
(1972) 09 KAR CK 0017
In the Karnataka High Court
Case No : First Appeal No. 30 of 1968

Smt. Chinnamma and Others

APPELLANT

Vs

The Devanga Sangha and Others

RESPONDENT

Date of Decision : 01-09-1972

Acts Referred:

Contract Act, 1872 — Section 16, 16 (2), 16 (3)

Citation : AIR 1973 Kar 338 : AIR 1972 Kar 338

Hon'ble Judges : E.S. Venkataramaiah, J; Ahmad Ali Khan, J

Bench : Division Bench

Advocate : N.R. Raghavachar and G.V. Thimmappaiah, for the Appellant; S. Rangaraj, for the Respondent

Final Decision : Allowed

Judgement

1. The above appeal is filed against the decree passed in Original Suit No. 210 of 1964 on the file of the Civil Judge of Bangalore City. The said suit was originally instituted on 11-7-1961 in Original Suit No. 40 of 1961 on the file of the District Judge. Bangalore, and was later on transferred to the file of the learned Civil Judge under the provisions of the Mysore Civil Courts Act. 1964.

2. The suit was instituted by the Devanga Sangha which is a Society registered under the Mysore Societies Registration Act 1904 (hereinafter referred to as the plaintiff), for a declaration that the property described in the schedule attached to the plaint belonged to it and for possession of the same. A claim for damages of Rs. 855.60 till the date of suit and for future mesne profits was also made in the plaint. The suit property is a house bearing No. 13 and situated in 11th Cross Street. Cubbonpet, Bangalore City, and its market value on the date of the suit was stated to be Rs. 20,000/-.

3. The plaintiff based its claim to the suit property on a registered Sift deed dated 28-12-1960 said to have been executed by one Kenchamma. Kenchamma was the widow of a certain Muddappa who died on 10-6-1956. Defendant 1

Chinnamma is the daughter of Muddappa by his first wife. After the death of Chinnamma's mother, Muddappa married Kenchamma. Chinnamma defendant 1 was given in marriage to one Bommanna and even after her marriage defendant 1 continued to live with Muddappa along with her husband Bommanna. Defendant 2 is the son of defendant 1. Bommanna the husband of defendant 1 died in or about the year 1936 when defendant 2 was only three months old. Even after the death of Bommanna, defendants 1 and 2 continued to be under the care and protection of Muddappa till his death in 1956. At the time of the death of Muddappa there were two Immovable properties standing in his name and the suit property was one of them. The other property which was also a house, was sold by Kenchamma and defendants 1 and 2 under a registered sale deed dated 13-8-1959 for a sum of Rs. 13,500/-. In one part of the suit property. Kenchamma and defendants 1 and 2 were residing and in another portion they had installed power looms which were being run by them and the remaining portions of the property had been leased out in favour of defendants 3 to 6.

4. It is the case of the plaintiff that on the coming into force of the Hindu Succession Act on 17-6-1956 Kenchamma who had inherited the suit property from her husband and was holding it as a limited owner became the absolute owner of the same as well as the other property which was situated in 9th Cross Street, Cubbonpet Bangalore City. As already stated, the other property which was situated in 9th Cross Street, Cubbonpet, Bangalore City, was sold on 13-8-1959 for a sum of Rs. 13,500/- by Kenchamma and defendants 1 and 2. A portion of the consideration received under the said sale was utilised to discharge a mortgage loan which had been taken from Bangalore City Co-Operative Bank Limited and the rest of the money was utilised for improving the suit house and for purchasing additional looms and for the maintenance of Kenchamma and defendants 1 and 2. It is stated in the plaint that even though Kenchamma was sole owner of the said property. Defendants 1 and 2 were also shown as the vendors under the said sale deed as required by the purchasers. With regard to the gift deed under which the plaintiff claims the suit property, the averments made in the plaint are that it was the desire of Muddappa who was a member of the Devanga Community and a member of the plaintiff to apply a portion of his assets for the benefit of the community through the plaintiff, but he died before his wishes in that regard could be implemented; that Kenchamma who was in full sympathy with those wishes of her husband and having been called upon by him expressly to give effect to his wishes, approached B. G. Veeranna, the Secretary of the plaintiff who was a good friend of Muddappa, and informed him that it was her intention to make a gift of the suit property to the plaintiff and that the plaintiff might be requested to accept the same and to utilise the suit property for the promotion of, the welfare of the Devanga Community; that she was advised to give a formal application in that regard to the plaintiff which she accordingly did on 7-12-1960; that the plaintiff considered her request at its meeting held on 11-12-60 and resolved that the said gift be accepted and steps

might be taken to obtain a formal gift deed executed in favour of the plaintiff and to meet the costs thereof from out of his funds; that Kenchamma on being communicated about the said resolution executed the deed of gift in favour of the President and Secretary of the plaintiff as representing the plaintiff on 28.12.1960 and the same was registered in the office of the Sub-Registrar, Bangalore City on the same day; that on completing the gift of the schedule Property in the above manner, she placed in the hands of the Secretary of the plaintiff a signed receipt issued by the Sub-Registrar authorising the plaintiff to take delivery of the document from the office of the Sub-Registrar along with her application dated 3-1-1961; that she also delivered to the plaintiff the Death Certificate of her husband and also khatha transfer form duly signed; and that she also got notices issued to the tenants, namely, defendants 3 to 6 through her Advocate. Sri B. Nagarej, intimating of the transfer of the suit property by way of gift to the plaintiff and calling upon them to attorn to the plaintiff. It is further alleged in the plaint that when Kenchamma was making arrangements to make a gift of the suit property to the plaintiff defendants 1 and 2 showed resentment in several ways and made her life uncomfortable even though they had no justification for doing so when they had no right whatsoever to interfere with the properties belonging to Kenchamma and particularly after Kenchamma had treated them generously by conferring on them large benefits out of her estate to which they had no claim in law; that Kenchamma's health deteriorated and she required medical attention; that she sought the assistance of the plaintiff in preference to defendants 1 and 2 who had become quite inimical towards her by that time; that the plaintiff made arrangements for her treatment and provided for the necessary expenses, and that when Kenchamma died on 7-3-1961, made arrangements for her funeral and obsequies ceremonies; that on 1-2-1961 defendants 1 and 2 caused a notice to be issued through their advocate to the plaintiff claiming that they were the owners of the property and that the gift deed said to have been taken by the plaintiff was not valid and binding and the said notice was replied by the plaintiff's counsel on 18-2-1961 which brought forth a rejoinder dated 11-3-1961 from the advocate for defendants 1 and 2; that on 18-2-1961 the counsel for the plaintiff issued notices to defendants 3 to 6 calling upon them to pay the rents to the plaintiff with effect from 28-12-1960; and that since defendants 1 and 2 who were living in a portion of the suit property laid claim to the suit house and questioned the validity of the gift deed, the plaintiff filed the above suit for declaration of its title to the suit property and for its possession and other reliefs.

