
(1988) 10 MAD CK 0041
In the Madras High Court

Sakkarathayammal and Others

APPELLANT

Vs

Shanmugavel Chettiar and Others

RESPONDENT

Date of Decision : 05-10-1988

Acts Referred:

Transfer of Property Act, 1882 — Section 3

Citation : (1990) 1 LW 475 : (1990) 2 MLJ 175

Hon'ble Judges : Sathiadev, J

Bench : Division Bench

Judgement

Sathiadev, J.—Defendants 4, 6 and 7 Legal representative of Fifth Defendant in O.S. No.85 of 1974, Sub Court, Tuticorin are appellants herein. Plaintiff is the first respondent. Second defendant having died, his legal representatives are impleaded as respondents 4 to 8. Third defendant, the wife of the second defendant is the wife of the third respondent.

2. The suit was filed for declaration of plaintiff's title to the 1st Schedule property, and to direct defendants 4 to 7 to deliver possession, and to pay mesne profits or in the alternative to direct defendants 2 and 3 to pay plaintiff the amounts specified in the 2nd Schedule with costs.

3. In the plaint it is stated that third defendant is the wife of the second defendant. First Schedule Property bearing Door No : 323, North Car Street, Sankarankovil alongwith other properties were settled by one Sankaralinga Mudaliar and his wife Nedungi. Animal in favour of defendants 2 and 3 under settlement deed dated : 16-9-1968. Four daughters were born to them. They being : Gomathiammal, Muthanamal, Shanmugathammal, and Anachi Animal. The last two daughters were married to second defendant. Anachi Animal lived away from him because of certain disputes. Under the terms of the settlement deed, the donors were given a life estate without any power of alienation and power of cancellation, and that after their life time, the property should vest absolutely on defendants 2 and 3. First defendant was a tenant on a monthly, rent of Rs.40. When rent was demanded from him, he claimed that there was a

dispute with-reiercace to the property, and therefore, he was depositing the rent in Court. Sankaralinga died on 24-12-1969, and Nedungi on 30-11-1970. On 5-7-1970, defendants 2 and 3 and Nedungi entered into an agreement of sale to sell the property to one Arumugham Chettiar, the Plaintiff's undivided brother for Rs. 11,500. Pursuant to this agreement, defendants 2 and 3 conveyed the property to the plaintiff on 23-9-1972 for Rs. 11,500 out of which Rs.3,000 had been paid, and for the balance amount of Rs.8,500 a promissory note had been executed in favour of second defendant. It was agreed that defendants 2 and 3 should secure physical possession of the property before claiming the amount under the promissory note. Thereafter, reference is made to certain Rent Control Proceedings, and adjustment of amounts between the parties. Hence, it is claimed that the plaintiff is entitled to the reliefs as prayed for.

4. First defendant, who was in occupation of the property as a tenant under Sankaralinga opposed this claim by stating that Sankaralinga had cancelled the settlement deed dated: 16-9-1968 by a cancellation deed dated : 15-10-1968, and executed a gift deed in favour of his three daughters viz., Gomathi, Muthammal and Ananchi Ammal on 17-10-1968, settling the 1st Schedule property on 31st October, 1968. Sankaralinga issued a lawyer's notice to second defendant informing him about the cancellation of the settlement deed dated 16-9-1968 and the execution of the gift deed, but no reply was received from him. The Power of Attorney brought about by second defendant was also cancelled by Sankaralinga on 24-10-1968 on knowing about the fraud played upon him in view of his old age and ill-health. The settlement deed dated : 15-9-1968 was not accepted and acted upon. The donees had been in possession and enjoyment of the property covered by the gift deed dated : 17-10-1968 by paying taxes, etc. in their names. First defendant continued to be in possession of the property having been inducted as a tenant. The alleged sale deed in favour of the plaintiff is not a valid one.

5. Second defendant supported the plaintiffs claim, and his right to get possession of the property from first defendant.

6. Defendants 4 to 7 supported the claim of first defendant.

7. A reply-statement was filed by plaintiff claiming that no fraud or misrepresentation had been played upon Sankaralinga and his wife.

