

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE S.V.BHATTI

&

THE HONOURABLE MR. JUSTICE BECHU KURIAN THOMAS

TUESDAY, THE 30TH DAY OF JUNE 2020 / 9TH ASHADHA, 1942

R.F.A (INDIGENT) No.306 OF 2019

AGAINST THE JUDGMENT IN OS No.17/2015 DATED 18-08-2017 OF
SUB COURT, MUVATTUPUZHA

CMCP No.84/2017 OF HIGH COURT OF KERALA,ERNAKULAM

APPELLANT/1ST DEFENDANT:

MARY
AGED 72 YEARS, W/O. CHACKO,
PLAPPILIL,
ARAKKUZHA VILLAGE AND KARA,
MUVATTUPUZHA TALUK,
ERNAKULAM DISTRICT.

BY ADV. SRI.ALIAS M.CHERIAN

RESPONDENTS/PLAINTIFF & 2ND DEFENDANT:

1 LEELAMMA
AGED 62 YEARS, D/O. IYPE,
W/O.JOSEPH PLAPPILLIL,
ARAKKUZHA VILLAGE AND KARA,
MUVATTUPUZHA TALUK,
NOW RESIDING AT EDAVAKKANDATHIL,
KOLANI KARA,
THODUPUZHA TALUK AND VILLAGE,
REPRESENTED BY HER DAUGHTER
AS NEXT FRIEND MANJU,
AGED 38 YEARS, W/O. SEBASTINE,
RESIDING AT THE SAME ADDRESS AS STATED ABOVE.

R.F.A.(Indigent) No.306/19

-:2:-

2 AANI ,
 AGED 63 YEARS , W/O. PATHIKKULAM JOSE ,
 OKKAL KARA ,
 CHELAMATTOM VILLAGE , KUNNATHUNADU TALUK ,
 ERNAKULAM , PIN-683 550 .

 BY LEELAMMA (PARTY IN PERSON)
 SRI.RAMANAND , SR. GOVT. PLEADER

 THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON
15-06-2020 , THE COURT ON 30-06-2020 DELIVERED THE
FOLLOWING :

"C.R."

JUDGMENT

Dated this the 30th day of June, 2020

Bechu Kurian Thomas, J.

Total deprivation, through a partition deed and a release deed, of the property of a deaf and dumb sister forced her to approach the Court to restore her rights in her property and claim partition. Suit having been decreed, the eldest sister – the beneficiary under the two documents, has come up in appeal.

2. Mary, Leelamma and Aani are sisters. Mary is the eldest and Aani, the youngest. Admittedly, Leelamma, the second amongst the sisters, is a deaf and dumb person. She is also illiterate. Mary claims to have brought up Leelamma under her care and custody, conducted her marriage and that of her daughter too. Leelamma's conjugal life with her husband did not last long as she came back along with her daughter to Mary's care, on account of difference of opinion with her husband. Even after the death of their mother, Leelamma continued to live with Mary.

3. On 9-3-2011, Leelamma through her daughter Manju, as

next friend, filed a suit as an indigent person before the Munsiff Court, Muvattupuzha, which was later transferred and re-numbered as O.S. No.17 of 2015 on the files of the Subordinate Judge, Muvattupuzha. Alleging that the partition deed (Ext.A1) and the release deed (Ext.A2) executed on 5-1-2011 and 10-1-2011 respectively, were on account of fraud and undue influence exerted over the plaintiff, she sought for setting aside those two documents and for a declaration that the said deeds shall not affect the plaintiff's right over her properties. For easier reference, the parties are referred to in this judgment, as they were arrayed in the trial court.

4. Ext.A1 is a partition deed, partitioning the 65 cents of property between the three sisters. As per the said deed, the properties left behind by their mother, having an extent of 65 Cents, was divided as two schedules - A and B. 1st defendant-Mary was allotted A schedule, comprising 60 cents, while B schedule, comprising just 5 cents, was allotted to the share of both plaintiff and the 1st defendant. Aani, the youngest sister and 2nd defendant, recited in the document that she is relinquishing her share in the properties. Thus, in short, when plaintiff received 2.5 cents of property under Ext.A1, the 1st defendant received 62.5 cents of property. Ext.A2 is a release

deed executed within 5 days of execution of Ext.A1. Through that document, plaintiff is purported to have released her entire rights in the above referred 2.5 cents of property in favour of Mary. Thus Mary, the 1st defendant, became the absolute owner of the entire 65 cents.

