
(1997) 03 MAD CK 0008

In the Madras High Court

Case No : A.S. No's. 1372 of 1988, 544 of 1989 and 1153 of 1990

Palanisamy and 3 Others

APPELLANT

Vs

A. Palaniswami and 2 Others

RESPONDENT

Date of Decision : 12-03-1997

Acts Referred:

Evidence Act, 1872 — Section 111

Citation : (1997) 03 MAD CK 0008

Hon'ble Judges : S.S. Subramani, J

Bench : Single Bench

Advocate : A.K. Kumarasamy, for the Appellant; V.K. Muthuswami, for the Respondent

Final Decision : Allowed

Judgement

S.S. Subramani, J.—A.S. No. 1372 of 1988 arises from O.S. No. 100) of 1985, on the file of Sub Court. Dharapuram Defendants 2 and 4

to 6 in that suit are the appellants herein. Plaintiffs and 3rd defendant are the respondents therein. A.S No. 544 of 1989 arises from O.S.29 of

1987 on the file of the same Court. Plaintiff therein is the appellant before this Court. A.S. No. 1153 of 1990 arises from O.S. No. 114 of 1987,

Sub Court Dharapuram. Plaintiffs in that suit are the appellants herein. Parties herein will be referred to according to their rank in O.S. No. KK) of

1985. which is a suit for specific performance of agreement of sale. 2nd defendant is the plaintiff in O.S. No. 29 of 1987, which is a suit for

declaration and partition. Defendants 4 and 5 are plaintiffs in O.S.114 of 1987. That is a suit for declaration of title over the plaint property therein

and to restrain the defendants from trespassing into the property.

2. Since the parties are common and in all the three suits most of the properties

are also common, joint trial was ordered and evidence was taken in OS. 100 of 1985.

3. Material averments in O.S. No. 100 of 1985 may be stated as follows:-

Plaintiffs are the sons-in-law of the 3rd defendant. The subject-matter of the suit is property having more than six and odd acres of land which

admittedly belonged to late Chinnammal, who is the wife of the first defendant. After filing written statement, first defendant died. Second

defendant is the only son of Chinnammal and deceased 1st defendant. Defendants 3 and 4 are their daughters. 5th defendant is the son of the 4th

defendant; 6th defendant is the son of the 2nd defendant. It is the plaintiff's case that first, defendant and Chinnammal owned separate properties

and they were leading a very decent life from out of the income from the properties. They also celebrated the marriage of their daughters

defendants 3 and 4, and whatever gift that could be given at that time was also given according to their family status. It is said that the liberal act of

first defendant along with his wife, late Chinnammal, was not liked by second defendant, and there was some misunderstanding between them. In

view of that, the aged parents, i.e., the first defendant and his wife were living separately for more than ten years prior to the institution of the suit, in

a place called Palla Kadu. It is said that their son, second defendant, did not even assist them in cultivation, and from 1977 onwards, first plaintiff

being the son-in-law of the third defendant, was actually in possession of the property, and was giving the income to Chinnammal.

4. Second defendant was scheming to knock off the properties to himself, whereas defendants 3 and 4 were equally interested in getting the

properties. In spite of repeated demands, late Chinnammal was not willing to convey either the whole or any portion of her properties either to the

son or any one of the daughters. In view of the adamant attitude of late Chinnammal. defendants 2 to 4 were annoyed, and they were not co-

operating with their parents. Therefore. there was some difficulty for the aged parents in having a decent living. They thought of selling the property

and converting the same into hard cash so that in their last days they could live with comfort and convenience. The plaintiff property was offered for

sale, and the offer was open for more than three months in 1984 and in the beginning of 1985. One or two persons who wanted to purchase the

properties from Chinnammal were threatened by defendants 2 to 4, and, therefore, the transaction could not materialise. Thereafter, Chinnammal

offered to sell the properties to plaintiffs. After bargain, the price was fixed at Rs. 1,50,000/-. It is said that the negotiation was carried on for

nearly 1 1/2 months, after which the sale agreement was entered into in writing on 4.4.1985, evidenced by Ex.A-2 in the case. It is further said that

both the sons-in-law of third defendant paid Rs. 1,25,000/- to deceased Chinnammal. agreeing to purchase the property within a period of nine

months. The balance amount payable was Rs. 25,000/-. It was agreed by the plaintiffs and Chinnammal that they will purchase the property on

