaintiff has also not let in any evidence on this aspect. Though the second defendant has stated that he was not aware of the

details of the B schedule property, the fact that the second defendant has not stated the source for the purchase of properties covered under items

1 to 6 of B schedule does not mean that they are the joint family properties. The trial Court was correct in holding that items 1 to 6 of B schedule

are not available for partition.

35. I have carefully gone through the judgment of the trial Court. The learned Subordinate Judge has observed the demeanour of the plaintiff when

he was examined as P.W.1 and noticed the way in which the plaintiff had given his evidence. Therefore, it cannot be said that the learned

Subordinate Judge has first come to the conclusion and then arrived at his reasonings later. Learned counsel for the appellant also referred to the

paragraph 23 of the Judgment, wherein the learned Subordinate Judge has held that both the plaintiff and the second defendant have not come to

the Court with clean hands. I am of the view that from the observations made by the learned Subordinate Judge in considering the question

whether the costs should be awarded or not, it cannot be stated that the case of the plaintiff is true and should be accepted and the case of the

second defendant should be rejected. I am of the view that it is not permissible for the learned counsel for the appellant to take advantage of the

reasoning of the learned Subordinate Judge in not awarding the costs to the second defendant and contend that the plaintiff has come to the court

with clean hands and he is entitled to claim partition. I find that the learned Subordinate Judge has considered the matter in detail and discussed the

evidence and come to the correct conclusion. I do not find any justifiable reason to interfere with the judgement and decree of the learned

Subordinate Judge. Accordingly, the appeal stands dismissed. However, considering the close relationship between the parties, there will be no

order as to costs.