5. When plaintiff's daughter visited her during the last week of January 2011, plaintiff conveyed through gestures, that she had been taken to some place to give her signature and that her thumb impression was also taken. On enquiry, plaintiff's daughter understood that Ext.A1 and A2 were created and that all rights in the property had been released by the plaintiff in favour of the 1st defendant, without even receiving any consideration. Plaintiff thus alleged that, Exts.A1 and A2 were created by undue influence, fraudulently, dishonestly and without her knowledge or consent.

6. The defendants filed separate written statements and controverted all allegations in the plaint. The 1st defendant questioned the right of the next friend to file the suit and also denied the incapacity of the plaintiff as far as her ability to comprehend and do things by herself was concerned and also denied the allegation of fraud, cheating and undue influence exerted by the defendants over the plaintiff. On the contrary, the

1st defendant stated that plaintiff and her daughter were looked after by the 1st defendant and her husband and they even got plaintiff's daughter married off. 1st defendant pleaded that plaintiff had agreed to execute the partition deed and that the documents were executed with full knowledge and consent of the plaintiff and also that she had received consideration for releasing her half right over the schedule property as per Ext.A2. The 2nd defendant, adopted the contentions in the written statement of the 1st defendant and further stated that the impugned documents were validly executed and that they are binding on the plaintiff.

7. In order to prove the plaint averments, plaintiff examined herself, through an interpreter appointed by the court, as PW1. She further examined the Sub-Registrar who registered the impugned document as PW2 and also her daughter – the next friend as PW3 and marked Ext.A1 to Ext.A6. The defendants examined the 1st defendant as DW1 and marked Ext. B1 to Ext.B8. The 2nd defendant did not mount the witness box.

8. The learned Subordinate Judge, after a detailed consideration of the facts and circumstances arising in the case, decreed the suit by declaring that the documents Exts.A1 and A2 are null and void with respect to the share of the plaintiff and

also directed the property to be divided into three, by metes and bounds, and declared that the plaintiff is entitled to get one third share. 1st defendant has come up in appeal.

9. We heard the learned counsel for the appellant Sri Alias M. Cherian and also Smt. Manju, who is the next friend of the plaintiff and her daughter, who argued in person.

10. Sri. Alias M. Cherian, learned counsel, assiduously argued that appointment of a next friend in the circumstances of the case was clearly illegal in as much as plaintiff was neither of unsound mind, nor had any infirmity of mind entitling her to be represented by a next friend. He submitted further that failure of the trial court to raise a plea as regards the competence of the next friend has rendered the judgment perverse. The learned counsel further argued that the plaint lacks in specific pleading regarding the allegation of fraud and undue influence. He also pointed out that the documents were executed undoubtedly for consideration and also that there was nothing wrong in execution of the said documents.

11. Smt. Manju submitted that the plaintiff is wholly incapable of taking care of herself and does not have even the capacity to comprehend things either in part or in full, which necessitated the appointment of the next friend on an

application submitted. It was pointed out that since the plaintiff herself was examined as a witness, the contentions regarding the irregularity in the appointment of the next friend has no legs to stand. She also pointed out that the plaintiff has been deprived of all property by the documents impugned in the suit and albeit the availability of many relatives, including plaintiff's own daughter, none of them were made witnesses to the transaction/deed all of which cast doubts on the veracity of the documents. The partition is unconscionable and was executed without free consent after exerting undue influence and by playing fraud.

12. In view of the aforesaid facts and arguments raised, the following points arose for determination in this appeal.

- (1) Whether appointment of a next friend for the plaintiff was proper in the facts and circumstances of the case?
- (2) Whether Ext.A1 and Ext.A2 documents are null and void on account of undue influence or fraud or both?
- (3) Whether plaint schedule property is liable to be partitioned, if so to what extent?
- (4) Whether the trial court judgment is liable to be affirmed, modified or reversed?
- (5) Who shall bear the costs?