5. Defendants 1 and 2 denied that Kenchamma was the sole owner of the suit property. They pleaded that the gift deed executed by Kenchamma was not true and valid and that in any event it was vitiated on account of undue influence and fraud. They claimed that the other property which stood in the name of Muddappa and which was sold on 13-8-1959, belonged to them as well and that it was not true to say that they joined the said deed as vendors at the desire of the vendees even though they had no title to it. The allegations that Kenchamma

was advised to give a formal application to the plaintiff; that the plaintiff decided to accept the gift of the suit property at its meeting held on 11-12-1960; that Kenchamma executed the gift deed, and that she gave the receipt issued by the Sub-Registrar along with the Death certificate and the Khata transfer form to the plaintiff, were all denied by defendants 1 and 2. They further pleaded that the President and Secretary and other members of the plaintiff were very powerful and they were in a dominating position and that kenchamma who had just then lost her husband was mentally weak, bad in health and was also ignorant and illiterate. Kenchamma was living with defendants 1 and 2 till the month of November 1960 and that she left the house abruptly due to the instigation of the president and the Secretary of the plaintiff and their associates; that due to the acute illness she was admitted to the Victoria Hospital for treatment for cancer, and that she later on died. Taking advantage of the fact that Kenchamma was helpless, illiterate and mentally weak, the President and the Secretary of the plaintiff being influential members of the community with the help of their friends got up a document purporting to be a gift deed and also had taken her signature on a number of documents which they were trying to utilise against defendants 1 and 2. The recitals in the gift deed were alleged to be false and fraudulent and it was stated that they had been incorporated by the president and the Secretary of the plaintiff and their associates. Defendants 1 and 2 being joint owners of the suit property, were not bound by the said gift deed. They claimed that they were entitled to one-half of the suit property during the lifetime of Kenchamma and on her death, they became full owners of the property. In the written statement there is also a reference to a police complaint said to have been given by them against the President and the Secretary of the plaintiff alleging that defendants 1 and 2 were being harassed by the members of the plaintiff. The plaintiff filed a reply to the above written statement and it is unnecessary to set out in detail the contents of the said reply. It is also unnecessary to refer to the contents of the written statement filed by the fifth defendant for the purpose of this appeal.

6. On the basis of the above pleadings, the Court below framed the following issues:--

- (1) Was Muddappa the exclusive owner of the suit property ?
- (2) Did his wife Kenchamma inherit the same and become the absolute owner thereof under the Hindu Succession Act ?
- (3) Did she execute the gift deed dated 28th December 1960 ?
- (4) Was the gift deed executed under the circumstances alleged in para 6 of the written statement of defendants 1 and 2 ?
- (5) Have defendants 1 and 2 a share in the suit schedule property ?
- (6) Did Kenchamma put the plaintiff in possession of the property as alleged by the plaintiff?
- (7) Were defendants I and 2 in possession of the property ?

(8) Is the gift deed null and void and unenforceable ?

(9) Are defendants 1 and 2 entitled to the whole of the property after the death of Kenchamma ?

(10) Is the plaintiff entitled to obtain possession of the properties ?

(11) Is the valuation of the suit property correct ?

On behalf of the plaintiff four witnesses were examined and on behalf of defendants 1 and 2 two witnesses were examined. The trial Court by its judgment dated 19-3-1968 held that Muddappa was the exclusive owner of the suit property and that Kenchamma inherited the same from him and that she became the absolute owner thereof on the coming into force of the Hindu Succession Act. It held that she did execute the gift deed dated 28-12-1960 and that it was not executed in the circumstances pleaded by defendants 1 and 2. It negated the case of defendants 1 and 2 that they had a share in the suit property and held that Kenchamma had put the plaintiff in possession of the suit property as alleged in the plaint. Defendants 1 and 2 were held to be in possession of portion of the suit property with leave and licence of Muddappa. The gift deed was held to be not void. Defendants 1 and 2 were held to be not entitled to the suit property, and therefore, the plaintiff was entitled to a decree for possession. Aggrieved by the judgment and decree of the Court below, defendants 1 and 2 have filed this appeal.

7. A few undisputed facts in the above case may be stated first. That Kenchamma was suffering from cancer on the date of the gift deed; that she was admitted into Victoria Hospital sometime during the month of January 1961 and that she died of cancer on 7-3-1961, are not in dispute. P. W. 2 the clerk of the plaintiff has stated in the course of his deposition that on the date on which Kenchamma executed the gift deed, she was suffering from cancer and P. W. 4 B. G. Veeranna the Secretary of the plaintiff, has stated in the course of his deposition that he came to know after she was admitted to Victoria Hospital that she was suffering from cancer and that for hospital expenses, the plaintiff had paid some amount as she applied for such help. In paragraph 11 of the plaint it is admitted that Kenchamma required medical attention and that the plaintiff rendered the necessary assistance at her request. It is further stated therein that she died on 7-3-1961. It is also not in dispute that the preliminaries leading to the gift deed in question must have occupied only three or four weeks prior to 28-12-1960 on which date it is alleged to have been executed by Kenchamma. It is also not in dispute that Kenchamma was in impecunious condition and had not sufficient money to maintain herself. It is clear from the averments in paragraph 11 of the plaint and Exts. P-4 (c) and P-4 (d) which are the resolutions alleged to have been passed by the plaintiff on 7-1-1961 and 12-2-1961 by which the plaintiff sanctioned a sum of Rs. 100/- on each occasion towards the medical expenses of Kenchamma in accordance with her request contained in the applications submitted by her. One other question of fact which is not in dispute

is that after the death of Bommanna, husband of defendant 1 in or about the year 1936, Muddappa, Kenchamma and defendants 1 and 2 were all living together in the suit house under the care and protection of Muddappa till his death.