getting the balance sale consideration, and in case of default by either party, the agreement could be enforced through Court of law. It is further

said that ever since the date of agreement, plaintiffs are in exclusive possession of the property. Before the expiry of the period fixed under the

agreement, i.e., nine months, Chinnammal passed away on 5.11.1985. Defendants I to 4 are her legal heirs. Even before the death of Chinnammal,

request was being made for sale of the property and she herself was postponing the same in view of her illness. Later, demand was made to the

legal heirs and notice was issued on 8.11.1985 to execute the deed. A reply was received on 12.11.1985 raising several contentions which include

the challenging or questioning the validity of Ex.A-2. In view of the reply, plaintiffs had no other go but to file the suit for specific performance. It is

further said that the averments in the reply notice are all false and the value fixed is also a reasonable rate prevalent in that locality. Since the

defendants have refused to comply with the demand, they have filed the suit for specific performance.

5. First defendant filed a written statement wherein he disputed the genuineness of the alleged agreement Ex.A-2." He also said that himself and his

wife were all along residing with his son jointly for ten years. Second defendant was jointly cultivating the land with first defendant, and there was

no ill-will between the parents and second defendant. It is said that on the date of suit, first defendant was aged more than 90 years, but he was

maintaining good health. He further said that himself and second defendant have been personally cultivating the lands, and they are paying electricity

charges. The entire income from the suit lands had been with first defendant and Chinnammal. It is farther contended that Chinnammal was an

illiterate and she had not gone out of the house without the knowledge and company of the defendants 1 and 2. Four years prior to her death,

Chinnammal did not go out of the house except for being taken to doctors at Chemnimalai, Tiruppur and other places. She was under treatment

with one Dr. Shanmugham of Chennimalai from 17.4.1981 to 28.5.1981, due to a fire accident. She had lost one eye, and was given treatment for

the other eye in January 1984. She could not move out without glass. She had very poor and feeble eyesight and was unable to go out of the

house. The allegation that the first plaintiff is cultivating the land is denied. All along, first defendant and Chinnammal were in possession of the

properties. 1st defendant further denied the alleged agreement for sale for Rs, 1,50,000/-. The receipt of advance of Rs. 1,25,000/- is also denied.

According to him, the alleged agreement is a forged one. Various circumstances have been put forward to invalidate Ex.A-2. According to first

defendant, there was no necessity for Chinnammal to alienate the suit properties. Even without sale, they had liquid cash in their bank account,

which was more than sufficient for their requirements. That apart, they themselves have given loans to various persons on promissory notes. Even

the 1st defendant was not aware of the so-called agreement when both of them were residing together ever since the date of their marriage. The

agreement is not registered even though the Sub Registrar's Office is close to the place where it is alleged to have been written. The value of the

properties as stated in Ex.A-2 is too meager and the properties were worth more than several lakhs of rupees. The allegation that a sum of Rs.

1,25,000/- was paid to late Chinnammal is denied, and she never brought that amount to the house where the first defendant was also living. It is

said that the alleged agreement is a forgery, and the existence of such an agreement was brought to the knowledge of first defendant and other

defendants only when they received notice from plaintiffs. Even the thumb-impression said to have been affixed in Ex A-2 is not that of

Chinnammal. It is said that the attempt of the plaintiffs is to knock-off the properties by paying a paltry sum of Rs. 25,000/-First defendant had

denied the alleged payment of Rs. 1,25,000/- to Chinnammal. According to him, plaintiffs have no financial capacity to advance such a huge sum,

nor were they in possession of any amount on that date it is further said that Chinnammal did execute a gift deed for a portion of the plaint property

in favour of defendants 5 and 6. It is said that the discretion of granting specific performance should not be exercised in favour of plaintiffs First

defendant prayed for dismissal of the suit

6. A.S.544 of 1989 arises from O.S.29 of 1987. As I said earlier, plaintiff in that suit is the second defendant in OS.100 of 1985 (suit for specific

performance). Defendants 1 and 7 are his sisters, and defendants 3 and 4 are plaintiffs in O.S. No. 100 of 1985. In that case the claim of the

plaintiff is that on the death of Chinnammal, her husband, namely, first defendant in the connected suit OS. 100 of 1985 inherited 1/4th share. First

defendant also inherited 1/4th share. Deceased first defendant executed a Will bequeathing his one-fourth share in favour of first defendant. That is

marked as Ex.B-2 in the case. In view of the bequest made by deceased first defendant plaintiff in O.S.29 of 1987 is entitled to half share. The

same is sought to be partitioned An allegation is made against defendants 3 and -4 that they have already filed OS. 100 of 1985 on the basis of a

fraudulent document

7. In that suit, all the defendants have filed written statement. They deny that deceased first defendant executed a Will. It is said that the plaintiff-

