

Kunhalima vs Mohammed

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Court : Kerala

Decided On : Mar-15-2024

Judge : Honourable Mr.Justice C. Jayachandran

Appeal No. : RSA/408/2006

Appellant : Kunhalima

Respondent : Mohammed

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE C. JAYACHANDRAN FRIDAY,
THE 15TH DAY OF MARCH 2024 / 25TH PHALGUNA, 1945 RSA NO. 408 OF
2006 AGAINST THE JUDGMENT DATED 30.11.2005 IN AS NO.114 OF 1998

**OF DISTRICT COURT, KASARAGOD ARISING OUT OF THE
JUDGMENT**

DATED 06.04.1998 IN OS NO.122 OF 1996 OF SUB COURT,KASARAGOD
APPELLANTS/APPELLANTS 1 TO 5, 7 & 9 IN A.S - PLAINTIFFS 1 TO 5,7 & 9 IN
SUIT:

1 KUNHALIMA, W/O LATE MAHAMMED, RESIDING AT SHENI, MAIRE VILLAGE AND POST, KASARAGOD TALUK. 2 BEEPATHUMMA, D/O LATE MAHAMMED, RESIDING AT SHENI, MAIRE VILLAGE AND POST, KASARAGOD TALUK. 3 NAFFISSA, D/O LATE MAHAMMED, RESIDING AT SHENI, MAIRE VILLAGE AND POST, KASARAGOD TALUK. 4 RUKIYA, D/O LATE MAHAMMED, RESIDING AT SHENI, MAIRE VILLAGE AND POST, KASARAGOD TALUK. 5 MAIMOONA, D/O LATE MAHAMMED, RESIDING AT SHENI, MAIRE VILLAGE AND POST, KASARAGOD TALUK. 6 SAKEENA, D/O LATE MAHAMMED, RESIDING AT SHENI, MAIRE VILLAGE AND POST, KASARAGOD TALUK. 7 BASHEER, S/O LATE MAHAMMED, A MINOR NOW A MAJOR, RESIDING AT SHENI, MAIRE VILLAGE AND POST, KASARAGOD TALUK. BY ADVS. SRI.S.V.BALAKRISHNA IYER (SR.) SRI.K.JAYAKUMAR SRI.P.B.KRISHNAN(SR.)

RESPONDENTS/APPELLANTS & RESPONDENTS 6 & 8 IN A.S -
DEFENDANTS AND PLAINTIFFS 6 AND 8 IN SUIT:

1 MAHAMMED, S/O.ABOOBACKER, RESIDING AT ARIYAPPADI - 2 -
IN MUGU VILLAGE, P.O.ARIYAPPADI, KASARAGOD TALUK. 2
YUSUFF, S/O.ABOOBACKER, RESIDING AT ARIYAPPADI IN MUGU
VILLAGE, P.O.ARIYAPPADI, KASARAGOD TALUK. 3 ABDULLA
(DIED), S/O.ABOOBACKER, RESIDING AT ARIYAPPADI IN MUGU
VILLAGE, P.O.ARIYAPPADI, KASARAGOD TALUK. 4 IBRAHIM, S/O
MAHAMMED, RESIDING AT SHENI, MAIRE VILLAGE AND
POST, KASARAGOD TALUK 5 SHARIFF, S/O. MAHAMMED, LATE A
MINOR NOW A MAJOR RESIDING AT SHENI, MAIRE VILLAGE AND
POST, KASARAGOD TALUK 6 ZUHARA, W/O .LATE ABDULLA, AGED
35, RESIDING AT BAPPALIPALAM HOUSE, P.O. ARIYAPADY, VIA
PERDALA, KASARAGOD- 671551 7 AZEEM, S/O.LATE ABDULLA,
MINOR AGED 4, RESIDING AT BAPPALIPALAM HOUSE, P.O.
ARIYAPADY, VIA PERDALA, KASARAGOD- 671551 8
ZAMEEL, S/O.LATE ABDULLA, MINOR AGED 3, RESIDING AT

BAPPALIPALAM HOUSE, P.O. ARIYAPADY, VIA PERDALA, KASARAGOD- 671551 (LEGAL HEIRS OF DECEASED R3 IS IMPLAED AS ADDL.R6 TO R8 AS PER ORDER DATED 23.11.2022 IN IA.1626/2014.) ADDL.R6 IS APPOINTED AS THE GUARDIAN OF ADDL.R7 & 8 (MINOR) AS PER ORDER DATED 23.11.2022 IN IA.1665/2014.) (MINORS 2 AND 3 REPRESENTED BY THEIR GUARDIAN MOTHER ZUHARA) BY ADVS. SURESH KUMAR KODOTH SRI.K.G.GOURI SANKAR RAI

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 27.06.2023, THE COURT ON 15.03.2024 DELIVERED THE FOLLOWING: - 3 - C.R.

JUDGMENT

Dated, this the 15th day of March, 2024

A registered sale deed of the year 1989(Ext.B9) was assailed by the legal heirs of the executant, one Mahammad, alleging that he was not competent to contract for want of sound disposing state of mind, at the time of execution of the sale deed. The suit, O.S. No.122/1996, was dismissed by the Sub Court, Kasaragod, which was confirmed by the

District Court, Kasaragod by judgment dated 30.

were appellants 1 to 5, 7 and 9 in the appeal - are the appellants herein.