8. We will not (now ?) proceed to consider the evidence adduced in this case, P. W. 1 is the scribe. It is admitted that he is a document writer by profession and that he was known to the President and the Secretary of the plaintiff for nearly ten to fifteen years prior to his date of examination. He was examined on 6-11-1962. His evidence is that he had prepared a draft of the gift deed as instructed by Kenchamma three days prior to the date of Exhibit P-1 and that he had read-over the same to her. He accompanied Kenchamma to the office of the Sub-Registrar and identified her before the Sub-Registrar. He is also the scribe of Exhibit P-2 dated 7-12-1960 which was an application alleged to have been given by Kenchamma to the plaintiff requesting it to accept the gift of the suit property and Exhibit P-3 the document dated 3-1-1961 along with which she is alleged to have handed over Exhibit P-6 the receipt issued by the Sub-Registrar. In cross-examination he stated that he knew Kenchamma 7 or 8 years prior to the date of Exhibit P-1 and that she and defendants 1 and 2 were living in the suit house. He further stated that the draft of Exhibit P-1 was prepared by him fifteen days prior to Exhibit P-1 in his house as per instructions of Kenchamma. He has also stated that he tore off the draft after writing Exhibit P-1 in accordance with the draft and nobody else was present when he wrote the draft and read it over to Kenchamma. He proceeds to state that he did not see any reference documents in respect of the property before he wrote the draft and when he asked her, she told him that she did not have any reference documents. He therefore, looked into the encumbrance register in the office of the Sub-Registrar regarding the title of the property. In his re-examination on the above question, he has stated that he saw the references in the Sub-Registry about one month before Exhibit P-1 dated 28-12-1960 or five or six days prior to Exhibit P-2 dated 7-12-1960, It is therefore, clear that even before Exhibit P-2 was written and the plaintiff resolved to accept the gift. P. W. 1 had made enquiries in the office of the Sub-Registrar regarding the documents of title in respect of the suit property. It may be relevant at this stage to mention that Exhibit D-3 which is a document executed in favour of Muddappa in respect of the suit property, was produced by defendant 1 into Court. If as stated in the course of Exhibit P-1 Kenchamma had full confidence in defendants 1 and 2 and that the feelings between them were not strained. P. W. 1 would have asked her to secure Exhibit D-3 from defendant 1 for purpose of writing the gift deed. According to this witness Exhibit P-2 the application dated 7-12-1960 made to the plaintiff to accept the gift was written about 20 days before Exhibit P-1 dated 28-12-1960, in the house of Kenchamma. He stated that Exhibit P-2 was signed by Kenchamma in his presence and that when he wrote Exhibit P-2, defendants 1 and 2 were moving about inside the house With regard to Exhibit P-3 dated 3-1-1961, this is what P. W. 1 says: "I do not remember when I wrote Ex. P-3 or how long before Ex. P-1 I wrote it or if I

wrote it before Exhibit P-I. I have to refresh my memory by looking into Exhibit P-3. I am unable to say whether I wrote Exhibit P-3 before or after I wrote Ex. P-I. I do not remember what was the occasion for her to have such a document like Ex. P-3 written. Exhibit P-3 was written in her house and only I and she were there when I wrote it. She signed as per Ex. P-3 (a) immediately I wrote Ex. P-3." It was suggested in the course of cross-examination that the signatures appearing to be those of Kenchamma in Exhibits P-2 and P-3 were not of Kenchamma. Sri N. R. Raghavachariar, the learned counsel for defendants 1 and 2, brought to our notice that the signatures Exs. P-2 (a) and P-3 (a) found on Exhibits P-2 and P-3 appear to have been made with an ink different from the ink used for writing the bodies of Exhibits P-2 and P-3. By a physical examination of the two documents, we feel that the ink with which Exhibit P-2 (a) is written is slightly different from the ink with which the body of Ex. P-2 is written and similarly the ink with which Ex. P-3 (a) is written is different from the ink with which the body of Exhibit P-3 is written. Ex. P-I, the gift deed said to have been written by P.W. 1 is a very long document, longer than it was necessary. A large portion of the said document relates to the history of the family of Muddappa, Kenchamma and defendants 1 and 2, the business which defendants 1 and 2 were carrying on, the value of movables in the possession of defendants 1 and 2, the sale deed executed in the month of August 1959 by Kenchamma and defendants 1 and 2 in respect of the other property situated in the 9th Cross Street, Cubbonpet, and the way in which the sale proceeds under the said document were utilised by Kenchamma and defendants 1 and 2. It is also stated in the said document that Kenchamma had full confidence in defendants 1 and 2 that they would look after her even though the suit property was given away by way of gift. It was argued that Kenchamma who was suffering from cancer and who was an illiterate woman who knew only to sign her name could not have given all the necessary instructions to P. W. 1 to write the said document and therefore, the statement of P. W. 1 that he prepared the draft in accordance with her instructions and Exhibit P-I in accordance with the draft should not be accepted. It is significant to note that P. W. 1 does not say in his deposition that he read-over Exhibit P-I to Kenchamma after it was written although the Court below has stated that this witness had stated in his evidence that he read-over the document Exhibit P-I to Kenchamma in the course of its judgment.

9. P. W. 2 is one of the attestors of the gift deed Exhibit P-I. It is seen from Exhibit P-I that four persons, namely. B. R. Lingappa. N. Kalappa. B. Shankarappa P.W. 2, and Marihuehappa alias Chikka Honnappa have attested it. In the list of witnesses filed on behalf of the plaintiff on 10-10-1962, the plaintiff cited all the four attestors as its witnesses. It may be mentioned here that by mistake the name of witness No. 7 in the said witness list is written as Marikenchappa alias Chikka Honnappa instead of Marihuchappa alias Chikka Honnappa. But ultimately only one of them, namely. P.W. 2 was examined. He stated in his examination-in-chief that he had attested Exhibit P-I and that Kenchamma signed it after it was read over to her. He further stated that her