8. Trial Court decreed the suit, and directed defendants 4 to 7 to put plaintiff in possession of the property, and pay past damages in a sum of Rs.800 for use and occupation and future damagess at Rs.40 monthly from 1-6-1974 till recovery of possession. On the appeal learned Judge of this Court in A.S. No : 541 of 1977 confirming it, this letters Patent Appeal is preferred.

9. The learned Judge proceeded on the basis that if the validity or otherwise of Exhibit B-1, the settlement deed dated 16-9-1968 is decided upon, then the subsequent deed of cancellation under Exhibit B-27 and the deed of gift under Exhibit B-28 dated: 17-10-1968 have got to be ignored, and that first defendant

and his legal representatives being defendants 4 to 7, cannot resist the title claimed by plaintiff. It is in this perspective, the learned Judge held that the evidence tendered by D.Ws. 1 and 2, the two of the four attestors to Exhibit B-1, and the evidence of second defendant, as D.W.3 would show that Exhibit B-1 was not brought into existence by practising any fraud or misrepresentation upon Sankaralinga. The learned Judge also held that in the absence of any details furnished in the written statement about the nature of misrepresentation fraud; and there being no cogency between the stand taken in Exhibit B-27, and the lawyers's notice (Exhibit B-26) dated 31-10-1968 at the instance of Sankaralinga relating to the fraud practised upon him; and also taking note of the conduct of Nedungi Ammal in Contrast to what her husband did; it was held that Exhibit B-1 is not a valid document as claimed by first defendant and his legal heirs (hereinafter referred as defendants) (ranking of parties as in suit).

10. As rightly approached by the learned Judge, the pivotal point which determines the rights of parties is, whether Exhibit B-1 is a valid settlement deed or not. Mr. K. Alagiriswami, learned Counsel for defendants, submits, that there being a misrepresentation made to Sankaralinga about the nature and character of the transaction, it is a void document. According to him, his son-in-law having represented that what is being executed was a Power of Attorney, and when ultimately he had brought into existence two documents viz. Exhibit B-1, settlement deed, and Power of Attorney, and soon thereafter realising the fraud practised upon him, he having executed a registered cancellation deed pertaining to Exhibit B-1, and followed it by cancelling the power of Attorney by another deed dated 24-10-1968, and not stopping with this, when he had taken the further step to issue a lawyer's notice (Exhibit B-26) to his son-in-law informing him of how he had been cheated, and when the representation made to Sankaralinga, who did not have admittedly proper eye sight, that he was executing a power of Attorney, when in fact, what had been got from him was a settlement deed also and therefore, when such misrepresentation relates to the nature and character of document, as held in *Ningawwa Vs. Byrappa and Others*, , Exhibit B-1 is a void document.

11. Mr. T.S. Subramaniam, learned Counsel for the Plaintiff, submits that in the absence of particulars of fraud and misrepresentation in the written statement, and when Sankaralinga himself could not decide relating to the validity of Exhibit B-1, and there being lack of cogency between the stand taken in Exhibit B-27 and Exhibit B-26, and when two of the four attestors had spoken as to how and in what manner, Exhibit B-1 came to be executed by Sankaralinga fully knowing of its contents, and when both husband and wife executed Exhibit B-1 but cancellation having been attempted only by Sankaralinga in spite of a recital in Exhibit B-1 that they have no power of alienation, and When the three of his daughters have fraudulently brought into existence in Exhibits B-27 and B-28, and when the averments relate to contents of Exhibit B-1; it could at best be construed as a voidable document and not a void document; and when Sankaralinga had never gone to Court to set aside Exhibit B-1 within the period

of limitation, nor any of his successor-in interest; the validity of Exhibit B-1 cannot be impeached at this distance of time.

12. Exhibit B-1 bears the signatures of both Sankaralinga and his wife Nedungi Ammal. Several properties were covered by this document of which, learned Counsel for the plaintiff would state that 32 items belong to Sankaralinga, and 7 items to his wife; It is attested by four witnesses apart from the scribe. Plaintiff has not chosen to examine any of these attestors, but it is the second defendant who besides examining himself as D.W.3, had examined two of the attestors, who are also identifying witnesses, as D.Ws. 1 and 2. D.W. 1 says that Sankaralinga by reference to earlier documents, dictated the recitals contained in Exhibit B-1, and after writing, the scribe read it over to him and thereafter along with his wife, he affixed his thumb impressions, and this, was followed up by all the attestors affixing their signatures, which was known to the executants. In cross-examination, he admits

Then he would state that it was only Nedungi, who came and requested him to be an attestor to Exhibit B-1, and after 1 1/2 weeks of the execution of Exhibit B-1, it was registered and that he was an identifying witness before the Sub-Registrar. He also speaks about the execution of the Power of Attorney at that time.