2. This Court admitted the second appeal on the following substantial questions of law, as formulated in the memorandum of appeal:-

- 4 - (A) Is the lower appellate court correct in law in discarding Ext.A4 medical certificate while determining the mental state and capacity of Muhammed at the time of the execution of the alleged sale deed?

(B) Has not the lower appellate court

committed an error of law in ignoring the vast difference in signatures, non-measurement of the property, non-insistence on prior title deeds and lack of evidence to establish passing of consideration as unexplained suspicious circumstances surrounding the alleged sale deed?

(C) Whether on the facts and in the

circumstances of the case the defendants have discharged the burden of proof cast on them to prove due execution of the sale deed by a vendor having necessary mental capacity to execute such a document?

(D) Has not the lower appellate court ignored relevant and material items of evidence, which if relied on, would have enabled it to come to a different

conclusion?

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3. Heard Sri.S.V.Balakrishna Iyer, learned Senior Counsel, instructed by Adv.P.B.Krishnan, on behalf of the appellants and Sri.Suresh Kumar Kodoth, learned counsel for the respondents. Perused the records.

4. Learned Senior Counsel for the appellants, after having referred to the facts, first pointed

out that the requirement of Section 12 of the Contract Act to allege incompetence in terms of Section 11 is not to establish that the executant of the document was insane or mad at the relevant point of time, but only to show that he was not of sound mind for the purpose of contract, in the sense that he was incapable of understanding the transaction and forming a rational judgment as to its effect upon his interests. It was also pointed out that in the context of burden of proof, the liability of the plaintiffs is only to show that the executant was not of a sound mind at the time of contract by the yardstick of preponderance of

- 6 - probability, whereupon, the onus would shift to the defendant, either to establish that the executant was a person of sound mind, or that the document

was executed during the spell of a lucid interval. Secondly, learned Senior Counsel pointed out the following glaring factual aspects, which according to the learned Senior, would cast serious suspicion over the transaction in question:

(1) Vast difference between the admitted signature of the executant with the one contained in the questioned document, Ext.B9.

(2) Failure to obtain the prior title deeds from the executant, as admitted in evidence.

(3) Non-measurement of the property before its purchase.

(4) Complete dearth of evidence as to passing

of consideration, especially when the defendants plead that the entire consideration was not paid simultaneous to the execution of the document, but in advance. - 7 -

5. Learned Senior Counsel would point out that, by virtue of the evidence adduced by PW2 and PW3, two neighbours, who were acquainted with the executant Mahammad, to the effect that Mahammad was not of sound mind, whose evidence remained

unshattered, the plaintiffs have satisfactorily discharged their burden. Another aspect highlighted by the learned Senior Counsel is with regard to the suit, O.S.No.585/1993, instituted before the Munsiff's Court, Kasaragod seeking specific performance of Ext.B10 agreement, which was executed simultaneous with Ext.B9 impugned

document, by late Mahammad. By virtue of Ext.A9 document, the suit was withdrawn by the plaintiffs therein (the defendants in the subject suit), with liberty to institute a fresh suit, which liberty was not acted upon later, for reasons best known to the plaintiffs therein, who are defendants in the instant suit. Inasmuch as Exts.B10 and B9 were documents executed consecutively on the same day, the failure of the defendants to pursue Ext.B10

- 8 - would cast serious doubt on the genuineness of Ext.B9 as well. Along with that, the learned Senior Counsel invited the attention of this Court to Ext.A5 interim order of the Munsiff's Court in the same suit, where the interim injunction sought for was seen dismissed, holding that no notice was served to the executant, Mahammad. Ext.A5 is dated 6.1.1995, at which point of time Mahammad was alive. The court found that notice was served upon another Mahammad, who is the son of one Aboobaker (whereas the executant - Mahammad is the son of Ibrahim). In that suit also, the 1st defendant canvassed that, Mahammad, who was the 2nd defendant, was a person of unsound mind and hence incompetent to execute Ext.B10 agreement for sale.

6. Yet another important document highlighted by

the learned Senior Counsel is Ext.A4 medical

Mangalore. The document clearly depicts that the - 9 - executant Mahammad was suffering from Mania as on 17.10.1988. According to the learned Senior Counsel, both the courts below erred in eschewing

Ext.A4 for reason of its author not being examined. It was pointed out that Ext.A4 medical certificate was marked without any objection and that there is no serious cross-examination on the contents of Ext.A4. Even though Ext.A4 need not have been taken as a conclusive proof as regards the mental state of the executant at the relevant time, the same should and ought to have been taken as a supporting evidence at least, along with the

other evidence and circumstances established

Iswariah [1953 Madras 858] and State of Kerala v. Venugopalan [1987 (1) KLT SN 15 (C.No.28)]

7. Finally, the learned Senior Counsel pointed out the stark difference in the signature of the - 10 -

executant Mahammad in Exts.B9 and B10 on the one hand and his admitted signature in Ext.A3 on the other. The admitted signature contains 4 letters,

whereas the one contained in Exts.B9 and B10 has only 3 letters, an obvious incongruity, which can be deciphered even in the absence of an expert's assistance. Coupled with the above, the admitted fact that the property was not measured and that the purchasers/defendants have not cared to obtain the prior title deeds etc. should have been counted by the courts below to frown upon Ext.B9 sale deed. The learned Senior Counsel also urged that the defendants have not proved as to how the sale consideration was paid to the executant Mahammad and in what circumstance, it happened to be paid prior to the execution of the document, as claimed by the defendants. The learned counsel submitted that the absence of legal capacity to enter into a contract, especially of the nature of unsound mind, cannot be proved to the hilt, but

can only be probalised and deciphered from - 11 - possible evidence which could be adduced, as also, from attendant circumstances. On such premise, the learned Senior Counsel would seek the second appeal to be allowed and to declare Ext.B9 document to be invalid and inoperative for want of competence of the executant.