mental condition and health were quite good at that time even though P. W. 3 contradicts him on the condition of her health. In cross-examination this witness has admitted that he was a member of the plaintiff and that, he and Y. H. Venkataramanappa, the President of the plaintiff were cousins. His house is separated by one house from Y. H. Venkataramanappa's house. He proceeds to state in cross-examination that he knew Kenchamma for ten years prior to the date of Exhibit P-1 and knew her husband Muddappa also. But curiously he says that he was not aware if defendants 1 and 2 resided with Kenchamma or not. He admits that he was not present when Exhibit P-1 was written. According to him B. R. Lingappa, Chikka Honnappa and Kalappa attested it before he attested. A perusal of the document Exhibit P-1 shows that P. W. 2 is the third attestor and Chikka Honnappa's signature is found after the signature of P. W. 2. He does not mention the name of the person who called him to the house of Kenchamma to attest the document. He has stated that he knew P. W. 3 for five or six years and that P. W. 3 had not told him of any proposal of Kenchamma to give the suit house to the plaintiff. He further admits that when he attested Exhibit P-1, no other document was there. On going through the deposition of this witness we feel that his presence at the place where the document was written is doubtful and that his deposition does not inspire confidence. We shall again advert to the evidence of P.W. 2 at a later stage. P. W. 3 is the Clerk of the plaintiff. He has produced Exhibit P-4 containing the resolutions, Exhibit P-4 (a) to (d) of the plaintiff. He has stated that at the instance of P. W. 4, the Secretary of the plaintiff, he obtained an encumbrance certificate (Exhibit P-51 in respect of the suit house from the office of the Sub-Registrar and showed it to P. W. 4 before he purchased the stamp paper. He states that he was present when Exhibit P-1 was signed by Kenchamma; that he accompanied her to the office of the Sub-Registrar and from there he went along with her to P. W. 4 where she gave the application Exhibit P-3 dated 3-1-1961 along with the receipt issued by the Sub-Registrar (Exhibit P-6) to the Secretary and the Secretary gave him Exhibits P-3 and P-6. This part of the evidence of P. W. 3 is contradicted by the evidence of P. W. 1 who states that when the Sub-Registrar gave the receipt to Kenchamma, she gave it to Krishnamurthy. When the delivery of the receipt and Exhibit P-3 took place on 28-12-1960 according to this witness, Exhibit P-3 itself bears the date 3-1-1961. He has further stated that he obtained khatta extract from the Municipality in respect of the suit house as per Exhibits P-7 and P-8 and also produced before the Court Exhibits P-9 and P-10 which were the demand notices issued by the corporation and Exhibits P-12 to P-14 which were the receipts for payment of tax to the corporation. Exhibit P-15 is the certificate of death of Muddappa, produced by this witness. In cross-examination first he stated that he knew nothing about Kenchamma or where she lived until Ext. P-1 was executed by her i.e., 23-12-1960, but later on he stated that he had come to know from Kenchamma when she had gone to attend the meeting of the plaintiff held on 11-12-1960 that she had another house in 9th Cross-Street, Cubbonpet and that she and defendants 1 and 2 had sold it to one Papanna sometime earlier. It follows that either P. W. 3 knew everything about the transaction from beginning

to end or that Kenchanima did not attend the meeting of the plaintiff on 11-12-1960 at all. The above two statements of P. W. 2 are inconsistent with each other. He further stated that he was not present when Exhibit P-3 was written, but he was present when Kenchamma gave Exhibits P-3 and P-6 to P. W. 4 and at that time nobody else was present. If Exhibit P-3 was given to the Secretary on 28-12-1960 itself, it must have been written on that very day. We have already referred to the version of P. W. 1 regarding the writing of Exhibit P-3. P. W. 3 does not say in his deposition that the document Exhibit P-1 was read over to Kenchamma before she signed it. P. W. 3 has admitted in the course of his evidence that Kenchamma was suffering from cancer when she executed Exhibit P-1 and to the suggestion made in cross-examination he stated that he did not know whether for one month before the date of Exhibit P-1 Kenchamma was suffering from cancer. He speaks to the fact that the plaintiff had paid two to three hundred rupees towards the hospital charges payable by Kenchamma. He does not give any information about the person who called the persons to act as attestors when Kenchamma is alleged to have executed Ex. P-1.

10. P. W. 4 is B. G. Veeranna, the Secretary of the plaintiff. Even though in the plaint it is stated that Kenchamma was advised regarding the suit before she gave Exhibit P-2 on 7-3-1960, this witness does not refer to the said meeting at which she was tendered advice. He admits that Muddappa was keeping defendants 1 and 2 in his house and was protecting and maintaining them until his death and that after his death. Kenchamma and defendants 1 and 2 must have continued the business which was being run by Muddappa. He stated that he had not made any enquiries about the title to the suit property and how Muddappa acquired it until he got the encumbrance certificate Exhibit P-5 which was obtained from the office of the Sub-Registrar on 17-12-1960, although P. W. 1 has stated in his deposition that even before 7-12-1960 he had made a search in the office of the Sub-Registrar regarding the title deeds in respect of the suit property. We feel that P. W. 1 must have done so at the instance of P. W. 4. We shall again advert to this aspect of the matter later. Some of the contradictions and variations between the deposition of this witness and other witnesses and the documents marked in the case will also be dealt with at a later stage.

11. On the side of the defendants, the first defendant examined herself as D. W. 1 and defendant 5 as D. W. 2. D. W. 1 has given evidence regarding the manner in which the suit house and the other property at the 9th Cross-Street Cubbonpet, was purchased and about the condition of Kenchamma's health at the relevant point of time. Her evidence is that the properties were purchased by her father Muddappa out of the earnings and assets of her husband who died about 30 years prior to the date of deposition, which had been left with Muddappa. It is in evidence that Kenchamma had no children, and therefore defendant-1 and her husband were under the protection of Muddappa and that Muddappa and Bommanna, the husband of defendant-1, were jointly carrying on business in the suit house. She has stated that she and defendant-2 executed the sale deed the original of Exhibit D-2, conveying the house in 9th Cross

Street, Cubbonpet. On 13-8-1959 because she had interest in it and not because, as pleaded in the plaint the vendees insisted on defendants 1 and 2 executing the document as a matter of abundant caution. Regarding the illness of Kenchamma she has stated that she was not keeping well for sometime and that she died in the hospital. Before that she was ill for about three months. She has stated that Kenchamma did not know reading or writing, but she could only sign her name. She has stated that she had a fickle mind. D. W. 1 has further stated that she came to know of the gift deed only when she received the notice from the plaintiff. It is not suggested to her that Exhibits P-1 and P-2 were written in the suit house and it is also not suggested to her that she had the movables of the value of Rs. 25,000/- as recited in Exhibit P-1. D. W. 2, who is defendant 5 is a tenant of a portion of the suit house. He has stated in his evidence that Kenchamma was generally unwell and now and then she was taking medicine. He has further stated that Kenchamma was not of sound mind and intellect that she was sometimes going out of the house.

