

**Alphonse Vs. S. Dharmaraj**

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**Court :** Chennai

**Decided On :** Feb-06-2002

**Reported in :** (2002)2MLJ185

**Judge :** P. Shanmugam and ;P. Thangavel, JJ.

**Acts :** [Indian Contract Act, 1872](#) - Sections 3, 4(1), 4(2), 5, 8, 16 and 16(3); Benami Transactions (Prohibition) Act, 1988 - Sections 4; Transfer of Property Act - Sections 52; [Code of Civil Procedure \(CPC\), 1908](#) - Order 6, Rule 4; Christian Law

**Appeal No. :** Civil Miscellaneous Appeal Nos. 1397 to 1399 of 1996 and C.M.P. Nos. 13882 to 13883 of 1996

**Appellant :** Alphonse

**Respondent :** S. Dharmaraj

**Advocate for Def. :** G. Masilamani, Senior Counsel for ;T.P. Manoharan

**Advocate for Pet/Ap. :** R. Sekar, Adv. for ;Sarvabhauman Associates

**Disposition :** C.M.A. Nos. 1397, 1398 and 1399 of 1996 allowed

**Judgement :**

**P. Shanmugam, J.**

1. C.M.A. No.1397 of 1996 is the petitioner's appeal against the dismissal of O.P. No.16 of 1993 filed by her for judicial separation. C.M.A. No.1398 of 1996 is an appeal filed by the plaintiff/wife against the dismissal of the suit O.S. No.25 of 1996 for a decree to cancel the deeds executed by her in favour of her husband and for return of the jewels and money.

C.M.A. No.1399 of 1996 is filed by the respondent/wife in O.P. No.24 of 1992 against the order passed restoring the conjugal rights in favour of the husband.

2. All the three matters were decided by a common judgment dated 30.6.1994 by the Family Court Judge at Pondicherry.

3. The facts of the case are stated hereunder :

The marriage between the appellant/wife and the respondent/husband took place as per the Christian Law on 15.9.1969. Out of their wedlock, the appellant had given birth to three children, each of them suffering with some deficiency. The appellant purchased four items of property under Exhibits A.6, A.7, A.8 and A.12 during the period between 1984 to 1988. According to the appellant, right from the beginning of their marriage, the respondent was ill-treating the appellant and on many occasions, drove her out of the house for getting huge money for his business and other luxurious expenses. Many panchayats were convened and he then used to take her back. According to her, he had spread rumours among the relatives suspecting the appellant's character and fidelity. However, she was tolerating the cruelty for the sake of her children and for the family. During April 1988, she was threatened to handover all her jewels weighing about 150 sovereigns and receipt of the same was acknowledged by the respondent in a panchayat. During the last week of May 1988, in view of the constant threat to her life from the respondent and his henchmen, the appellant was forced to go to her mother's house and thereafter, she issued a lawyer's notice dated 26.5.1988. Once again, there was a panchayat and the respondent persuaded her to join him in Pondicherry. That also lasted only for a few weeks and in the last week of July 1988, the appellant was forced and coerced to execute three documents which were styled as release deed, power of attorney and gift deed, on the same day, i.e. on 28.7.1988 in favour of the respondent. She had to sign the documents against

her will for fear of her life and safety. In spite of her signing the documents, she was mercilessly beaten and became bed-ridden for nearly two months. Thereupon, her mother came with her close relatives and rescued her. The respondent detained the children and refused to hand over the jewels and hence the suit O.S. No.25 of 1996 for a decree to cancel those two documents and for a direction to return the gold jewels and money.

4. The appellant preferred O.P. No.73 of 1992 for a decree of judicial separation against the respondent herein on the ground of cruelty and the constant ill-treatment meted out to her by beating. She has also alleged, apart from what is stated above, that she was coerced and compelled to execute three documents under threat and undue influence and further alleged that in the written statement, the respondent had, without any regard for the truth, alleged that the appellant was living in criminal intimacy with the driver and that this fact was known to her daughter and others in Pondicherry. According to her, these allegations are, per se, false, malicious and motivated and it is no longer safe for her to continue the marital relationship with the respondent. According to her, the allegations amount to legal and mental cruelty and hence, she prayed for a decree of judicial separation.

5. Miscellaneous Petition No.24 of 1992 is an application filed by the respondent herein under Section 212 of the French Civil Code for restitution of conjugal rights on the ground that there is nobody to look after the three children and that the appellant/wife is bound to oblige him for all the matrimonial obligations. He further says in his application that due to the love and affection that he had for his wife, he had purchased the properties in her name as benami and these properties thereafter were conveyed by the appellant in favour of the respondent. After having executed these deeds, at the instigation of her paternal uncle, she had filed a suit for cancellation of the deeds. According to the respondent, though she initially agreed for a settlement, at the instigation of her paternal uncle, she went back and hence the above application.

6. Both the suit as well as the appellant's application were resisted to by filing a detailed statement and counter, inter alia, contending and denying the allegation of

cruelty. The respondent has stated that because of his attachment with his wife, he foolishly purchased the properties in the name of his wife. But, the appellant was unfaithful to him and was acting at the instigation of her relatives. According to the respondent, he had signed a blank white paper on 20.4.1988 to avoid separation and thereafter, she had illicit relationship with the driver and in repentance of her behaviour, she expressed her willingness to execute three documents on 28.7.1988 and did execute the same and thereafter, she had filed the above suit as an afterthought at the instigation of her relatives. He had denied the handing over of the jewels and retention of the same by him. The respondent had denied the averments including the allegation of mental torture and ill-treatment.