8. Per contra, the learned counsel for the respondents/defendants argued to sustain the concurrent findings in the impugned judgment, which confirmed the dismissal of the suit by the

learned Sub Judge. It was pointed out that Ext.B9 impugned document was of the year 1989 and that the executant Mahammad died only in the year 1996. No action, whatsoever, was initiated either by the plaintiffs herein or by the said Mahammad during

the interregnum, which itself would

defendants in the year 1996 and a claim that the plaintiffs came to know about Ext.B9 document only - 12 - pursuant to Ext.A1 Lawyer's notice, etc., are all

false allegations made for the purpose of

attestor to Ext.B9, which would not only vouch the genuineness of Ext.B9, but would also establish

the knowledge of the plaintiffs as rega

counsel would iterate, as a trite legal position, that a medical certificate cannot be acted upon in the absence of the Doctor being examined to prove its contents, unless the same is admitted. In the instant case, the defendants have never admitted Ext.A4, but has disputed the same by suggesting that the person named in Ext.A4 is not the executant, Mahammad. Learned counsel also argued that a mere reference to periodic disorder of mania is not sufficient to attract the incapacity under Section 11, r/w Section 12 of the Contract Act, since the person's cognitive capacity will - 13 - not be seriously impaired. As regards the difference in signature, the learned counsel would

point that the plaintiffs have no c

and A9 documents, Ext.A5 being an interim order

and Ext.A9, a decree withdrawing another suit. No inference as suggested by the appellants could be drawn from the withdrawal of suit, as evidenced by

Ext.A9. Learned counsel would point o

executant Mahammad had purchased another property within two months from the date of execution of Ext.B9 by utilizing the sale consideration therein. Exts.B1, B2 and B9 documents were all prepared and written by the same scribe, who was examined as DW2. His evidence, especially of the - 14 - instructions given to prepare Ext.B9 by the executant Mahammad, would speak volumes of Mahammad's legal capacity and sound state of mind

to enter into the contract in question.

being the husband of the 5th plaintiff and the son- in-law of the executant. According to the learned counsel, all aspects have been considered in the proper perspective by the courts below and having regard to the scope and ambit of an interference in a second appeal, the instant case warrants no interference to the impugned judgment. On such premise, the learned counsel for the respondents/ defendants would seek dismissal of the appeal, with costs.

9. Before addressing the facts, this Court will first ascertain the legal nuances of this peculiar ground of attack to a contract, whereby a party's - 15 - competence to contract, premised on the allegation that he was not of a sound mind at the time of execution, is under challenge. Sections 11 and 12 of the Contract Act, which are relevant to the context, are extracted here below:-

11. Who are competent to contract.-Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind and is not disqualified from contracting by any law to which he is subject.

12. What is a sound mind for the purposes

of contracting.-A person is said to be of sound mind for the purpose of making a contract, if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests. A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind. A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind. - 16 -

10. This Court will straight away notice the difference in the legal position as between the English Law and the Indian Law applicable to the infirmity attached to a document executed by an

unsound person. The English Law in this regard is succinctly stated by Lord Esher.M.R. in *Imperial Loan Co. Ltd v. Stone* ([1892] 1 Q.B. 599). The relevant findings are extracted here below:-

"When a person enters into a contract, and afterwards alleges that he was so insane at the time that he did not know what he was doing, and proves the allegation, the contract is as binding on him in every respect, whether it is executory or executed, as if he had been sane when he made it, unless he can prove further that the person with whom he

contracted knew him to be so insane as not to be capable of understanding what he was about.

11. This test has been reformulated by the

U.K. Supreme Court, which introduced an element of constructive notice. However, under the Indian Law, knowledge of the purchaser as regards the - 17 - unsoundness of the mind of the vendor has not been statutorily made a vital consideration, whereas the English Law contemplates that the contract could not be set aside on the ground of lack of mental capacity, unless the same is known to the

purchaser. The document could not be set aside as unconscionable.

[(1985) 2 All ER 880] Lord Brightman held that there ought to be procedural unfairness, such as undue influence or some other form of victimization.

12. A reading of Sections 11 and 12 of the Indian

Contract Act would make it explicit that the thrust is on the understanding capability of the executant and of forming a rational judgment as to the effect of the contract upon his interests. The above referred yardsticks are to be ascertained at the point of time of execution of the contract, as could be seen from the two sub-paragraphs to - 18 - Section 12 of the Act, which propounds that a person usually of unsound mind, but occasionally of sound mind, can make a contract when he is of sound mind; and that a person, who is usually of sound mind, but occasionally of unsound mind, cannot make a contract when he is of unsound mind. However, the difficulty arises on ground as to how

the soundness or unsoundness of mind at the peculiar time of execution of the contract can be proved practically. Of course, the yardstick cannot be anything other than preponderance of probability. In this regard, it is also relevant to discuss the burden of proof, as also, the shifting of onus, if any, by and between the plaintiff, who assails the document, as vitiated under Sections 11 and 12 of the Act and the defendant, who seeks to sustain the same.