Palanisami Gounder, who is one of the legal heirs, is entitled to one-third share in the plaint item. On the death of the mother, even though one-

fourth share was taken by the father, on his death, the share has augmented and, therefore, first defendant-Palaniammal claimed one-third share in

the properties scheduled to the plaint in O.S.29/87. She prayed for a decree for partition allotting her one-third share.

8. In the written statement filed by second defendant, she also disputed the Will alleged to have been executed by her father. She prayed for

dismissal of the suit.

9. Defendants 3 and 4, who are plaintiffs in O.S. No. 100 of 1985, filed a written statement stating that they have been unnecessarily impleaded in

the suit. Further, the averments in the plaint in O.S. No. 100 of 1985 are mostly reiterated in their written statement.

10. In A.S. No. 1153 of 1990, the related suit is O.S. No. 114 of 1987. That suit was filed by defendants 3 and 4 in O.S.100 of 1985 for

declaration of title and consequential injunction. The allegations in the plaint are, that Chinnammal executed settlement deeds in their favour in

respect of portions of property which belonged to her, and, on that basis, they claimed title over the properties described in O.S. 100 of 1985.

Consequential injunction was also sought for against defendants. That suit was dismissed, and plaintiffs therein filed A.S.51 of 1989, on the file of

District Court, Erode. As per direction of this Court, the same was withdrawn to this Court and renumbered as Transfer A. S. 1153 of 1990, to

be heard along with the other two First Appeals.

11. The trial Court took evidence, both oral and documentary, and the leading case was O.S.100 of 1985, which is a suit for specific

performance. It decreed the suit O.S. 100 of 1985, holding that Ex.A-2 agreement is genuine and the plaintiffs therein are entitled to get the

discretionary remedy of specific performance. Ex.A-2, according to the trial Court, is binding on all the defendants and they are duty-bound to

execute a sale deed in favour of plaintiffs in O.S.100 of 1985.

12. In O.S. No. 29 of 1987, the Will Ex.B.-38 was found to be not genuine. The suit was dismissed. In O.S. No. 114 of 1987, trial Court found

that the alleged settlement deeds(Exx.B44 to B46) alleged to have been executed by Chinnammal are all invalid and no right passes under those

documents. That suit was dismissed.

13. That is how all the above three Appeals have been preferred by the respective defendants in O.S. No. 100 of 1985.

14. In these Appeals, the following points arise for consideration:-

1). Whether Ex.A-2 agreement for sale is a genuine transaction and whether plaintiffs are entitled to get specific performance?

2). Whether the Will alleged to have been executed by late Kolandaisami Gounder, as evidence by Ex.B-38, is not a genuine Will and his last

testamentary disposition?

3). Whether the defendants therein are entitled to get partition as prayed for?

4). Whether ExsB-44 to B-46, various settlement deeds alleged to have been executed by Chinnammal are valid and whether the plaintiffs in O.S.

114 of 1987 are entitled to get declaration and injunction as prayed for ?

15. I will consider the above questions in seriatim.

16. Ex.A-2 is the agreement for sale alleged to have been executed by deceased Chinnammal on 4.4.1985. The plaintiffs' case, as stated in the

plaint in O.S. 100 of 1985, is that deceased Chinnammal was in search of a purchaser, and in view of the misunderstanding between herself and her children, in spite of the fact that some persons wanted to negotiate with Chinnammal, the same could not materialise. Therefore. Chinnammal requested the plaintiffs to purchase the property. After a prolonged negotiation which lasted for nearly 1 1/2 months, they agreed to purchase the property for Rs. 1,50,000/- and an agreement of sale was executed after completion of the negotiation on 4.4.85. It is marked as Ex.A-2 in the case. But it is not registered. It should not be understood that it requires registration. To prove Ex.A-2, apart from P.W.1, first plaintiff, the two attestors and the document-writer have been examined respectively as P.Ws.2, 3 and 4. Trial Court believed their evidence and came to the conclusion that Ex. A-2 is a genuine transaction.