12. The learned counsel for the appellants before us submitted the following points for our consideration:--

- (1) that there are a number of contradictions and inaccuracies in the evidence adduced by the plaintiff regarding the transaction of gift;
- (2) that the president and the Secretary of the plaintiff had exercised undue influence over Kenchamma in securing the gift deed in favour of the plaintiff: and
- (3) that defendants 1 and 2 in any event were entitled to one half of the suit property.

13. He submitted that the Court below had committed serious errors while appreciating the evidence adduced in the case and that the decree of the Court below was liable to be set aside. The following are the infirmities in the evidence of the plaintiff that were pointed out by the learned counsel for the appellants :--

- (i) In paragraph 9 of the plaint it is stated that it was the desire of Muddappa to give a portion of his assets to the plaintiff and that pursuant to the same Kenchamma approached B. G. Veeranna, the Secretary of the plaintiff. In this connection our attention was drawn to the deposition of B. G. Veeranna, P. W. 4, who has stated that Kenchamma's husband had told her that she should make a gift of the suit house to the plaintiff and to the recital in Exhibit P-1 the gift deed wherein it is stated that it was the desire of Muddappa to make a gift of the suit property to the plaintiff. He also drew our attention to Exhibit P-2, the application said to have been given by Kenchamma dated 7-2-1960 to the plaintiff in which it was stated that it was the desire of Muddappa to give by way of gift the suit property. Sri Raghavachariar argued that in paragraph 9 of the plaint there was no reference to the desire of Muddappa to give away the suit property by way of gift in favour of the plaintiff. What was alleged in the plaint was that it was his wish to give a portion of his assets and not to give any specific item of property, namely, the suit property.

(ii) the next submission of Shri Raghavachariar related to the allegations made in the plaint regarding what took place between B. G. Veeranna and Kenchamma before the alleged gift deed came into existence. In paragraph 9 of the plaint it is alleged that Kenchamma approached B. G. Veeranna who was a good friend of her husband and informed him that it was her intention to make a gift of the suit property to the plaintiff and that the plaintiff might be requested to accept the same. It was further alleged that she was advised to give a formal application in that behalf to the plaintiff which she accordingly did on 7-12-1960. As against the above allegations in the plaint, this is what we find in the deposition of B. G. Veeranna; "It is only when Kenchamma came to me with Exhibit P-2, I came to know that she wanted to gift this house to the Sangha". In another part of his deposition, we find the following: "It is only when she gave me Exhibit P-2 that she told me that her husband had asked her to gift this house to the Sangha". It was argued by Sri Raghavachariar that whereas in the plaint there is a reference to an earlier meeting which took place between Kenchamma and B. G. Veeranna before she gave the application dated 7-2-1960 (Exhibit P-2), when P.W. 4 is alleged to have tendered advice to Kenchamma, in the deposition of P.W. 4 we do not find any reference to the said meeting and the advice which he gave to Kenchamma. The statement of P.W. 4 is that he came to know of the intended gift just at the time when Exhibit P-2 was handed over to him. (iii) The next discrepancy pointed out by the learned counsel for the appellants is with regard to the expenses that had to be incurred in connection with the gift deed. In the deposition of B. G. Veeranna, it is stated as follows: "The Sangha paid her the cost of the stamp paper and also the registration charges. She had not applied to be paid. We thought that as she was giving us the gift, we should meet the said expenses". The foregoing is contradicted by the contents of Exhibit P-2 in which Kenchamma had made a specific request to the Sangha to bear the expenses of the gift and its registration out of the funds of the Sangha. (iv) The next item of contradiction brought out in the course of the argument of Sri Raghavachariar is in relation to Exhibit P-3. Exhibit P-3 is a letter dated 3-1-61 said to have been written by Kenchamma to the plaintiff enclosing the receipt issued by the Sub-Registrar for taking back the gift deed from his office, the death certificate of her husband, and the katta transfer form duly filled in and signed by her. Exhibit P-3 shows that until 3-1-1961 the receipt issued by the Sub-Registrar was with Kenchamma and that is also what is stated in paragraph 9 of the plaint. But the evidence of P.W. 1 the scribe of the gift deed, P.W. 3 the Clerk of the Plaintiff, and P.W. 4 the Secretary of the plaintiff, is in direct conflict with the recitals in Exhibit P-3. P.W. 1 has stated that he accompanied Kenchamma and P.W. 3 Krishnamurthy to the Sub-Registrar's Office and that the Sub-Registrar gave the voucher to Kenchamma who in turn gave it to P. W. 3. It may be mentioned here that the document was registered on 28-12-1960. P.W. 3 has stated in his deposition as follows: "The Sub-Registrar gave the receipt to Kenchamma and she came with us to the Secretary to whom she gave the application Ex. P-3 and with that she gave the Sub-Registrar's receipt to the Secretary, and the Secretary gave me Ex. P-3 and the receipt. Ex. P-6 is the receipt and I took it to

the Sub-Registrar's Office and I signed on it and I got back Ex. P-I from the Sub-Registrar's Office and I placed Ex. p-I before the meeting". A reading of the above extract from the deposition of P.W. 3 would show that immediately after the document was registered, Kenchamma went along with Krishnamurthy and the scribe to the Secretary and handed over to him Exhibit P-3 which is dated 3-1-1961 and the Sub-Registrar's receipt on 28-12-60 itself. P.W. 4 has stated in the course of his deposition on the above question as follows: "Then she executed the gift deed Exhibit P-I and it was registered and she came to my house and she gave me Exhibit P-6 receipt given to her by the Sub-Registrar and I gave the receipt Exhibit P-6 to P.W. 3 to fetch the document from the Sub-Registry and he brought Exhibit P-I". The allegation that on 3-1-1961 the receipt was handed over along with Exhibit P-3 is not, therefore, supported by P.Ws. 1, 3 and 4.