13. There is always a presumption in law in favour of sanity [see, *Sudama v. Rakshpal Singh* - (2013) SCC Online All 13428] and *Hall v. Warren* - - 19 - 7 R.R.306]. It was held that, there being a

presumption of sanity, the person, who alleges unsoundness of mind must prove it sufficiently to satisfy the test. In *Indar Singh and Others v. Parmeshwardhari Singh* [AIR 1957 Patna 491], it was

held that the onus of proving insanity is, in the

first place, on the person, who alleges it, the normal presumption being of sanity. The legal position that the onus of proving insanity is on the person who alleges it, has been upheld in the following decisions as well:

(i) *Mahomed Yakub v. Abdul Quddus* [AIR 1923 Patna 187]; and

(ii) *Sham Nath Madan v. Mohammed Abdullah and Others* [AIR 1967 J&K 85]

The allegation of unsoundness of mind must be established by evidence, showing that the person was incapable of understanding the business and of forming a rational judgment as to the effect of - 20 - the transaction on his interests, at the time of making the contract [See in this regard, i) *Indar Singh* (supra); ii) *Ram Sundar Saha v. Kali Narain Sen Chaudhary* [AIR 1927 Cal 889]; iii) *Mahomad Yakub* (supra)].

14. Once it is established that a person is of

unsound mind, the onus shifts to the person, who alleges that the document was executed during a lucid interval to prove the same. In other words, if it is shown that a person is of unsound mind usually, the burden of proving that at the time of contract, he was of sound mind, lies on the person who affirms it [See in this regard, i) *Mohanlal Madangopal Marwadi v. Vinayak Sadasheo Sonak* - AIR 1941 Nag 251; *Bahadur Singh Chhetri v. Bir Bahadur Singh* - AIR 1956 Cal 213]. *Mohanlal* (supra) in fact held that, if there is sufficient evidence to prove that the person, whose mental capacity is in doubt of usually unsound mind, then the burden shifts to the person, who alleges his sanity, to

- 21 - prove that the contract was made during a lucid interval. Mohanlal (supra) also held that

circumstances taken individually, would, of themselves, be of little value to prove insanity, but they have to be considered together and their cumulative effect gauged. In a Madras decision of the year 1940 [Govindaswamy Naicker (Deceased) and Others v. K.N.Srinivasa Rao and Others - AIR 1940 Mad 73] it was held that, where senile dementia in the case of an old man is proved to have existed on a particular date, it is more reasonable to presume its continuance, than its discontinuance; and the onus will be upon persons, who wish the court to uphold transactions entered into by him subsequent to that date, to prove that they were not vitiated on the ground of his incapacity.

15. This Court also had occasion to consider the effect of Section 12 of the Contract Act, as also, the burden of proof. A Division Bench held in Mariyam v. Varghese [1965 KLT 692], thus:

- 22 - 7. Counsel for the appellants brought to our notice the decisions reported in ILR.40 Mad.660, AIR. 1940 Mad. 73, AIR. 1941 Nag. 251, AIR.1956 Cal.213 & AIR.1958 A.P.22 & a few English decisions bearing on the subject. The principle laid down in these cases may be summarised thus: When a transaction is impeached on the ground that the executant was a man of unsound mind, the initial onus lies on the person who sets up the plea that the executant was of unsound mind. If there is sufficient evidence to prove that the person has been adjudged under the Lunacy Act to have been a lunatic or if there is other sufficient evidence to show that a person had at a certain stage been of unsound mind, the burden shifts to the person who alleges his sanity. The mere proof of a solitary fact that on the day when the impeached conveyance was being executed the executant did not show any signs of insanity would not be sufficient to demonstrate that the person had been acting as a normal man during a lucid interval. The evidence in the case has to be considered in the light of these principles. (underlined by me, for emphasis)

16. However, a learned Single Judge in *Zenith v. - 23 -*

Sakkir Hussain [2015 (3) KLT 621] held that a treatment record indicating that the executant was treated for Manic Depressive Phycosis; that he was admitted in the hospital on 17.06.1979 and was found missing on 24.06.1979; that the recording in the treatment records that ailment recur once in a year and further that the insight and judgment of patient was impaired when he was admitted in the hospital, etc. were not sufficient to frown upon documents executed by the executant, unless there is evidence to indicate that the executant was

suffering from any ailment at the time of

execution of the disputed documents. *Mariyam* (supra) of the Division Bench was held to be one rendered in the peculiar facts before the Division Bench. The learned Single Judge went on to hold that merely for the reason that a person suffered an ailment affecting the soundness of his mind once in his life, he cannot be presumed to be a

person of unsound mind, throughout his life. Rather than *Mariyam* (supra), it appears to this - 24 - Court that *Zenith* (supra) is one rendered in the peculiar facts therein, for, what is seen laid down in *Mariyam* (supra) is the legal principle, after referring to various decisions, including a few English decisions, on the point. Be that as it may.