13. D.W.2. the other attesting witness states that he witnessed both the executants affixing their thumb impressions, and that they saw the attestors signing the document. In cross-examination, he too admitted that Sankaralinga did not have eye sight. He too stated that Nedungi requested him to come, and at it was Sankaralinga who dictated the recitals, and the scribe Nataraja wrote the document and read over the same to them, and he too was an identifying witness. It is their evidence which had impressed both the trial Court and the learned Judge to hold that they having attested the document, and also being identifying witnesses, their version is entitled to acceptance. Both of them admit that Sankaralinga did not have eye-sight, but yet, they had gone to the extent of claiming that he along with his wife had seen the attestors affixing their signatures in Exhibit B-1...This part of the evidence is not only unworthy of acceptance, but also makes their attestation invalid. When both the attesting witnesses claimed that by reference to earlier documents, Sankaralinga had dictated the recitals, they have uttered blatant falsehood, and certainly he had not seen the witnesses attesting. Exhibit B-1. Hence, the requirements of Section 3 of Transfer of Property Act had not been complied with, in that, Exhibit B-1 has not been proved to be a validly executed document. Even if for any reason it is to be held that the attestation as contemplated in Section 3 had been made; even then, their evidence cannot be accepted and acted upon, because of the utter falsehood which is self-evident on what had been already referred to. Hence when both of them having been examined," and as their evidence cannot be accepted and acted upon; on this ground as well, it is held that Exhibit B-1 had not been properly proved, as required u/s 68 of Evidence Act.

14. It is the second defendants against whom Sankaralinga had evert in a registered document, claimed that he had practised fraud upon him; who bad come forward to get them examined. Both these witnesses had not given any reason as to why it took neariy ten days to register the document. D.W.3 would state that, because at the time the seeds were being sowed in the field, the document was registered on 11th day. This is all the evidence available to claim that Exhibit B-1 had been validly executed by Sankaralinga and his wife, being fully aware of the nature and contents of the document executed by them.

15. To counter this claim, first defendant who had been a tenant under Sankaralinga, and who had since become a purchaser of the property from the donees under Exhibit B-28, has relied upon what all Sankaralinga did immediately on realising about the fraud practised upon him by his son-in-law. Under Exhibit B-27, dated 15-10-1968, Sankaralinga had executed a registered cancellation deed. According to him, he had asked his son-in-law to get a Power of Attorney for management of the properties, and on that he had represented to him that he had brought a document to that effect, and obtained the thumb impressions of himself and his wife thereon. He had got it registered in Karivalamvandanallur Sub-Registrar's Office. Later on, Sankaralinga came to know that his son-in-law had obtained also a settlement deed from them. They never intended to settle all the properties in favour of their son-in-law and his wife Shanmughathammal. They wanted the properties to be taken by all the four daughters, and therefore, the settlement deed that had beenh brought into existence is not valid and hence, he is cancelling the document in respect of -the properties belonging to him, His wife would be executing a separate document relating to her properties. He stated in Exhibit B-27 to the following effect:

Not stopping with this, immediately on realising that in practising fraud upon him, the son-in-law had taken two documents viz., the settlement deed and power of Attorney he had got that power of attorney also cancelled on 24-10-1968. Not stopping with all these which he thought would be the proper way of getting over the fraud practised upon him by his son-in-law, toe sent a lawyer's notice to him under Exhibit B-26 on 31-10-1968. He has claimed therein as follows:

1. My client is an old man, and not in sound health, His wife is also aged. He directed you to get a general power of attorney written in your name to collect rents, to manage the properties and attend to Court work of theirs and his wife. On 27-9-1968 you took my client and his wife to Kariyalam vandanallur and had the power registered. On the even date it transpired you had a deed of settlement registered as if my client and his Wife settled in favour of you, and your wife Shanmughathammal, all their properties. The said document is a deliberate creation of you and your wife both. My client never desired to bequeath his properties to you both"to the exclusion of his other daughters. As my client was being helped by you and your wife, by undue influence you have brought about the deed of settlement.