17. A suit for specific performance is a suit to enforce an agreement for sale. Under Specific Relief Act, the Court is not bound to decree a suit for specific performance, even if the agreement is lawful. It is a discretion which is to be exercised by Court of law, and if the discretion has been exercised improperly, the same is also liable to be corrected in Appeal.

18. While taking into consideration the evidence in the case, Court is not a blind spectator of what the witness has spoken. It can also take into consideration the surrounding circumstances. It is an equitable relief that the plaintiff is seeking through the aid of Court. Naturally, his conduct is a relevant factor. For considering the equitable relief, the technical rule of evidence taken before Court will not be the sole guide. An overall picture of all relevant circumstances will have to be taken into consideration.

19. In S.C. Banerjee's "Law of Specific Relief (Tagore Law Lectures)- 10th Edition (1996), the learned Author, while commenting on Section 20, has said thus:-

The discretion is guided by judicial principles :-The expression means that discretion is not to be arbitrarily exercised, but must be based on sound, reasonable and judicial principles, that is, the discretion must not be dependent upon the mere pleasure of the Judge, but must be sound and reasonably guided by judicial principles. The Court must grant or withhold relief, according to the circumstances of each particular case, when the general rules and principles do not furnish an exact measure of justice between

the parties.

(Emphasis supplied)

In granting or withholding the relief, the Court should take the following circumstances, conditions and incidents into consideration:

- (1) The Contract must be certain, unambiguous and upon a valuable consideration;
- (2) The contract must be perfectly fair in all its parts;
- (3) The contract must be free from any fraud, misrepresentation, imposition or mistake;
- (4) The contract must not impose an unconscionable or hard bargain;
- (5) The performance of the contract must not impose any hardship on the defendant, such as he could not foresee;
- (6) The contract must be capable of specific execution through a decree of the Court.

a fit one, the above rule may not apply....

20. From the above guiding principles, it is clear that the plaintiff will have to come to Court with evidence that there is a valid agreement for sale. It

must also be shown that she executed the same after fully understanding the terms of the agreement, and she was fully competent to contract.

Plaintiffs must further prove that the averments in that agreement are fully true and nothing but truth. If any false statement is made therein, and the

same is tried to be justified in evidence, that is also a disqualification for getting a decree for specific performance.

21. In the plaint, there is no allegation that the first defendant was in any way on bad terms with defendants. Of course, in evidence, an explanation

is offered by stating that after the death of his wife Chinnammal, he was taken forcibly by their son, the second defendant. Plaintiff does not contain

any averment regarding any misunderstanding between plaintiffs and deceased 1st defendant, that will have some bearing in considering the

truthfulness of Ex.A2. At the time when Ex.A-2 was executed, first defendant was nearly 90 years old and late Chinnammal was aged more than

80. Both of them were residing together all along, and it is not the case of the plaintiffs that each of them was contracting with others without the

knowledge of the other. Though both of them were having properties, it is the case of the plaintiffs themselves that the first defendant was taking

the income. Ex. A-2 is written at Erode, a place which is situated about 60 kms. away from the permanent residence of either first defendant or his wife Chinnammal. The case that is put forward is that due to misunderstanding with the son, Chinnammal was not getting a willing purchaser and, therefore, she wanted the plaintiffs to purchase the property. Why they thought of selling the property at their old age was, that they had incurred liabilities for Chinnammal's treatment. They were not getting any support from their children, and they were actually prevented, from cultivating their own property. Therefore, they thought of converting the property into hard cash, so that they can live comfortably in their last days.

22. For Ex.A-2, stamp papers have been purchased on 27.2.1985, from a stamp vendor at Chenmmalai. Admittedly, late Chellammal was an

illiterate, and it is in evidence that about four years prior to Ex.A-2, she met with a fire accident, and thereafter she was not having good eye-sight.

P.W.1 himself admitted that late Chinnammal was having treatment for eye. Ex.A-14 will show that first plaintiff himself was taking deceased

Chinnammal to an ophthalmic surgeon, and that too non 13.2.1985, a few days before Ex.A-2. Evidence of P.W.3 also shows that the deceased

Chinnammal was not having proper eye-eight. In cross-examination, he has said thus:

23. I have already said that the allegation in the plaint is that about 1 1/2 months before Ex.A-2. negotiations began. But. when P.W.1 was

examined, this is what he has said in cross-examination on 22.8.1988;-

That means, more than 70 days have elapsed between the alleged oral understudying and the execution of Ex.A-2. But. in the earlier portion of his

cross-examination, he has said thus:-

This is the statement given by P.W.1 regarding the execution of Ex.A-2. The reason for going to Erode for the execution of Ex.A-1 is that the

second plaintiff had undergone piles operation and, therefore, there was some difficulty for him to travel.