17. This Court may wind up the discussion on the

theory of Sections 11 and 12 of the Contract Act by referring to one judgment of the Honourable Supreme Court in *Sona Bala Bora and Others v. Jyotirindra Bhattacharjee* [(2005) 4 SCC 540]. The Honourable Supreme Court took stock of the maxim *insanus est qui, abjecta ratione, omina cum impetu et furore facit* - he is insane who, reason being thrown away, does everything with violence and rage.

18. Unsoundness of mind is seen dealt with in *Sona Bala Bora* (supra), as under:

20. It cannot be disputed that a contract of sale like any other contract would be vitiated if the consent of - 25 - either party is given by a person

of unsound mind as provided in Section 11 of the Contract Act, 1872. Under Section 12 of that Act, a person is said to be of sound mind for the purpose of making the contract, if at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests. A person of unsound mind is thus not necessarily a lunatic. It is sufficient if the person is incapable of judging the consequences of his acts. Black's Law Dictionary says:

"As a ground for voiding or annulling a contract or conveyance, insanity does not mean a total deprivation of reason, but an inability, from defect of perception, memory, and judgment, to do the act in question or to understand its nature and consequences."

21. It must be remembered that in a

civil matter the issues have to be decided on a balance of probabilities. The question of the capacity of Bhogirath to execute the conveyance did not have to be established only by medical evidence. The unsoundness of the mind may be established by proving such - 26 - conduct as was not only not in keeping with the person concerned's character but such that it could not be explained on any reasonable basis."

19. As regards the initial burden and the shifting of onus, the Honourable Supreme Court held thus:

No doubt the burden to prove or establish at least on a balance of probability that Bhogirath's action in executing the sale deed in favour of the respondent was the outcome of an unsound mind was on the appellants. But unrebutted evidence of an unnatural and inexplicable animosity to his wife and children as well as of an unnatural and inexplicable fixation on selling of all his properties probabilses that the sale was effected when Bhogirath was incapable of rational behaviour. This was sufficient to discharge the appellants' burden. The onus then shifted to the respondent to adduce evidence either to show that the

ostensibly irrational conduct of Bhogirath had a rational explanation or that the conveyance was executed by Bhogirath in a lucid interval. The respondent had, if his statement is to be accepted, a certificate of a Doctor who had medically examined Bhogirath - 27 - just before the conveyance was executed. The respondent did not seek to call the Doctor or prove the certificate."

20. Having delineated the creases of the law relating to a challenge, in the context of Sections 11 and 12 of the Contract Act, this Court will now address the facts and evidence adduced.

The essential ground of attack to Ext.A6/B9 document is that the executant, Mahammad, was not competent to contract at the time of execution of Ext.A6/B9, since he was not possessed of a sound disposing state of mind. The specific plaint allegation is to the effect that Mahammad was mentally unsound and that he was being treated for the said illness, wherefore, Ext.A6/B9 is not a true and genuine document, but a fraudulent, fictitious and nominal one, not binding on the plaintiffs. It is, however, stated in the plaint itself, towards the end of paragraph no.5 that late Mahammad was also having lucid intervals during his life time. - 28 -

21. In support of the above contention, the first

and foremost evidence is Ext.A4, a me

Mangalore dated 27.02.1997. Ext.A4 certifies that 'Mohamad.Y.M, son of Ibrahim' was suffering from periodic disorder of Mania, that he was admitted to the hospital on 17.10.1988 and that he was also treated in the hospital about 5 years earlier, as well. In the written statement, the defendants would deny the allegation as regards the absence of sound disposing state of mind of Sri.Mahammad, which is sought to be demonstrated by various averments in the written statement. It was inter alia averred that Mahammad received consideration, gave instructions to the scribe to prepare the

sale deed, presented the sale deed for registration after execution, admitted the contents of sale deed before the Sub Registrar, purchased two properties by using the sale - 29 - consideration - one in the name of late Mahammed and another in

the name of his son Abdulla by two consecutive documents of the year 1990, that Mahammad conducted several legal proceedings before various authorities prior to the execution

of the sale deed and that he was therefore mentally sound to execute the sale deed. The first defendant who was examined as DW1 deposed that Ext. A4 certificate is not in respect of the executant Mahammad.

22. It is in the backdrop of the above pleadings

that the sufficiency of the evidence adduced has to be addressed. Before addressing the intrinsic evidentiary value Ext.A4, this Court will also notice out that the 6th plaintiff and two independent witnesses were examined in support of the plaint allegation as PW1 to PW3, the evidentiary value of which will be discussed later. - 30 -

23. As regards Ext.A4, this Court may straight away take note that the author of Ext.A4, Dr.K.S.Shetty, was not examined before the court. The question which therefore arise is whether the contents of Ext.A4 medical certificate stands

proved and can be taken stock of by its mere production, without examining its author? In this regard, this Court notice that what is relevant is not the medical certificate, by itself, but the opinion expressed therein by the author/doctor. Section 59 of the Evidence Act stipulates that all facts, except the contents of the documents, be proved by oral evidence and Section 60 mandates oral evidence to be direct. The 4th limb of Section 60 deals with oral evidence in respect of an opinion, or to the grounds on which that opinion is held, and prescribes that the same must be proved by the evidence of the person, who holds that opinion on those grounds. It is therefore clear that the medical opinion of an expert, though indicated and reflected in the medical - 31 - certificate, has to be proved by examining the doctor, who tenders such opinion on the medical status of a person. It is profitable in this regard to refer to the following observation of the Gujarat High Court in Muncipal Corporation of City of Ahmedabad v. Gandhi Shanthilal Giridharlal and another - 1960 SCC OnLine Guj 29:

5. In our view, a medical certificate such as Ex. 59 by itself is not a substantive or primary evidence particularly when it is relied upon to prove the opinion it contains. It is the opinion of the medical expert in such cases that is relevant. The certificate is only a record made by him which at best would show that he had recorded his view or opinion or made an entry as regards the injuries seen by him immediately after or at the time of his examination. At best, such a certificate would have a corroborative value but it is not a substantive piece of evidence from which an opinion of the medical expert can be proved or established. Section 45 of the Evidence Act provides that when the Court has to form an opinion upon a point of science or art, opinions on that point of persons specially skilled in such science or art etc. are relevant facts. What is thus made relevant evidence under this section is - 32 - the opinion of a medical expert or any other expert and not the document in which he has recorded his opinion. In our view, therefore, the certificate was not an admissible document.

Concurring with the above view of Shelat,J., Raju,J. held

thus on the topic:

18. The Evidence Act does not make a medical certificate relevant except in some special cases such as those referred to in section 32. Excluding such special cases, it is the opinion of the doctor that has to be proved as a relevant fact and not the medical certificate. The doctor who issues a medical certificate stating his opinion has to be examined to give evidence - in the only permissible way - of his opinion and not, as observed in AIR 1953 Mad 858, to prove the certificate. Even though the signature on the medical certificate is proved, the certificate would not be evidence of the opinion of the doctor except in such special cases as those referred to in section 32. 19.xxx

20. A medical certificate can, however, be

proved to corroborate the substantive evidence of the doctor after he has been examined as a witness, as provided in section 157 of the Evidence Act. In such cases, the substantive evidence is the oral - 33 - evidence of the doctor and not the certificate.

24. In *Bommidala Poornaiah v. The Union of India* -

AIR 1967 AP 338, the issue was discussed in detail from paragraph nos.35 to 37 to ultimately conclude that the Subordinate Judge went wrong in admitting Ext.B30 therein (medical certificate) without the expert being examined. The issue as the effect of marking a document without objection and whether it amounts to admission of its contents is specifically seen dealt with in paragraph no.35

and found that the contents thereof would not stand admitted by mere marking of the certificate, without objection. The same issue was considered and held as above in *Municipal Corporation (supra)* as well. In respectful agreement with the law laid down in *Municipal Corporation* and *Bommidala* (both *supra*), this Court holds that Ext.A4 is not duly proved and its contents cannot be acted upon to adjudge late Mahammad as incompetent to execute Ext.B9.

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25. This Court is fortified in the above view for the following reasons on facts as well. The treatment records of Mahammad were not produced.

Nor was the custodian of the records

medical condition of late Mahammad at the time of discharge. There is no reference, whatsoever, as to when the patient was discharged, after admission on 17.10.1988. There is nothing available as regards the nature of the disease, except referring to the same as a 'disorder of Mania'. The question as to whether it is curable in nature, or whether it can be kept controlled by administration of medicine, and also, as to whether the same will impair the judgment of the

patient as regards his interests etc.

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impermissible for a court of law to assume the impact, effect and consequences of a particular disease, especially as to whether it affects the patient's cognitive features. In the context of the afore referred parameters, the evidence of the treating doctor becomes all the more necessary. This Court is therefore of the opinion that mere

production of Ext.A4, in the absence of examination of its author, and also, in the absence of any evidence as regards the effect of the disease on the patient, is of no moment to drive home the plaintiff's case that late Mahammad was not competent to contract at the time of execution of Ext.A6/B9.

26. Coming to the oral evidence tendered by PW1,

the 6th plaintiff, it is deposed that his father became insane in the year 1987 (Ext.A6/B9 is of the year 1989). The contention is that Mahammad was treated for insanity in Fr.Muller's Hospital, Mangalore in the year 1988 as an inpatient, that - 36 - even thereafter he was being treated in the said

hospital and that he continued to be mentally insane until his death. It is pertinent to note that the details of the disease; its ramifications on Mahammad's personal life; the periodicity of its recurrence, if any; the period/ spell during which he was admitted in the hospital; whether the disease was cured or not at the time of discharge etc. are grey areas, in respect of which, nothing was spoken to by PW1, the 6th plaintiff. This Court is of the opinion that although the evidence of the 6th plaintiff is not liable to be eschewed on the premise that he is an interested witness, mere

statements to the effect that his father was insane and mentally unsound, without referring anything further as to the practical effects on the life of Sri.Mahammad is grossly insufficient to arrive at a conclusion that late Mahammad had no disposing state of mind at the time of execution of Ext.A6/B9. - 37 -

27. PW2's chief examination is contained in two

lines, to the effect that he knows Mahammad for the past 25 years and that he was insane for the last 12 years. The evidence was tendered on 04.03.1998,

wherefore, the twelve years period relates back to 1986 onwards, which covers the period during which the document was executed. However, nothing more is seen stated by PW1. In the cross-examination, PW2 went one step ahead of the plaintiff averments that Mahammad was not having any lucid interval, after he became mentally ill. In cross-examination, PW2 would state that he can't say in which year Mahammad fell ill and that he cannot deny the suggestion that Mahammad was capable of executing a document.