(v) Our attention was next drawn to the evidence of the scribe with regard to the draft of the gift deed that was prepared by him. P.W. 1 in examination-in-chief has stated as follows: "Kenchamma is the wife of Muddappa. Three days earlier I had prepared the draft as instructed by her and I read it over to her and she said it was alright and then the stamp papers were got by her and I wrote Exhibit P-I on the said stamp papers". In cross-examination he contradicted what he had stated in examination-in-chief by saying: "I prepared a draft of Exhibit P-I fifteen days before Exhibit P-I was written on the stamp paper. I know Venkataramanappa, President and Veeranna, the Secretary of the Sangha since 10 or 15 years. I wrote the draft of Exhibit P-I in my house as instructed by Kenchamma". The draft said to have been prepared by P.W. 1 is not placed before the Court. It was argued on behalf of the appellants that two drafts must have been prepared by P.W. 1 and only one must have been read-over to Kenchamma, It is not known whether the same draft was used for writing Exhibit P-I or not.

14. From the submissions made by the counsel for the parties before us and the material placed before the court, we feel that in this case the following suspicious circumstances exist-

I. P.W. 1 who is a professional document writer has not given any information about the person who asked him to make a search in the office of the Sub-Registrar regarding the title to the suit house even before the plaintiff had decided to accept the gift. He must have been paid his fees for acting as the scribe by the plaintiff which had undertaken to meet all the expenses in connection with the completion of Exhibit P-I. It is clear from the documentary evidence produced by the plaintiff itself in the form of Exhibits P-4 (c) and P-4 (d) that Kenchamma was not in a position to pay the charges payable to P.W. 1. The evidence of P.W. 4 however is that he came to know of the intended gift only after 7-12-1960. P.W. 1 does not say that Kenchamma had instructed him to make a search in the Office of the Sub-Registrar. The identity of the person who had asked to make a search is not, therefore, disclosed to the court and it

remains a mystery. The President of the plaintiff against whom also allegations were made in the written statement that he too exercised undue influence over Kenchamma in order to secure the gift deed has not entered the witness box although he has signed and verified the plaint along with P.W. 4 and he is the only person who has signed and verified the reply of the plaintiff dated 24-11-1961 to the written statement of defendants 1 and 2.

II. No evidence is forthcoming regarding the nature of advice which was given to Kenchamma even though it is admitted in the plaint that such advice was given to her before 7-12-1960 on which date Kenchamma is alleged to have given Exhibit P-2 to P.W. 4.

III. When admittedly the feelings between Kenchamma and defendants 1 and 2 had become strained for sometime prior to the date of Exhibit P-1, on account of the gift which she wanted to make in favour of the plaintiff and on no other account (as mentioned in the plaint), it appears to be highly improbable that P.Ws. 1 and 3 would have gone to the suit house where defendants 1 and 2 were also residing, to write the document on the stamp paper and secure the presence of four attestors therefore attesting the document. Ordinarily one would expect that defendants 1 and 2 would create sufficient disturbance which would make the writing and completion of the document almost impossible. Another circumstance which would improbabilise the writing and completion of the document at the suit house on 28-12-1960 as stated by P.Ws. 1, 2 and 3 is the absence of any person, other than the Clerk of the plaintiff, who was holding a responsible position in the plaintiff at the time of execution of the document particularly when the evidence on the side of the plaintiff is silent about the approval of any draft which had been prepared earlier by any responsible official on behalf of the plaintiff.

IV. The contradictions between the contents of Exhibits P-2 and P-3 on the one hand and the oral evidence already referred to and the difference in the colour of the ink with which the signatures of Kenchamma are affixed to these documents and the colour of the ink with which they are written, show that Exhibits P-2 and P-3 have not come into existence in the manner and on the dates they are alleged to have come into existence.

V. The non-examination of the Doctor who treated Kenchamma on 18-1-1961 even though he had been cited as witness, shows that the plaintiff was unwilling to place before the court the evidence regarding the stage of Kenchamma's illness which would have thrown sufficient light upon her physical and mental condition about three or four weeks prior to the date on which she was admitted into the hospital, is a circumstance which goes against the plaintiff.

VI. Similarly, the non-examination of Sri B. Nagaraj. Advocate, who is alleged to have issued notices on behalf of Kenchamma on 12-1-1961 and 17-1-1961 to the tenants occupying portions of the suit house, is a circumstance against the plaintiff. It is not known how the plaintiff was able to secure and produce before

Court the said exhibits which are office copies of Sri B. Nagaraj. Exhibits P-17 and P-18 purport to bear the signatures of Kenchamma. We find that the signature of Kenchamma in Exhibit P-17 is different from the signature of Kenchamma in Exhibit P-18 and that the signatures in Exhibits P-17 and P-18 appear to be different from the signatures of Kenchamma in Exhibits P-1, P-2 and P-3. It appears to be likely that the notices were got issued by somebody else on behalf of Kenchamma, It may be remembered here that Kenchamma had not sufficient money at all with her at that time to pay the lawyer and that is clear from the grant of Rs. 100/- made by the plaintiff by way of assistance to Kenchamma OP. 7-1-1961 as per Exhibit P-4 (c).

VII. One more circumstance requires to be noticed here. Defendants 1 and 2 had issued notice. Exhibit P-19, to the President and the Secretary of the plaintiff and to four others who were tenants in portions of the suit house challenging the genuineness and validity of the gift deed and the said notice was replied as per Exhibit P-20 on 18-2-1961 on which date Kenchamma was still alive. It is stated in the last paragraph of the reply notice Exhibit P-20 that Kenchamma had been contacted by the President and the Secretary of the plaintiff and her instructions had been sought by them regarding the notice that had been issued by defendants 1 and 2. In such a situation, ordinarily one would expect the plaintiff to have got the reply sent by Kenchamma herself or secured a statement from her in the presence of a Doctor or a Magistrate regarding the transaction affirming the gift. It may be remembered here that on that date Kenchamma was already in the hospital. No such action has been taken. But one thing that appears to be clear is that Kenchamma was under the influence of the authorities of the plaintiff even during that period. Her hospital charges were admittedly paid by the plaintiff.