Point No.1

13. Order 32 of the Code of Civil Procedure 1908 deals with

Suits by or Against Minors and Persons of Unsound Mind. Appointment of a next friend for a person with unsound mind is dealt with in Order 32 Rule 15 of the Code Of Civil Procedure 1908 and the same is extracted as below:

“O.32 R.15. Rules 1 to 14, (except rule 2-A) to apply to persons of unsound mind.- Rules 1 to 14 (except Rule 2-A) shall, so far as may be, apply to persons adjudged, before or during the pendency of the suit, to be of unsound mind and shall also apply to persons who, though not so adjudged, are found by the Court on enquiry to be incapable, by reason of any mental infirmity, of protecting their interest when suing or being sued.”

14. Though the heading of the section mentions only persons of unsound mind, a reading of the above extracted provision will show that it deals also with persons of mental infirmity, who are, by the said reason, incapable of protecting their interests, except with the assistance of a next friend, when suing or being sued. Legislature has used two terms in the same provision – ‘unsound mind’ and ‘mental infirmity’. Certainly, both are not intended to cover the same situation. This is all the more so since, the word mental infirmity was not part of the statutory provisions in Section 463 of the Civil Procedure Code of 1882, but was inserted in the corresponding provision of Order 32 Rule 15

of C.P.C 1908.

15. While interpreting a statutory provision, Courts start with the presumption that every portion of a statute has some purpose and also that the presence of each word in a provision, is necessary to effectuate that purpose. Legislature does not use words in surplusage and every word in a statute must be given due meaning and application. It is also not a sound principle of construction of statutes to brush aside words in a statute as being inapposite surplusage. Reference can usefully be made to **J.K. Cotton Spinning and Weaving Mills Co. Ltd. v. State of UP** (AIR 1961 SC 1170), **Aswini Kumar Ghose & Another v. Arabinda Bose & Another** (AIR 1952 SC 369). Viewed in the above perspective and the principles of interpretation, we have no doubt that, the word 'mental infirmity' has been used in Order 32 Rule 15 C.P.C., to convey a meaning, which is wider and which would encompass something more than what the word 'unsoundness of mind' would cover.

16. The term 'mental infirmity' has not been defined in the C.P.C, 1908. In the context in which the term is used in Order 32 Rule 15 C.P.C., it is capable of taking a meaning different from that of unsoundness of mind. What would that meaning be?

17. Cognitive skills are used to comprehend, process,

remember, and apply incoming information to create an external reaction. The cognitive skills are the core skills a person's brain uses to think, read, learn, remember, reason, and even pay attention. The cognitive functions enable us to orient ourselves in the world, making us aware of the various dangers and rewards, assimilate the main sources of pleasure and pain, and are also the means by which we receive information from others. An infirmity in the cognitive faculty which impairs the skills of perception, discernment, comprehension and thought, will necessarily have an impact on the mind. A hearing impaired person becomes dumb on account of the impairment of his skills of perception, discernment, comprehension thought and response. Living as a deaf and dumb person, has a debilitating effect on the mental faculties of comprehension, thought, communication and even response. These faculties when affected will have an effect on the person's capacity to protect his civil rights. In the matter of communicating his views about his civil rights, a deaf and dumb person will be weak. If the impairment of hearing is to such an extent that it is almost difficult to communicate with that person, or even comprehend any reply given by him, except by understanding the signs by which one communicates with him, then there arises a weakness

of the mind. This weakness, akin to an infirmity, makes it almost impossible for any person, other than those intimately acquainted with that person or a trained interpreter, either to reach his mind or to interpret it. When the infirmity of hearing is to such an extent that no one, other than those closely associated with that person or an interpreter alone is able to communicate and reach that person's mind, then, that infirmity could be regarded as a mental infirmity for the purpose of Order 32 Rule 15 of the C.P.C. Such a person though not mentally unsound, is, for the purpose of Order 32 Rule 15 of the Code of Civil Procedure, 1908, a person who is mentally infirm.