24. Before Ex.A-2 was executed, there was a marriage in their family, a few days before. That is evident by Ex.A-1, marriage invitation card. The

marriage took place on 27.3.1985. The second plaintiff comes to the family only after 27.3.1985, i.e., one week before the alleged agreement of

sale. In Ex.A-2. nobody is representing deceased Chinnammal. All the witnesses

are brought by P.W.1. It is in evidence that P.W.1 is a Abkari

Contractor. P.W.2 is his own relation and P.W.3 is also acquainted only with him. P.W.4 is a document writer, who is also brought to the scene

only by P.W. 1 and his associates.

25. If, with the knowledge of all the persons, an agreement was executed, and Chinnammal also agreed for the sale, for getting the details of

property, P.W.1 need not go to Taluk Office. It is only after getting details from the Taluk Office, even according to P.W.1. Ex.A-2 was written.

As I said already, second plaintiff came into the family only a week before. He would not have thought of purchasing the property-belonging to the

grandmother of his own wife and whether the grandmother had title to the property also would not have been known to him. Documents of title will

be the first thing that a purchaser may insist. Without getting documents of title and also even without looking into encumbrance certificate, it is said

that Ex.A-2 was written, and on the same date, hard cash of Rs. 1,25,000/- was paid to Chinnammal, an illiterate and half blind woman. In this

connection, it may also be noted that according to the first plaintiff(B.W.1) he was cultivating the land atleast from 1977. If that is so, why he

should go to Taluk Office for getting details of the property.

26. In the plaint itself it is said that from 1977, first plaintiff is enjoying the property and he is giving the income therefrom to Chinnammal. When

Ex.A-2 was written, there is a statement that in pursuance of the agreement, the property is handed over to him. There is no statement therein that

the first plaintiff is already in possession of the plaint items.

27. The stamp papers have been purchased from a stamp vendor at Chennimalai. Nobody has a case that at Komarapalayam, stamp paper

cannot be obtained. In between Komarapalayam and Chennimalai. there are several towns from where stamp papers could have been obtained.

Near Komarapalayam, there is Erode, the Headquarters of Periyar District. When stamp papers could have been purchased in any one of these

places, why stamp papers were purchased at Chennimalai, is a mystery which is not explained, by the plaintiffs. Again, from the folding of the two

stamp papers, it is clear that old stamp papers have been made use of for creating the document. One must understand that the stamp papers in

which Ex.A-2 had been written, were issued by the Stamp Office in July 1983,

and they are said to have been sold by the vendor nearly 1 1/2 years later. When the defendants deny the thumb-impressions found in Ex.A-2 as those of Chinnammal, no attempt was made by plaintiffs to substantiate that they were actually affixed by Chinnammal by getting an Expert opinion. The lady was aged more than 80, and she was half blind.

It is with that woman, plaintiffs say that they entrusted a sum of Rs. 1,25,000/-, when she agree to sell the property for Rs. 1,50,000/-. Of course, three witnesses say that the said sum of Rs. 1,25,000/- was entrusted to Chinnammal. P.W.1 would say that after counting the notes, the amount was entrusted to late Chinnammal. Of course we can understand such a conduct from strangers. But. at the request of Chinnammal, plaintiffs agreed to purchase the property. They proceeded to Erode to prepare the document with the assistance of a document writer. Before taking Chinnammal to Erode, first defendant was also consulted, and he was also requested to accompany her. It is the plaintiffs' case that the first defendant agreed that the plaintiffs may take Chinnammal for execution of the deed. If the children were at loggerheads with the parents and there was nobody to look after them, and, if the plaintiffs, out of sympathy, agreed to purchase the property for Rs. 1,50,000/-. and if the story of their handing over Rs. 1,25,000/- is true, they would not have left Chinnammal at lurch immediately after entrusting the huge sum with her. Plaintiffs only pleaded ignorance as to what happened thereafter. If really the payment had been made, under normal circumstances P.W.1 or P.W.2 would have accompanied her to the place where first defendant was residing. It is also the case of the plaintiffs that Chinnammal wanted to sell the property to discharge the debts which she incurred for her treatment. It is their case that promissory notes were executed and those debts were discharged.