VIII. The next circumstance which improbabilise the gift deed is its improvident and unconscionable nature. Kenchamma was a middle aged lady at the time Exhibit P-I came into existence. In Exhibit P-I it is stated that she was 45 years old on 28-12-1960. One other property which stood in the name of Muddappa had been sold in 1959. The only other property remaining was the suit house. According to the plaint allegations, the relationship between Kenchamma and defendants 1 and 2 had already become strained. In that situation is it probable that she would have executed a gift deed losing all control over the suit house without making provision for her own maintenance in the event of her getting cured of the disease she was suffering from. Could she not have made a will instead of a gift deed ? Would she not have introduced a condition that the plaintiff should maintain her in the deed ? Why would she decide to give away the suit house to the plaintiff without providing for dependants 1 and 2 who were residing with her all along when there was no compelling reason to do so ? These questions naturally arise for consideration and no convincing answers are available from the material on record. We are of the opinion that if she had voluntarily executed a gift deed or if she had sought advice from proper quarters in connection with the transaction, in all probability the nature of the document

would have been different from the one in question.

IX. The fact that there is no evidence showing that she removed herself from the suit house immediately on the completion of the gift deed on 28-12-1960, suggests that she did not intend delivering possession of the suit house to the plaintiff.

X. The recital in Exhibit P-I that movables of the value of Rs. 25,000/-were with defendants 1 and 2, appears to be an untrue statement for if that had been the case they would not have sold a house in 1959 to discharge a mortgage loan of Rs. 3,000/- and odd. The said recital is introduced apparently to support the plaintiff's case.

XI. We also feel that Exhibit P-I was not read out to Kenchamma before it was executed by her. According to P. W. 1 the scribe, what was read out to her was only the draft that was prepared three days before Exhibit P-I. P. W. 1 does not say in his deposition that Exhibit P-I was read out to Kenchamma after it was written. The trial Judge has committed an error when he observed that P. W. 1 had stated before Court that he had read out Exhibit P-I to Kenchamma which was a serious error committed by him in the circumstances of this case. The evidence of P. W. 2 on this point does not appear to be trustworthy. P. W. 3 who claims to be present, does not say that Exhibit P-I was read out. The other attestors though cited, were not examined. We have already observed that it is improbable that Exhibit P-I would have been written in the suit house on 28-12-1960. But it was argued that Exhibit P-I having been registered, it must be assumed that at least the Sub-Registrar must have read it out to her. We find it difficult to accept this contention. There is no endorsement of the Sub-Registrar to the effect that he read out the document to her. The Sub-Registrar is not examined as a witness. Further, as held by the Supreme Court in Rani Purnima Devi and Another Vs. Kumar Khagendra Narayan Dev and Another, that registration of a document may take place without the executant really knowing what he was registering.

15. Shri Raghavachariar argued that the degree of proof regarding the execution of the gift deed where the donor dies within a few days after its execution should be the same as required in the case of a will for the very same reason, namely, that the executant would not be available to give evidence as in the case of a will when it is sought to be established and relied upon the decision of the Supreme Court in H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others, in support of the above submission. It is unnecessary to express any opinion on the above submission in the circumstances of this case, for we are of the opinion that the execution of the deed of gift Exhibit P-I is not satisfactorily established even by applying the ordinary standards of proof of execution of documents.

16. In view of the foregoing we are of the opinion that the plaintiff has not established that Kenchamma executed the gift deed Exhibit P-I by adducing reliable evidence.

17. The next ground urged on behalf of defendants 1 and 2 is that Exhibit P-I had been obtained by the President and the Secretary of the plaintiff by exercising undue influence over Kenchamma and that Kenchamma had not voluntarily executed the said document. The Court while dealing with a case in which the validity of a gift is challenged on the ground that it is vitiated by undue influence, should bear in mind two factors, viz., whether the donor and donee stood in such a position that the donor was able to dominate over the will of the donee and whether the donor utilised the said position to obtain an unfair advantage over the other. Section 16(2) of the Contract Act provides a special presumption that in cases falling under Clauses (a) and (b) thereof, a person is deemed to be in a position to dominate over the will of the other. In particular clause (b) states that when a person makes a contract with a person whose mental capacity is either temporarily or permanently affected by reason of age, illness or mental or bodily distress, the former is deemed to be in a position to dominate over the will of the latter. Whereas ordinarily the burden of establishing undue influence is on the person alleging it, in a case falling under Sub-section (3) of Section 16 of the Act i.e., where a person is in a position to dominate the will of another enters into a transaction with him and the transaction either appears on the face of it or is proved to be unconscionable the burden of proving that it was not induced by undue influence lies on the person in a position to dominate the will of the other. In *Ladli Prasad Jaiswal Vs. Karnal Distillery Co. Ltd. and Others*, the Supreme Court explained the doctrine of undue influence as follows :--

"The doctrine of undue influence under the common law was evolved by the Courts in England for granting protection against transactions procured by the exercise of insidious forms of influence spiritual and temporal. The doctrine applied to acts of bounty as well as to other transactions in which one party by exercising his position of dominance obtains an unfair advantage over another. The Indian enactment is founded substantially on the rules of English common law. The first sub-section of Section 16 lays down the principle in general terms. By Sub-section (2) a presumption arises that a person shall be deemed to be in a position to dominate the will of another if the conditions set out therein are fulfilled. Sub-section (3) lays down the conditions for raising a rebuttable presumption that a transaction is procured by the exercise of undue influence. The reason for the rule in the third sub-section is that a person who has obtained an advantage over another by dominating his will, may also remain in a position to suppress the requisite evidence in support of the plea of undue influence."

In the instant case, it is clear from the evidence discussed above that Kenchamma was suffering from cancer on 28-12-1960 on which date it is alleged that Exhibit P-I was executed, that it was known to P. W. 3, the Clerk of the plaintiff and that she died of the said disease on 7-3-1961. It appears to us to be quite probable that Kenchamma knew that she was suffering from the said disease even for about a few weeks prior to 28-12-1960. Defendant 1 has stated in her deposition that Kenchamma was ill from November 1960. It is quite natural that Kenchamma must have been suffering from bodily and mental