18. We are fortified in the above conclusion by three decisions of different High Courts, including one of Kerala High Court. In **Nanak Chand and Ors. v. Banarsi Das and Ors.** (126 Ind.Cas. 579 = AIR 1930 Lah. 425), while dealing with the case of a deaf and dumb person under Order 32 Rule 15, it was held that *"it is only by means of signs that one can communicate with him and his replies can be given only by means of signs, and it further appears that only a few persons who know him intimately are capable of making him understand by signs what they desire to convey to him or to follow his replies given in a similar manner. Under the circumstances, I should say that it is*

almost impossible for any person not intimately acquainted with him either to reach his mind or to interpret it. No definition of the expression 'mental infirmity is to be found in any of the books on the subject dealing with mentally defective persons, nor did the counsel on either side refer to any authorities on the subject; the case, therefore, is one of first impression, and after giving the matter my careful consideration I am of the opinion that Rule 15, Order 32, is intended to cover the case of persons like Dina Nath who are absolutely deaf and dumb and on that account are incapable of receiving any communications or of communicating their wishes or thoughts to others."

19. In **In Re: Periaswami Goundan** (AIR 1954 Madras 810) the Madras High Court, considering the difference in the wording of the Civil Procedure Code, 1882 and that in Code of Civil Procedure, 1908, wherein the word mental infirmity was added apart from unsoundness of mind held that the scope of the rule had been enlarged and that it covers case of persons incapacitated from protecting the interest by reason of him being a deaf mute also.

20. Similarly, in **Raveendran v. Sobhana** (2008 (1) KLT 488), a Bench of this court considered the question whether a deaf and dumb person can be said to be a person suffering from

mental infirmity. It was held that *“mental infirmity is not mental disorder. It is not mental illness or unsoundness of mind or insanity. It only indicates the weakness of intellect and in the particular context of Order 32 Rule 15, weakness of intellect to the extent of making a person incapable of protecting his interest in the litigation. Thus a person who is not of unsound mind may, yet be a person who is mentally infirm, thus entitling him to the protection under Order 32 Rule 15. Idiocy or unsoundness of mind indicates an abnormal state of mind, whereas mental infirmity only indicates weakness of mental strength. The scope of enquiry under Order 32 Rule 15 is the assessment of the capability of a person either of unsound mind, or suffering from any mental infirmity deafness or dumbness as to whether such defects are infirmity or weaknesses would render a person incapable of communicating his views, wishes or thoughts. Thus, the legal position is that mental infirmity in the context of Order 32 Rule 15 is not mental disorder, insanity or mental illness. Weakness of mind due to any reason, making a person incapable of protecting his interests, is sufficient to unfold the protective umbrella under Order 32 Rule 15. Such infirmity can also be caused by physical defects like deafness or dumbness, whereby a person is made incapable of*

communicating his wishes, views or thoughts to others who are not acquainted with him".

21. Sri. Alias M. Cherian contended vehemently, that, the enquiry contemplated under Order 32 Rule 15 was not carried out by the trial court and the omission has vitiated the entire proceedings before trial court and the impugned judgment as well. According to him, failure of the trial court to adjudicate upon the capability of the plaintiff to protect her interests has resulted in a serious error in the procedure adopted. The counsel referred us to several decisions of this Court, including **Rasheeda v. Nazeer** (2011 (3) KLT 218), **Balakrishnan v. Kalliyani** (1957 KLT 268), **Cleetus v. South Indian Bank** (2007 (3) KLT 868) and canvassed that it is obligatory on the part of the court to conduct a judicial enquiry as to the capacity of the plaintiff, especially since grant of such a permission to the next friend to institute a suit would certainly affect the civil rights of the plaintiff.