28. Coming to PW3, it was deposed that he is

residing near the house of the plaintiff and that he knew Mahammad for the past 20 years, of which he was mentally unsound for the past 12 years. PW3 claims that he accompanied PW1 to take Mahammad to - 38 - Fr.Muller's Hospital, Mangalore, when his mental illness aggravated. According to PW3, Mahammad was not answering questions and was not understanding the questions put to him, since the last 12 years. However, in cross-examination, PW3 could not say whether Mahammad was admitted in Fr.Muller's Hospital in 1992. PW3 is residing at Sheni, near the plaintiff's house, thereby meaning, the 6th plaintiff, as it appears. PW3 would admit that Mahammad was residing at Volamogaru in 1992. PW3 would also admit that he was doing coolie work under the plaintiff as well and that Mahammad came to Sheni within the past six years from the year of tendering evidence, 1998. According to PW3, Mahammad was in hospital for two or three weeks, a claim, which is not seen espoused even by PW1, the 6th plaintiff. PW3 is not aware whether Mahammad was cured of the disease at the time of discharge. He would plainly admit that he was there in the hospital only for ten minutes. He is also not aware whether Mohammad was thereafter taken to - 39 - hospital for treatment. The mental condition of Mahammad was not the same during the said 12 years, is the version of PW2 in cross.

29. Analysing the evidence of PW3, this Court is

of the opinion that the same does not inspire adequate confidence in the mind of the court. He would state that Mahammad shifted to Sheni six years prior to 1998 and he is silent of the time at which, he allegedly accompanied PW1 to take Mahammad to Fr.Muller's Hospital, Mangalore. Going

by Ext A4,

Mahammad was admitted in the hospital on

1

forthcoming from PW3 as to why and how he had occasion to take Mahammad to Fr.Muller's Hospital along with the 6th plaintiff then. Besides, it has also come out in evidence that PW3 is a coolie, who was doing work also under the plaintiff, the 6th plaintiff. There is nothing in the evidence of PW2, or for that matter, PW3 to indicate that - 40 - Mahammad was lacking a sound disposing state of mind at the time of execution of Ext.A6/B9, apart from generally stating that he was having mental illness.

30. In the light of the above discussion, this

Court would conclude that neither Ext.A4, nor the evidence tendered by PW1 to PW3 would establish that late Mahammad was suffering from a mental illness, or for that matter not having a sound disposing state of mind, which impairs his capability of understanding the transaction, evidenced by Ext.A6/B9 and in forming a rational

judgment as to its effect upon his interests. The

question as to whether a person was of sound mind or not has to be assessed at the time of execution of the contract and what is pivotal for consideration is whether on account of such disease alleged, whether the person was deprived of his capability to understand the nature of the transaction and its effect on his interests. These - 41 - are not matters to be spoken of by persons like PW2 or PW3, whose perception with respect to a mental illness need not coincide with the clinical features of the disease. Unless and until, the witnesses, who are laymen, come forward to speak of the effect, consequences and impact of the deceased on the personal and practical life of the executant, with sufficient trustworthiness attached to it, it may not be safe to rely upon such evidence to castigate a person as having no sound disposing state of mind at the time of execution of a document. For that purpose, what can essentially and safely be relied upon is the medical evidence, wherefore, the requirement of examining the doctor, who treated the executant, is all the more necessary, since he alone can speak of the peculiar attributes of the disease on

the executant, apart from speaking about

the plaintiffs failed to discharge their burden to - 42 - prove the plaint allegations to the effect that late Mahammad was not in a sound disposing state of mind at the time of execution of Ext.A6/B9 and hence, was not competent to contract. Unless and until the plaintiffs establish their burden to prove the above aspect, the question of shifting the onus to the defendants to adduce evidence to validate the document as one executed during lucid intervals does not arise. The point is concluded accordingly.

31. This Court will now address the other contentions raised by the learned Senior Counsel. The first is with respect to the difference between the admitted signature of the executant and the one contained in the questioned document,

Ext B9. According to the learned Senior Counsel, there is stark difference in the signature of the executant Mahammad, as contained in Exts.B9 and B10, when compared to his admitted signature in Ext A3. The admitted signature contains four - 43 - letters, whereas the signature in Exts B9 and B10, simultaneously executed on the same date, has only three letters, is the contention raised.

32. As regards this contention, this Court will

immediately take note that there is no allegation of any impersonation in the plaint, as contended by the learned counsel for the respondent. The solitary sentence as contained in paragraph no.5 of the plaint, in this regard, is that late Mahammad has not executed the alleged sale deed in favour of the defendants. The rest of the allegation and averments, as contained in the plaint, are all pertaining to the alleged mental

infirmary of the executant, Mahammad.