distress on account of the dreadful nature of the disease, and as a consequence her mental capacity must have been affected during that period. The statement of defendant 1 in her evidence which is corroborated by D. W. 2 that Kenchamma's mental capacity had been affected during that period appears to be quite probable. During that period when Kenchamma's mental capacity was affected the plaintiff secured the gift deed from her. We are of the opinion that the case clearly comes under Clause (b) of Sub-section (2) of Section 16 of the Act. It is also quite clear that the transaction is of an unconscionable nature because Kenchamma had purported to part with all the known resources she had under Exhibit P-I and that she was driven to the necessity of applying for monetary assistance to the plaintiff to meet the medical bills immediately after the date of Exhibit P-I. Under these circumstances, Sub-section (3) of Section 16 would clearly be attracted throwing the burden of proving that the transaction in question was not induced by undue influence on the plaintiff who is deemed to be in a position to dominate over the will of Kenchamma by virtue of Sub-section (2) of Section 16 of the Act. On a careful assessment of the evidence adduced in the case, we are satisfied that the plaintiff has not discharged the burden of proving that the gift under Exhibit P-I was not induced by undue influence. It is argued by Sri S. Rangaraj, the learned counsel for the plaintiff, that defendants 1 and 2 had not disclosed how and in what manner such undue influence was brought to bear upon Kenchamma. We feel that there is no such obligation on them in this case to which Sub-section (3) of Section 16 of the Act is applicable. It is well to remember here the observations of the Supreme Court in paragraph 25 in *Ladli Prasad Jaiswal Vs. Karnal Distillery Co. Ltd. and Others*, that the reason for the rule in the third sub-section in Section 16 is that a person who has obtained an advantage over another by dominating his will may also remain in a position to suppress the requisite evidence in support of the plea of undue influence. The way in which we have approached and dealt with the evidence in this case, is in accord with the decision of the Supreme Court in *Lakshmi Amma and Another Vs. Talengalanarayana Bhatta and Another*, in which the Supreme Court was concerned with a settlement deed under which the settlor, when he was suffering from diabetes and other ailments, had purported to settle all his property on one of the grandsons to the exclusion of his own sons and other grandsons without making sufficient provision for the maintenance of his third wife and debarring himself from dealing with the property during his lifetime. One additional factor available in this case is that Kenchamma was an illiterate lady who knew only how to sign her name and had no independent advice. Further, the nature of advice said to have been given to her by P. W. 4 as alleged in the plaint is kept back from the Court.

18. One other argument of Sri Rangaraj, the learned counsel for the plaintiff, requires to be noticed here. He argued that neither the President nor the Secretary of the plaintiff derived any advantage personally from the transaction and that it was the plaintiff who was benefited thereby; He, therefore, submitted that Section 16 of the Act could not apply. We cannot accede to the above

submission. It is not correct to hold that Section 16 is attracted only when the party in a position to or deemed to be in a position to dominate the will of the other derives a personal advantage from the transaction. The said section is also applicable to case in which the executant is made to part with his property in favour of another in whom the person in a position to or is deemed to be in a position to dominate the will of the other is interested provided the other requirements of the section are satisfied. In coming to the above conclusion, we have relied upon the decision of the Allahabad High Court in Parbhu Lal Vs. Sital Prasad, in which the facts were as follows: The plaintiff who on the death of the widow of his brother became entitled to the estate of the deceased, found himself resisted in his claim by wealthy relatives. He was a man without means. The defendant took him to his house, kept him there, found him all the money for the purpose of carrying on his litigation with his relatives, in which the plaintiff succeeded. While the litigation for mutation of names in respect of the property was pending in the revenue Court and while the plaintiff was residing with the defendant, he executed a sale deed in favour of defendant's brother for the nominal consideration of Rs. 9,500/- on half the property he claimed, and again, shortly after the mutation case had terminated in his favour, he executed a deed of endowment of the remaining half in favour of a temple founded by the ancestor of the defendant in which the defendant was interested, and the result was that plaintiff was left as poor as he was when he first came into the defendant's hands. Plaintiff sued for cancellation of the deed of endowment on the ground that the same had been obtained from him by the exercise of undue influence and by means of fraud and obtained a decree. On appeal by the defendant it was held that looking at all the facts, such a relation between plaintiff and defendant in the course of the year 1885 had been established as to cast upon the latter the obligation of satisfying the Court that the transaction, which was given effect to by the deed of endowment, was an honest and bona fide transaction and one that ought to be upheld even though the advantage under the transaction was not derived by the defendant himself. Hence, the fact that in the present case the benefit is derived by the plaintiff in which its President and Secretary were interested and they entered into the transaction with the donor is enough to attract Section 16 of the Act. We are satisfied from the evidence placed before the Court that the President and Secretary of the plaintiff who were in a position to dominate or were deemed to be in a position to dominate the will of Kenchamma, have used their position to obtain an unfair advantage over her and to secure the gift deed Exhibit P-I in favour of the plaintiff in which they were interested.

19. After giving our anxious consideration to all the facets of the case presented before us, we hold that the execution of the gift deed Exhibit P-I is not duly proved and even if it is executed by Kenchamma, she had done so on account of the undue influence, and, therefore Exhibit P-I is void. The suit of the plaintiff for declaration of its title should fail.

20. We feel that it is unnecessary to go into the question whether the suit

property was held jointly by Kenchamma and defendants 1 and 2 in this appeal. We express no opinion on the said question.

21. Before parting with this case, we wish to make one observation in respect of the way in which the suit was tried in the court below. P. W. 1 was examined before the trial Court on 16-11-1962, P. W. 2 on 26-9-1963, P. W. 3 on 3-12-1963. P. W. 4 on 23-1-1964, D. W. 1 on 4-3-1967 and 5-4-1967 and D. W. 2 on 14-11-1967. The case was posted for arguments concluded on 7-3-1968. Between 1962 to 1968, four Judges dealt with the case and the judgment was delivered by a Judge who had not recorded any oral evidence at all in the case. We feel that the procedure followed by the Court below Should be discouraged. As far as possible the trial of suits should go on from day to day and the adoption of such a procedure adds to the efficiency of administration of justice. Apart from the trial Court being able to follow the evidence recorded carefully even the counsel and parties will be able to concentrate more effectively on the examination and cross-examination of witnesses if there are no long intervals between the examination of one witness and another. It is relevant to mention here that lately we have come across a large number of cases in which the interval between the date of examination of the first witness in a suit and the date of examination of the last witness in the suit, is in the order of four or five years and in many of them the trials have gone on before three to four Judges. In that situation, it is quite natural that all the sanctity that is ordinarily attached to the findings recorded by the trial Judge on the basis of appreciation of evidence adduced in the case, would get denuded. It is hoped that the trial Courts in the State would as far as possible take steps to avoid such inordinate delays in the trial of suits.

22. In the result, the appeal is allowed, the judgment and decree passed by the Court below is set aside, and the suit filed by the plaintiff dismissed with costs of this Court as well as the Court below.