22. Even though the aforesaid submissions were impressive on first blush, on going through the records we find that factually there is a difference in this case on a few material circumstances. These material differences persuade us to first appreciate on the happenings in the court below, instead of applying the decisions

relied on by Adv.Sri.Alias M.Churian. Records reveal that a separate application was filed by the next friend, who is none other than plaintiff's own daughter, as I.A. No. 995 of 2011, on the date of filing of the suit itself, seeking permission to institute the suit, through a next friend. The said application was allowed after taking a composite statement for appointment of a next friend as well as for permission to sue as an indigent person. The said order was never challenged by the defendants. Accepting that I.A. No.995 of 2011 was allowed at the numbering stage, when the defendants were yet to appear, still, the need for appointment of a trained interpreter for helping the plaintiff to give evidence as PW1, that too in the presence of the 1st defendant, was felt and understood by the court and the same was also not objected to by the defendants. Further, at the time of trial, the plaintiff while being examined as PW1 deposed through the interpreter, that, she has instituted the suit and also produced Ext.A3 to prove that she is deaf and dumb and there was no cross-examination even on that aspect. Plaintiff's ratification before the court during her deposition, regarding the filing of the suit, renders all technical objections relating to the defects of appointment of a next friend and of the next friend's eligibility to institute the suit, otiose. In such circumstances, we

reject the arguments of the appellant against the appointment of a next friend and hold that the appointment of a next friend in the facts and circumstances of the case was proper.

Point No.2

23. The learned counsel for the appellant urged that the burden of proof as regards undue influence and fraud is entirely upon the plaintiff under Sections 101 and 102 read with Section 111 of the Evidence Act and specific pleading is essential, which is lacking in the pleadings. It was also argued that the essential elements of undue influence or fraud have not been proved and the suit ought to have been dismissed.

24. There is no dispute with the proposition that the burden of proof in respect of the plea of fraud, undue influence or coercion is upon the person who alleges the same. The initial burden can be discharged only by putting forth the necessary plea in the pleadings and thereafter by adducing evidence in accordance with law. Order 6 Rule 4 of the Code of Civil Procedure, 1908 specifies that the party relying upon fraud, undue influence and other category of cases mentioned therein, must specify particulars in the pleading. The allegations must be fully stated, so that, the issues of fraud and undue influence can be decided on the particulars pleaded and evidence adduced by

such party. There cannot be any departure from what has been ordained under Order 6 Rule 4 C.P.C. and full particulars must be laid down in the pleadings itself. The cognate vices mentioned in Order 6 Rule 4 C.P.C. must be separately pleaded with specificity, particularity and precision. A general or vague allegation is not sufficient to build up a case of fraud or undue influence. The intention underlying Order 6 Rule 4 C.P.C. is that the opposite party is to be put on sufficient notice as to the case which he is called upon to meet. The aforesaid propositions were laid down by the Supreme Court in **Bishundeo Narain and Another v. Seogeni Rai and Others** (AIR 1951 SC 280), **Afsar Sheikh and Another v. Soleman Bibi and Others** (1976) 2 SCC 142) and **General Manager, Electrical Rengali Hydro Electric Project, Orissa and Others. v. Sri. Giridhari Sahu and Others** (2019) 10 SCC 695).

25. A reading of the plaint makes it clear that there are specific pleadings relating to fraud and undue influence and the same are not vague at all. In paragraph 5 of the plaint, it is mentioned that the defendants and their immediate relatives had taken the plaintiff to someplace twice and without realising the significance of her acts, the plaintiff, without her consent, was forced to sign and put thumb impression, under their insistence.

It was also stated that two documents were created for the selfish interests of the 1st defendant by exploiting the incapacity of the plaintiff to decipher things, and by cheating and committing breach of trust, with the fraudulent intention of personal aggrandizement of the 1st defendant. It was also averred that the plaintiff does not have the capacity or knowledge or capability to give any instructions for preparation of documents of title and had in fact never given any such instructions and nor had she obtained any consideration for releasing her rights, nor has she released such rights in her property. The plaint also contained averments that the defendants and their immediate relatives have all conspired together to create and register the two documents and plaintiff had never given any such instructions to any person and no one had ever enquired with the plaintiff about giving any such instructions and even the Sub Registrar had not sought for the consent of the plaintiff before the signature was obtained. The pleadings, narrated above clearly make out a case of fraud and undue influence and hence the contention of the appellant that the plaint lacks the necessary pleading is without any basis and accordingly rejected.