2. On coming to know the true facts, my client bad the settlement and power of attorney executed by him in favour of you, cancelled on 15-10-1968 and 24-10-1968 respectively. As my dent's wife was taking steps to cancel the said deeds by separate documents, she did not join my client in the said instruments. In any event, the cancellations by my client would operate as regards his properties.

3. As you and your wife are trying to collect rent and draw monies from Court, it has become imperative to intimate to you the cancellation of general power of attorney and settlement deed in you favour by this notice.

4. My client has gifted his properties to his three daughters on 17-10-1968. You are. hereby directed that you shall not in any way deal with my client's properties, collect rer.ts, or draw monies from Court or in any way act as my client's agent.

Sankaralinga died on 24-12-1969. Therefore, what all he could think of doing regarding Exhibit B-1 and the power of attorney, he had done to his best of knowledge and ability. He had taken legal" advice, and the lawyer had not advised him to file a suit then and there. That would not mean that what all he had done in this manner, and that too by bringing into existence registered documents, cannot be treated as irrelevant. What is contended by plaintiff is that it is not for Sankaralinga to decide whether fraud had been practised upon him or not, and whatever he says cannot be the conclusive evidence, and that by executing a cancellation deed, cannot take away the validity of Exhibit B-1, unless in a proceeding instituted by him, it is declared to be invalid and inoperative, and that his version in the document could not be acted upon unless corroborated; and in the written statement, the particulars of fraud having not been pleaded, whatever he had done, could not unsettle Exhibit B-1. These extreme contentions are least impressive, because Sankaralinga himself had taken certain positive steps to expose the fraud practised upon him. It would be improper for a Court if it cannot appreciate the circumstances in which a person like him is placed, and what ail he could do when faced with misrepresentation and fraud being practised upon him by his close relations and associates around this lay man without eye sight. It is too much to claim that he should have then and there instituted a suit and also obtained a decree setting aside the document before he died, failing which, it is a fraud that should prevail with flying colours. In these days, fraud is having better chance than truth. Cannot a party faced with misrepresentation and fraud, do any other act or thing, other than filing a suit to show that fraud had been practised upon him? It is for the Court to decide whether the follow up actions taken by Sankaralinga after the execution of Exhibit B-1 would constitute evidence or not. Therefore, the aforesaid documents which had come into existence during his life time, are taken into account as relevant piece of evidence. It must be remembered that to the lawyer's notice (Exhibit B-26), second defendant had not chosen to send any reply. As claimed by plaintiff's Counsel, is there any corroborative evidence of what Sankaralinga

has claimed? D.W.4, an attessor to Exhibit B-27 has stated in cross-examination by counsel for defendants 2 and 3 as follows:

He was also a neighbour to Sankaralinga, and he had denied the suggestion that the other three daughters, who were also living in the same village, had forcibly taken Sankaralinga and got Exhibits B-27 and B-28 executed by him. Therefore, when the claims made by Sankaralinga about fraud is corroborated by the evidence of D.W.4, and his claim having not been dislodged in any manner in cross-examination the much wanted claim of plaintiff about corroboration is fully satisfied. It must also be remembered that Sankaralinga had also executed a gift deed under Exhibit B-28 dated 17404968 in favour of three of his daughters, in respect of properties belonging to him, after cancellation effected by him under Exhibit B-27. Therefore, these facts and circumstances would show that it is with reference to the nature of the document his son-in-law had practised fraud upon Sankaralinga by making a representation that the papers in which the thumb impressions were being taken were for the purpose of a power of attorney, but factually he had brought into existence: two documents.; one being Exhibit B-1 and the other, the, power of attorney. Though they are differently dated, he got both of them registered on 27-9-1968 Hence, as held in *Ningawwa Vs. Byrappa and Others*, , Exhibit B-1 is a void document. It was held therein:

The legal position will be different if there is a fraudulent mis-representation not merely as to the contents of the document but as to its character. The parties make a clear distinction between the fraudulent representation as to the character of the document and fraudulent misrepresentation as to the contents thereof....