It

allegation that late Mahammad had no competence to execute the document, alleging want of sound - 44 - disposing state of mind. It is nowhere alleged in the plaint that a document has been created by impersonation and that someone else had signed the

document instead of Mahammad, thus perpetrating fraud. A contention to the effect that the signature contained in Ext B9 is not that of the executant Mahammad, has the legal effect of suggesting that his signature has been forged by somebody else. The contention is precisely an allegation of fraud by impersonation, which is not

at all pleaded in the plaint. This Court also notice the special requirements of pleadings with respect to fraud etc. are enjoined by the Code, which is not satisfied at all in the instant case. In such circumstances, the allegation that the signature contained in the impugned document differs from the so called admitted signature of Mahammad in Ext A3, cannot be taken stock of, to upset and set at naught, a registered sale deed, Ext B9. - 45 -

33. Coming to the evidence adduced by PW1, the 6th

plaintiff (the only plaintiff who chose to mount the box on behalf of as many as 9 plaintiffs), it is again noteworthy that no case of impersonation is spoken to by PW1. There again, what is seen deposed is that Ext B9 document was not executed by his father, which deposition is immediately followed by the statement that his father was mentally unsound and insane in the year 1989 and that he became so in the year 1987. Therefore, when the evidence of PW1 is read as a whole, the statement that his father had not executed Ext B9 document, can only be construed in the backdrop of the specific allegation that his father was mentally unsound at the time of execution of the document. PW1 has also deposed in the chief- examination that his father used to put signature

in Kannada language and that after he b

that the signature contained in Ext.B9 (mistakenly - 46 - stated as Ext.B8) is not that of his father and that his father's signature contains four letters. According to PW1, the attesor to Ext B9 document, who is the husband of the 5 th plaintiff/defendant, told him that his father was impersonated in Ext A6/B9 and he thus understood that his father was so impersonated. Here, at the risk of repetition, this Court would iterate that such evidence adduced by PW1 is not supported by any pleading. As it is well settled, even a mountain of evidence in

respect of a fact, which is not pleaded, is of no avail/consequence.

34. This Court also notice that apart from making

self-serving statements in the evidence adduced by PW1, no further steps were taken by the plaintiffs to establish the contention that the signature of late Mahammad contained in Ext B9 document is not one subscribed by him. This Court is of the definite opinion that evidence in the form of mere statement by an interested party is not sufficient - 47 - to dislodge the presumption with respect to a registered document, which is duly witnessed by the witnesses shown in the document, one among whom is none other than the husband of the 5th plaintiff.

35. This Court may also notice that, comparison of

signatures as contained in two documents, of which, one is admitted and the other is disputed by the naked eyes, though enabled by Section 73 of the Evidence Act, has been held by the Honourable Supreme Court in a catena of decisions to be dangerous and unsafe. Comparison of signatures is a matter coming within the province of an expert, which has to be done on the basis of various specified parameters and, therefore, arriving at a

conclusion on the validity of documents by mere

comparison is grossly unsafe, if not

therefore the document is invalid or illegal. - 48 -

36. Another contention raised by the learned

Senior Counsel is with respect to the failure to obtain prior title deeds from the executant, non measurement of the property before its purchase and alleged dearth of evidence as regards passing of consideration. Of course, these considerations are material, if the allegation is that Ext B9 document is got executed by the defendants by playing fraud.

37. In the instant case, fraud is not specifically

seen alleged. Instead, there is one sentence in the plaint that the document is fraudulent, nominal, fictitious etc., which allegation is made in the backdrop of basic contention that late Mahammad had no disposing capacity at the time of execution of Ext B9. If that contention has already been discounted as not proved, then, the above referred circumstances regarding failure to obtain prior title deeds, non-measurement of - 49 - property etc. would pale into insignificance, since the plaintiffs have not canvassed any case other than one rooted in Section 11 and 12 of the Contract Act in the plaint.

38. This Court is also persuaded to frown upon the

plaintiffs' case for the reason that a document, which was executed in the year 1989, was never challenged by the plaintiffs, or for that matter late Mahammad, until his death in the year 1996.

This Court is not, for a moment, persuaded

continued in possession of the scheduled property until 1996, more so, when one among the attestors to Ext B9 document is the husband of the 5 th plaintiff, a legal heir under late Mahammad. A mere allegation that the attestor (husband of the 5th plaintiff) was in inimical terms with the

plaintiffs is nothing, but self-serving. The facts

established by the defence evidence to the effect - 50 - that after the impugned sale vide Ext B9, two properties were purchased, one in the name of late Mahammad and the other in the name of his son Abdulla, would also stand to reason in rejecting the contention that late Mahammad was not in sound disposing state of mind at the time of execution

of Ext B9 document.

The infirmities, which are no

consideration, non-obtainment of the prior deeds etc., were not raken up at any point of time during Mahammad was alive. The said contentions are also liable to be failed.

39. It is also relevant to notice that Exts B1, B2 and B9 documents were all prepared and written by the same scribe, who was examined as DW2. His evidence would also negate the possibility of any infirmity as regards the sound disposing state of mind of late Mahammad, particularly when DW2 tendered evidence of the fact that it was Mahammad - 51 - who gave instructions to prepare Ext B9 document and the same was read over to him and executed before DW2.

This Court finds no reason to interfere with the concurrent findings of the trial court, as also, the first appellate court. The questions of law framed has already been answered in favour of the respondents. In the result, the Regular Second Appeal fails and the same will stand dismissed. Sd/- C.JAYACHANDRAN, JUDGE
ww/vdv

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