26. The next question we are confronted with is, whether

the document Exts.A1 and A2 ought to be declared null and void. For this purpose, it is necessary to extract provisions of Section 10 of the Indian Contract Act, 1872, hereinafter referred to as 'Contract Act' for short, which reads as follows;

“10. What agreements are contracts.- “All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

Nothing herein contained shall affect any law in force in India and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents.”

27. Free consent, competency to contract, lawful consideration, lawful object and agreement not declared to be void, are the main ingredients for a valid contract. It is a consensual act and the parties are free to settle any terms as they please. If both parties have consented to the agreement, still, consent of one of them may not be said to be free if the same had been obtained by coercion, undue influence or even fraud. This is evident from Section 13 and Section 14 of the Contract Act, which defines 'consent', and 'free consent'.

28. In order to ascertain whether consent for partition and for the release deed have been obtained by undue influence or

fraud played by the defendants upon the plaintiff, it is apposite to comprehend the meaning of the two terms. 'Undue influence' is defined in Section 16 while Section 17 defines 'fraud' and both sections are extracted as below;

“S.16. Undue influence defined- (1) A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

2. xxxx xxxx xxxx xxxx

3. Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall be upon the person in a position to dominate the will of the other.

Nothing in this section shall affect the provisions of section 111 of the Indian Evidence Act, 1872 (1 of 1872).

S.17. Fraud defined - 'Fraud' means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:

- (1) the suggestion, as a fact, of that which is not true,
by one who does not believe it to be true;

- (2) the active concealment of a fact by one having knowledge or belief of the fact;
- (3) a promise made without any intention of performing it;
- (4) any other act fitted to deceive;
- (5) any such act or omission as the law specially declares to be fraudulent.

Explanation xxxx xxxx”

29. Undue influence is not always capable of direct proof and must depend on conclusions drawn from the nature of transaction, the relation of parties and the attendant circumstances. No single circumstance is conclusive to accept or refuse the presence of undue influence. It is a cumulative effect of all the circumstances that result in a transaction being vitiated on the ground of undue influence. 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 applies 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 concept behind Section 16 of the Contract Act is that, a person who is in a position to dominate the will of another, by reason of his authority or fiduciary relation over the

other, or on account of mental or bodily distress, uses that position to create an unfair advantage over the other in a contract, then, such a contract will not be one regarded as having been entered into with free consent. In the matter of proof of undue influence, a statutory presumption is created, whereby, the transaction appears to be unconscionable, the burden to prove that there was no undue influence shall be upon the party who was in a position to dominate the will of the other.

30. It has been expounded that there are three stages which the Courts must identify and consider while dealing with a case of undue influence. First thing to be considered is, whether the plaintiff or the party seeking relief on the ground of undue influence has proved that the relationship between the parties to each other are such that one is in a position to dominate the will of the other. Up to this point 'influence' alone is made out. Once that position is substantiated, the second stage has reached namely, the issue whether the transaction has been induced by undue influence. That is to say, it is not sufficient for the person seeking the relief to show that the relationship of the parties have been such that one naturally relied upon the other for advice and the other was in the position to dominate the will of the first in giving it. More than mere influence must be proved so

as to render influence in the language of the law, 'undue'. Upon a determination of the issue at the second stage, a third point emerges, which is of the onus probandi. If the transaction appears to be unconscionable, then the burden of proving that it was not induced by undue influence lie upon the person who was in a position to dominate the will of the other. Error is almost sure to arise if the order of these propositions are changed. The unconscionableness of the bargain is not the first thing to be considered. The first thing to be considered is whether the relation of the parties, was such as to put one in a position to dominate the will of the other. The above three stages principle was expounded by the Privy Council in **Raghunath Prasad v. Sarju Prasad and Ors.** (AIR 1924 PC 60), and followed by the Supreme Court in **Afsar Sheikh and Another v. Soleman Bibi and Others** (1976) 2 SCC 142) and **Joseph John Peter Sandy v. Veronica Thomas Rajkumar and Another** (2013) 3 SCC 801).