Who those creditors are and how much was the amount borrowed by her, are all relevant pieces of evidence, if really the sum of Rs. 1,25,000/- was entrusted to Chinnammal. No evidence has been let in whether the plaintiffs had this sum of Rs. 1,25,000/- with them. It was said that they had to borrow from a financier and later that debt was discharged. If that version is true, certainly there will be evidence to prove such borrowal and also discharge. Plaintiffs could have produced accounts to show that they were in possession of liquid cash at or about the time of the transaction.

First plaintiff claims to be a big businessman. It is further spoken by P.W 1 that a major portion of the amount was handed over by second

plaintiff's father. He was also not examined, nor did the second plaintiff enter the box. Neither the second plaintiff nor his father would have come

to the scene since the marriage of second plaintiff with the granddaughter of Chinnammal took place only a week prior to Ex.A-2. The case

pleaded is that everything was settled nearly three months before the transaction, and the stamp papers were also purchased at that time. So there

could not have been any question of change of negotiations later. Moreover, in an agreement for sale, what was the necessity for the plaintiffs also

signing. It is a document that was executed by the deceased Chinnammal alone in favour of plaintiffs. If the plaintiffs had also signed in that deed,

naturally, a copy ought to have been given to Chinnammal and she might have retained the same. Plaintiffs have no such case. P.W.2 is a timber

merchant. He says that he is doing that business in partnership. According to him, himself, father of second plaintiff; Palanisami and two others

came from Chennimalai to Erode. According to him, the Sub Registrar's Office is about 10 feet away from the place where Ex.A-2 was written.

Why the document was not registered is not explained by plaintiffs. He denied the suggestion that he is an accused in Abkari Cases, but he later

said that in a case before the First Class Magistrate's Court at Kangeyam, he is 18th Accused, and the police are searching for him. First plaintiff,

even according to him, is an abkari contractor. He further says that there is change in the colour of the ink in the finger prints of Chinnammal found

in Ex.A-2. Regarding this, what he has said reads thus:-

P.W.5 is admittedly a close relation of the first plaintiff. The relevant portion of the evidence reads thus:-

From his evidence, it is also clear that it was at the instance of the first plaintiff, he also became a witness to Ex.A-2. He further says that between

Chinnammal and second defendant, there was no misunderstanding and they were on good terms, it is for the first time that he becomes a witness

for a document. He further says that Ex.A-2 had to be executed only because the second plaintiff was at Erode. He somebody must lead her. The

evidence of P.W.4 is also in the same way. He was also asked to write the document only by the first plaintiff. According to him, a draft was

prepared before finalising Ex.A-2. P.W.1 and P.W.2 do not speak about the preparation of any draft. It was he who got the finger prints of

Chinnammal. He also does not explain why the document was not taken to the Sub Registrar's Office, though it was situated nearby. This is all the

evidence which was let in to prove Ex.A-2. I have already said that the various circumstances stated above cast a doubt about the genuineness of

Ex.A-2. Along with the same, no evidence has been let in to show about the prior discussion. It is here, the written statement of first defendant

(who is now no more) gains importance. First defendant was all along on good terms with plaintiffs, and there was no necessity for him to plead

that Ex.P-2 was created fraudulently. If really Rs. 1,25,000/- had been entrusted to Chinnammal, first defendant also would have come to know

about that. If the amount had been entrusted to old couple, the same would not have been kept in the house at least for the purpose of safety.

These circumstances are sufficient to hold that Ex.A-2 can never be genuine. Being a discretionary relief, the Court is not bound by what the

witnesses have spoken in the box. It can take into account the surrounding circumstances also to come to the conclusion whether such a thing

would have happened. The lower Court simply stated that the evidence of P.Ws.1 to 4 is convincing and held that Ex.A-2 is proved. It further

found that from 1977 onwards, first plaintiff is in possession. If only the lower Court had taken into consideration or properly looked into Ex.A-2,

this would not have been the statement. If Ex.A-2 is believed, then the second plaintiff must also have a case that he is also in possession of the

property. The plaint itself is an answer to belie such a case.