Hence if the representation is with reference to the nature of document then it has been held that the transaction is void, while in the case of the other i.e. about contents then it is only voidable.

16 Division Bench of this Court in *Appanna v. Venkatappadu* (1953) 1 M.L.J. 476 : 1952 M.W.N. 128 : AIR 1953 Mad. 611 held that when a deed of one character is executed on a representation that it was of a different character, then it is void and inoperative. Such a document need not be set aside under Article 91 of the Limitation Act. In the light of these authoritative pronouncements, when the facts and circumstances of this case clearly show that there was a misrepresentation relating to the character of the document (Exhibit B-1), none of the decisions referred to by Mr. T.S. Subramaniam, learned Counsel for plaintiff as to what are voidable documents, and if Exhibit B-1 is voidable, what steps and within what time, the affected party should seek for remedies need be referred to. In the initial part of his submissions, considerable time was consumed in referring to decisions as to what remedies will be available, if it is a voidable document.

17. As for trial Court is concerned, in paragraph 13 of its judgment, it has chosen to rely upon the evidence of D.Ws. 1 to 3, and then confined its finding to the

point taken about the documents being registered at Karivalam Vandanallur Sub Registrar's Office instead of nearby office at Sankarankovii. No other aspect the trial Judge would deal with as proper or relevant to be referred to, in holding that Exhibit B-1 is not vitiated by fraud or mis-representation. Undoubtedly, this is an unsatisfactory manner of disposing of a vital point taken in the suit.

18. As for the judgment under appeal is concerned, the first aspect taken into account is that no details of misrepresentation or fraud are found in the written statement of first defendant. In para. 2, he had referred to what Sankaralinga did on coming to know about the fraud practised upon him, and about sending of lawyer's notice, which had not been refuted, etc., He was a tenant under Sankaralinga. It was not the first defendant against whom any fraud had been practised. He had chosen to rely upon the contents in the cancellation deed. Furthermore, he is not better placed than Sankaralinga to speak about the fraud experienced by him. It is not known as to what more is required to be stated in a written statement under such circumstances. On the nature of fraud, he had put the plaintiff on notice that reliance will be placed, on what Sankaralinga has stated in his documents. Hence, it cannot be said that there is absence of pleadings relating to fraud and misrepresentation in the written Statement of first defendant.

19. Learned Counsel for plaintiff relies upon Afsar Sheikh and Another Vs. Soleman Bibi and Others, and states that unless fraud is specifically pleaded, such a plea cannot be entertained. In the instant case, on paragraphs 2 and 3 of the written statement read with the contents of Exhibit B-27 to which plaintiff's attention had been drawn in para 3 of the written statement; it cannot still be claimed that there is lack of pleading in this regard. It was held in Ladli Prasad Jaiswal Vs. Karnal Distillery Co. Ltd. and Others, that the burden of proving undue influence primarily lay upon the defendant who was setting up the plea, and that particulars regarding the nature of undue influence must be found in the pleadings. In K.M. Madhavakrishnan Vs. S.R. Sami and Others, it was pointed out that it is settled law that a vague and general plea of undue influence would not be sufficient when the plaintiff comes forward with an action to set aside a contact on that ground, and that 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.

20. As stated in para 17 above, the required facts and circumstances relating to fraud are found in written statement. Hence, sufficient particulars had been made available in the pleadings, and the plaintiff has not shown as to in what manner and in regard to what particulars he had been at a handicap in knowing the defence put forth by defendants,

21. The next aspect is about reliance placed on the evidence of D.Ws. 1 and 2, the attestors. Already it has been pointed out that they have come forward with a false claim, and as to how they cannot be treated as attestors when

Sankaralinga had not seen them affixing their signatures, when admittedly he had no eye sight.