31. The very case of the 1st defendant was that PW1 was all along looked after by 1st defendant and her husband. PW1 also deposed that she is scared of 1st defendant and also that she is deaf and dumb and even illiterate. PW3 deposed that having no other way they had to reside with the 1st defendant and her

husband, under the dictates of the 1st defendant. There was absolutely no cross-examination on this facet of their evidence. Thus, it can be held that the plaintiff has proved that the relationship between the parties to each other was such that 1st defendant was in a position to dominate the will of the plaintiff.

32. Regarding the second point, in her deposition, PW1 had specifically stated that she is illiterate and cannot read or write and that she had not agreed to give her rights in her property to any person and that on the first occasion she was taken to a place under the guise of taking photographs and a fat person forcibly took her thumb impression, while on the second occasion she was taken to someplace under the guise of checking her blood. She had no idea that any contract was entered into, and on both occasions no amounts were given to her. She further deposed that she wants her property, which belonged to her mother who had told her to construct a house in the property she gets. During cross-examination, PW1 deposed that even after returning from the place, none had informed anything to her. PW3, who is the next friend and the daughter of PW1 in her proof affidavit, stated that though her mother's family had more than three and a half acres of property, the 1st defendant's husband had managed to convert all of it as his own

under some pretext or the other, and also that after the plaintiff conveyed through gestures and facial expressions that signatures and thumb impressions had been obtained twice after taking her to someplace, PW3 carried out enquiries and came across Exts.A1 and A2. She also stated that plaintiff had utmost faith in the defendants and never imagined that they would ever exploit the plaintiff, who is deaf and dumb. Even though both the above witnesses were cross-examined seriously, nothing was brought out to contradict the statements in chief-examination. PW2, who was the Sub-Registrar at the time of registration of Ext.A1 and A2, deposed that he does not remember as to whether he had explained anything to the parties to the document or as to whether the plaintiff was a disabled person or as to whether anyone had informed him that one of the parties to the document was a disabled person. The non-disclosure of the disability of plaintiff as deaf and dumb in Ext.A1 and Ext.A2 would certainly go a long way in appreciating the alleged free consent given by PW1 for execution and registration of Ext.A1 and Ext.A2. The method and extent of verification by the Sub-Registrar would have been definitely different, had this stark truth been brought on the documents executed as Ext.A1 and Ext.A2. Had it been informed, he says that the procedure for that

purpose would have been adopted and he would have explained to such persons the details of the transaction. The evidence indicates the use of the influence unduly.

33. Under Ext.A1 partition deed, 62.5 cents of property is allotted to the share of 1st defendant, while only 2.5 cents of property is allotted to the share of the plaintiff towards her admitted 1/3rd share which would otherwise be equivalent to 21.66 cents of property. Five days later, even that 2.5 cents of property is released in favour of the 1st defendant, leaving the plaintiff with no property. Apparently, the transaction is ex facie unconscionable and no reasons are recited in the documents to explain this unconscionable nature of the transactions. The 1st defendant failed in discharging her burden or onus in any manner. The only contention raised is that, plaintiff and her daughter were looked after by the 1st defendant and hence the properties were given to her. Taking care of ones own sister is a gratuitous or magnanimous act for which it cannot be believed that the entire property will be given away. The defendants have miserably failed in proving good faith in the transaction and on the other hand, it is proved that the documents Exts.A1 and A2 have been executed exploiting the position of dominance which the 1st defendant wielded over the plaintiff. The Plaintiff's

daughter was also not taken into confidence by making her a witness to Ext.A1 or Ext.A2, which only adds to the doubts in the mind of this Court on the free consent and fair procedure followed either at execution or during registration of Ext.A1 and Ext.A2. In such circumstances, we are of the firm view that the transactions in Ext.A1 and Ext.A2 relating to the share right of the plaintiff are void on the principle of undue influence.