28. The suit is filed for specific performance after the death of the alleged executant. If the case of the plaintiffs is admitted, all the other relations

are inimical towards late Chinnammal. Her husband is also no more. Therefore, the duty cast on the plaintiffs to prove Ex. A-2 is still more heavy,

and they should have adduced better evidence to prove the genuineness of Ex.A-2. When a doubt is raised regarding the genuineness of Ex.A-2, it

is not proper on the part of the Court to exercise discretion in favour of plaintiffs.

29. In this connection, it may also be noted that from Ex.A-29, it is clear that the first plaintiff himself was taking the deceased Chinnammal to the

doctor. A few days before Ex.A-2, a Certificate was issued by the doctor. If the

deceased was relying on the first defendant even for going to the doctor for treatment, that shows the confidence which the deceased had reposed in him. If the plaintiffs' case is believed, then he becomes a dependant on the first plaintiff. It becomes a relation of confidence. If that be so, on the basis of the available evidence, no Court will be justified in granting a decree for specific performance.

30. In "Sarkar on Evidence" - 14th edition (1993), commenting on Section 111 of the Evidence Act, the learned Author has stated thus (at page 1467):-

""The words "active confidence" indicate that the relationship between the parties must be such that one is bound to protect the interests of the other. ""But I venture to think that they do not go quite far enough to be an adequate expression of law, unless the words ""active confidence"" are to receive a larger meaning than they would naturally convey to any reader, whether a layman or a lawyer, not familiar with this class of cases (Pollock's p.65. See also Thakur Das v. Jairaj, 31 IA 46 : 26 A 130 : 8 CWN 569. The words ""active confidence"" should in order that the law may be really protective; receive a wider interpretation (Benoy v. Santi, 40 CWN 45 : 62 CLJ 99. ""Given a position of general and habitual influence, its exercise in the particular case is presumed. But, again, this habitual influence may itself be presumed to exist as a natural consequence of the condition of the parties, though it be not actually proved that the one habitually acted as if under the dominion of the other. There are many relations of common occurrence in life from which "the Court presumes confidence put in the general course of affairs and influence exerted", in the particular transaction complained of....Persons may therefore not only be proved by direct evidence of conduct, but presumed by reason of standing in any of these suspected relations, as they may be called, to be a position of commanding influence over those from whom they take a benefit. In either case they are called upon to rebut the presumption that the particular benefit was procured by the exertion of that influence and was not given with due freedom and deliberation. They must take upon themselves the whole proof that the thing is righteous. A stringent rule of evidence is imposed as safeguard against evasion of the substantive law.

(Emphasis Supplied)

The good faith of the transaction must be proved by plaintiffs. That burden on him is very heavy

31. In "Kerr on the Law of Fraud and Mistake"-Seventh Edition - First Indian Reprint 1997 - at page 185, under the heading "Fiduciary Relationship", the learned Author has stated thus:-

If the relation between the parties is one of fiduciary nature, transactions between them are watched by the Court with more than ordinary

jealousy. The duty of a person who fills a fiduciary position being to protect the interests which are confided to his care, he may not avail himself of

the influence which his position gives him for the purposes of his own benefit, and to the prejudice of those interests which he is bound to protect. It

is a rule of equity that no man can be permitted to take a benefit where he has a duty to perform which is inconsistent with acceptance of the benefit.

32. I have already extracted a passage from S.C. Banerjee's "Law of Specific Relief " wherein it is said that one of the grounds which disentitles a

person from getting the discretionary relief of specific performance is the use of sharp practice. I feel that this is a case in which P.W.1 has

exercised such practice and also fraudulent means in creating Ex.A-2.

33. In the result, I am constrained to set aside the judgment in O.S. No. 100 of 1985, granting specific performance. The said suit will stand

dismissed with costs, in both the Courts.

xx xx xx Paras 34, 35, 36, 37 are omitted as they contain discussion on facts.

-Ed.

38. In the result. A.S. No. 1372 of 1988 is allowed, by dismissing OS.100 of 1985. on the file of Sub Court, Dharapuram. A.S. No. 544 of 1989

and (Transfer) A.S. No. 1153 of 1990 are dismissed. Appellants in A.S. No. 1372 of 1988 are entitled to their costs both in this Court and also in

the trial Court. In the other two Appeals, parties are directed to suffer their respective costs. Connected C.M.Ps. for directions and stay are

dismissed, consequently. Dismissal of A.S. No. 544 of 1989 will not debar the parties from filing a separate suit for partition according to the

shares to which they are legally entitled to.