22. The other point which had impressed the learned Judge is that, there is no cogency between the stand taken in Exhibit B-26 and B-27. The contents of the lawyer's notice (Exhibit B-26) had been already extracted. The lawyer used the word "undue influence", and therefore, it was considered that there being difference between fraud, misrepresentation and undue influence, Sankaralinga had not come forward with a consistent plea. Except for the last sentence in para 1, in all the earlier sentences the plea that fraud has been practised upon him had been spelt out, and which is in consonance with the recitals in Exhibit B-27. It has been claimed that it was a deliberate creation by the son-in-law and his wife, and that the recitals found therein are contrary to their intention. An inept expression used by a lawyer, who cannot be termed as a seasoned lawyer, ought not to have been highlighted to this extent, particularly when every piece of evidence available goes to show that fraud was practised on Sankaralinga, who had re-acted to it at the shortest possible time by taking such steps which he could do to the best of his knowledge and ability. Hence there is practically no lack of cogency between the contents of Exhibit B-26 and B-27.

23. The only other aspect taken into account by the learned Judge was about lack of eye-sight, and it has been construed as not a factor which would support the plea of fraud, because Sankaralinga had executed three documents later on in spite of lack of eye sight. If he had come with the only plea that because of his lack of eye sight, it has been taken undue advantage of, then execution of later documents go to show that, in spite of this deficiency, he could take certain steps to safeguard his valuable rights. It is because he had to depend on others, he imposed confidence in his son-in law, and therefore, requested him to manage his properties by taking up a power of attorney in his favour. But the avaricious son-in-law had taken two documents from him. Therefore, he had to necessarily take the assistance of others and the neighbour (D.W.4) had acted as an attester to the cancellation deed. Hence, as none of the aspects taken into account by the learned Judge being relevant in the context of what had been done to Sankaralinga, it is held that Exhibit B-1, is a void document. Once it is held that 32 items of properties included therein and which belonged to him, had not been dealt with therein ; he being the absolute owner of the properties, had validly gifted those properties to his three daughters, Gomathi, Muthammal and Ananchi Animal under Exhibit B-28. No suit had been filed to challenge the validity of this gift deed. They having conveyed the plaint 1st schedule property to first defendant, who was a tenant under Sankaralinga under Exhibit B-31, dated 18-10-1972 his title to property cannot be assailed by the plaintiff, Who claims to have purchased the suit property from the son-in-law under Exhibit A-7.

24. There are certain other aspects on which Mr. T.S. Subramaniam, learned Counsel had advanced his submissions. He claims that it is only a Court which could say that a particular document is vitiated by fraud, and that it cannot be

done by executing a registered document, as done in respect of Exhibit B-27. He relies upon Appanna v. Venkatappadu AIR 1953 Mad. 611 and Tila Bewa Vs. Mana Bewa, , In the later decision, it was held

...It is not open to a settlor to revoke a settlement at his will and pleasure, and he has to get it set aside in a Court of law by putting forward such pleas that bear on the validity of gift deed.

25. As already pointed out. Exhibit B-27 has been taken into account only as a relevant piece; of evidence so the plea of fraud. Therefore, if the transaction is a voidable transaction, there would be need to set it aside, but if it is a void transaction, there is no need to institute a proceeding to declare it as void, but he can simply avoid it.

26. He would then rely upon Section 31 of Special Relief Act and claim that even in respect of a void transaction, it is obligatory on the part of the party, who wants to avoid the document, to institute proceedings. The Section itself states that if anyone who is faced with a void or voidable instrument, apprehends that it may cause him serious injury, he may sue to have it adjudged as void or voidable Article 91 of the Limitation Act of 1908, prescribed a period of three years for cancellation of a document which is voidable and it did not apply where the document was ab initio void, because such documents do not require to be set aside in law. Article 59 of the Limitation Act, 1963 prescribes a period of three years from the time when the facts entitling the plaintiff to have the instrument cancelled first become known to him. Therefore, this section cannot be relied upon to claim that, unless a suit is filed to declare a document as void, the executant cannot avoid it, when it is, ab-initio void as had happened to Exhibit B--1.

27. The other plea is that, 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. Mr. T.S. Subramaniam states that, such a party cannot plead non est factum. In support of this plea, he relies upon the ruling of a Division Bench of this Court is K.M. Madhavakrishnan Vs. S.R. Sami and Others, wherein it was held as follows:

...But, if however, a party has been misled in executing a deed or signing a document essentially different from that which he intended to execute or sign, he can plead non est factum in an action against him and the deed of writing is completely void in whomsoever hands it may come. As Byles, J., said in Foster v Mackinnon (1869) L.R. 4 C.P. 704:

It is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signor did not accompany the signature; in other words; that he never intended to sign and therefore in contemplation of law never did sign, the contract to, which his name is appended.