34. Adverting to the allegation of fraud, the evidence clearly shows that the defendants had clearly concealed from the plaintiff the fact that Ext.A1 deprives her of her property and that while putting her thumb impression and signature, she was actually executing a partition deed. She has deposed that she was taken to someplace under the guise of taking her blood sample. Ext.A1 and Ext.A2 do not mention anywhere, either in the recitals or even in the Preamble that one of the parties to the document is a deaf and dumb person. The recitals in Ext.A1 will go to show that the property is divided into two schedules and that 'A' schedule was allotted to the plaintiff and 'B' schedule allotted to the plaintiff, as well as the 1st defendant. It recites that the 2nd defendant has relinquished her rights in the property. The manner in which the division of property is recited in Ext.A1, creates an impression in the mind of the court that it was written

in a shrewd manner so that at first glance or on a quick look one would not be able to fathom the inequitable partition between the plaintiff and 1st defendant. Nowhere does the document recite as to why more than 95% of the property (62.5 cents out of a total of 65 cents) left behind by mother of the parties to the document has been allotted to the share of the 1st defendant, while the plaintiff is left with a meagre 4% (2.5 cents). Even the 2.5 cents allotted to the plaintiff was released in favour of the 1st defendant, within a period of five days of execution of Ext.A1. Though the document mentions payment of Rs.2.5 lakhs as consideration for the said transaction, it has come out in evidence that no such payment was received by the plaintiff. Thus, the entire property of 65 cents have, by Exts. A1 and A2, become the absolute property of the 1st defendant, that too without payment of consideration or legal consent. Fraud is evident in the transaction and it has been deployed to exploit a hapless lady of her properties.

35. In this context, reference to Section 34 of the Indian Registration Act, 1908 and the Rules made thereunder may be apposite. Under Section 34(3) of the Indian Registration Act, Registering Officer is bound to enquire whether the document was executed by the person whom it purports to have been

executed and also satisfy himself as to the identity of the persons appearing before him and also as to whether they have executed the document. Under Rule 71 of Registration Rules (Kerala), it is provided that *"A document executed by a Person who is unable to read shall be read out and, if necessary explained to him. A document written in a language not understood by the executing party shall, in like manner, be interpreted to him. When a party to be examined is deaf, dumb or blind recourse must be had to the means by which he makes himself understood."* Nowhere in Ext.A1 or Ext.A2 has it been mentioned that one of the parties to the document is deaf and dumb. Had it been so mentioned, the Sub-Registrar would have read out and explained the contents of the document to such party. This court finds that the failure to inform the Sub-Registrar about the deafness and dumbness of one of the parties to the document was a deft method in playing fraud.

36. Ext.A1 and Ext.A2, to the extent it has interfered with the rights of the plaintiff's share in the said property is vitiated by undue influence and fraud. We concur with the findings of the learned Subordinate Judge that Ext.A1 and Ext.A2 have been executed as against the plaintiff through undue influence and fraud and the same is null and void as against the plaintiff.

Point Nos.3 to 5

37. In view of our findings in point No.2 above, the plaint schedule property is liable to be partitioned. Even though the trial court observed that as far as the share of the 2nd defendant is concerned, Ext.A1 document is valid, towards the concluding paragraphs, there is an observation that DW1 is entitled to get her one share from the plaint schedule property. The said finding needs appropriate modification by this Court. Since the 2nd defendant had relinquished her share in the property in favour of the 1st defendant, and even confirmed it in her written statement in this case, the 1st defendant will be entitled to get 2/3rd share, while plaintiff will be entitled to get 1/3rd share in the entire scheduled property.

38. In the above circumstances we do not find any reason to interfere with the judgment of the Subordinate Judges Court, Muvattupuzha in O.S No. 17 of 2015, as regards the share of the plaintiff is concerned. As far as the share of the 1st defendant is concerned, we modify the judgment and declare that she is entitled to 2/3rd share in the plaint schedule property, and hold that the 2nd defendant is not entitled to any share. The 1st defendant shall bear the costs of the appeal also. The copy of the decree and judgment shall be forwarded to the District Collector

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concerned for realisation of court fee from the 1st defendant in the suit, as well as in appeal.

The appeal is allowed in part.

Sd/-

**S.V.BHATTI
JUDGE**

Sd/-

**BECHU KURIAN THOMAS
JUDGE**

vps