The doctrine of non est factum does not apply unless there is a

misrepresentation inducing a mistaken belief as to the class or character of the supposed document" and not a misrepresentation simply as to its contents....

Hence on the finding already rendered that Sankaralinga had been induced into a mistaken belief as to the nature and character of Exhibit B-1, such a plea could be taken by defendants in the instant case.

28. Yet another plea put forth is that, when Exhibit B-1. had been executed by Sankaralinga and his wife Nedungi relating to 39 items of properties, it could not have been cancelled only by Sankaralinga under Exhibit B-27. relating to 32 items of properties belonging to him. If fraud had been practised upon him, it was equally upon Nedungi, and she having not come forward to execute any cancellation deed in spite of Sankaralinga claiming that she will do it by separate document; Exhibit B-1 cannot be declared as a void document If a transaction is an ab initio void transsction as held in the decisions above referred to the party involved in the transaction can. simply avoid it. There is no need to. execute a cancellation deed. There is no need to institute any suit to declare that such a transaction is a void transaction. Failing which, it would not be a valid one Sankaralinga was thoughtless in executing Exhibit B-27. He could have avoided it as for Nedungi. What Sankaralinga did by executing Exhibit B-27 was only to bring into existence a piece of evidence, to show that at the relevant point of time he had felt that fraud had been practised upon him and accordingly reacted. Trial Court relied upon Exhibits B-20 and B-23, sale deeds, Exhibit B-24, the patta, and Exhibit B-6 to B-9, the kist receipts to show that Nedungi had acted as per Exhibit B-1 She had dealt with the items of properties belonging to her in the manner in which she had desired. It is in evidence that she had not chosen to go along with Sankaralinga. who on realising that fraud had been practised upon him, had chosen to live with the other three daughters. Both husband and wife had dealt with their properties in the manner in which they have desired. Hence, transactions entered into by Nedungi in respect of her properties subsequent to Exhibit B-1 would only show that she had avoided Exhibit B-1 and over those properties, Under Exhibit B-1, only life interest had been created in her favour, and in spite of it, she had chosen to be a party in selling the properties. Reference made to Exhibit B-1 therein would not make Ex. B-1 a valid documents. Hence, (here could be no legal impediment in treating Exhibit B-1 as a void document, because only one of them had chosen to execute a cancellation deed. Once again it is made clear that it is not Exhibit B-27 which made Exhibit B-1 a void document. It is the fraud which was, practised upon Sankaralinga by his son-in-law (D.W.3) which had made Exhibit B-1 as ab-initio a void document and that was why each of the executants therein had started dealing with the properties as they liked. Hence, even in so far as Nedungi is concerned, Exhibit B-1 is an ab-initio void document, and there was no need for her either to go to Sub-Registrar"s Office for cancellation or to Court and put forward pleas in the manner done by her husband. She could simply ignore the document.

29. One more aspect touched upon is that, if really both of them had thought of

benefitting their daughters as claimed in Exhibit B-27, then under Exhibit B-28, the gift would not have been made only to three daughters, D.W.3 married not only one of the daughters-Shanmughathammal but also married another daughter by name Ananchi Ammal. According to him the latter had not lived with him for nearly 15 years. There is no evidence available as to how and in what manner, the first two and the last daughter had been provided. Thirty-nine very valuable items have been dealt with under Exhibit B-1. All of them are purported to be settled only upon one daughter, and the son-in-law, who had taken two daughters in marriage. It cannot be said that the intention to provide for four daughters as found in Exhibit B-27 had not been more or less accomplished, because the father gave all his 32 items to his three daughters, and the mother gifted her 1 items of properties to the other daughter.

30. Therefore, for all the reasons stated above, there being a total failure on the part of the trial Court to take into account several relevant factors relating to the plea of fraud practised upon Sankaralinga, and as none of the conclusions of the learned Judge are based on relevant evidence on record, this Letters Patent Appeal is allowed, resulting in the Suit being dismissed with costs throughout.