7. The Family Court framed two issues in the suit for consideration, namely whether the three deeds were executed under coercion and threat to life and if they are to be cancelled and whether there was any entrustment of the jewels to the respondent and if the appellant is entitled to recover the same. The learned Judge answered the issues in favour of the respondent and held that the appellant had not proved that the documents were obtained under undue influence and that there was any entrustment of 150 sovereigns of jewels and accordingly dismissed the suit. The learned Judge allowed O.P. No.24 of 1992 for restitution of conjugal rights on the finding that there was no ill-treatment and that the appellant has got a duty to go and live with the respondent for the benefit and welfare of the children. The learned Judge also dismissed the application for judicial separation. He has found that the appellant has not proved the allegation of cruelty.

8. Learned counsel Mr. R. Sekar arguing on behalf of the appellant made the following submissions :

(a) The events that had taken place from the date of the marriage, especially from April 1988 till the date of execution of the three deeds dated 28.7.1988 would clearly show that the appellant was under threat and coercion and was under the dominance and threat of her husband.

(b) The recitals of the documents executed on 28.7.1988 and the manner and method of its execution would clearly show that all these documents

were unconscionable on the face of it and therefore, they would clearly come under Sub-clause (3) of Section 16 of the [Indian Contract Act, 1872](#) and the respondent has not discharged his burden.

(c) The respondent has not issued any reply to the legal notice issued by the appellant, Ex.A.2 dated 26.5.1988 which alleged clearly that the respondent had treated the appellant cruelly and mercilessly and subjected her to various acts of defamation in front of her own children and relatives and that she had to go to her parents' house, unable to bear the torture and mental agony. In the said letter, she had called upon the respondent to act as per the terms of the agreement dated 20.4.1988.

(d) The inconsistent stand of the respondent in reference to the motive for the alleged execution of the three documents and the failure of the learned Judge to consider the patent illegality in those documents has occasioned failure of justice.

9. Learned senior counsel Mr. G. Masilamani arguing on behalf of the respondent made the following submissions :

(a) The properties were purchased benami in the name of the wife and she did not have any source for the purchase of these properties.

(b) There is no proof of entrustment of 150 sovereigns of gold jewels with the respondent.

(c) There is no pleading as required under Order 6, Rule 4 of the Code of Civil Procedure in the plaint and the appellant had come to the court with vague allegations and false stories. In the absence of any evidence in support of these vague allegations, she is not entitled for the decree and order as prayed for.

(d) The respondent has established that the properties were initially purchased benami and that the appellant had executed the impugned documents on her own volition. In order to establish that the properties were purchased benami, the respondent has led in the evidence of D.W.5, the vendor to the documents, and established the same. According to him, the original documents were not produced and the possession and enjoyment of the properties was with the respondent and

the respondent had paid the money for the purchase of these properties.

(e) There is no proof for the entrustment of jewels with the respondent and in the absence of any evidence whatsoever, the appellant is not entitled to seek for a decree in reference to the jewels.

(f) The appellant is not entitled to let in any oral evidence contrary to the writings in the documents.

10. We have heard the counsel for the appellant Mr. R. Sekar and Mr. G. Masilamani, senior counsel appearing on behalf of the respondent, gone through the records and considered the matter carefully.

11. The following are the questions that arise for consideration in these appeals :

(i) Whether the appellant has established her allegation of cruelty and dominance over her by the respondent ?

(ii) Whether Exhibits A.3 and A.11 are brought about by undue influence and coercion and are liable to be set aside ?

(iii) Whether the appellant is entitled to the jewels and if so, to what extent ?

(iv) Whether the appellant has made out a case for judicial separation? and

(v) What are the reliefs that are to be granted to the parties

12. The parties were married on 15.9.1969 as per Christian Law and lived together at the appellant's place at Komarapalayam initially. The appellant's family was affluent, whereas the respondent admittedly was depending on the appellant's father. They came to Cuddalore some time in the year 1980. The father of the appellant died in the year 1983. Partition took place between the appellant and her brothers immediately thereafter. The appellant purchased the properties under Item 4 of 'B' Schedule on 15.10.1984, Item 3 of 'B' Schedule on 3.12.1984, Item 2 of 'B' Schedule on 22.10.1986 and Item 1 of 'B' Schedule on 1.2.1988 in her name. Apart from this, she had earlier purchased at Komarapalayam, in her father's place, a property on 11.4.1972. She was given, at the time of marriage, 150 sovereigns of

goldjewellery. Though there is some controversy regarding the actual quantum of sovereigns given to the appellant and contributed by the respondent, the fact that the appellant was given a considerable amount of jewellery in the range of 100 sovereigns cannot be disputed.

13. The case of the appellant is that ever since the birth of the children, the husband started ill-treating her in order to force her to get huge sums of money for his business and other luxurious expenses. There were many occasions of compromise and on the promise of the respondent, she would come back and live with him. However, the respondent used to keep quiet for a few days and again would begin to ill-treat and harass her. Though there were many such instances of ill-treatment, the important piece of evidence in support of a compromise is evidenced by Ex.A.1, the Panchayat Muchalika, where the appellant as well as the respondent have signed. The English translation of this Panchayat Muchalika is as follows :

'(1) The family is in a confused state without peace and till peace is restored between the parties and till the appellant agrees, the parties shall live separately.

(2) The appellant will be living at the Tagore Nagar house with the children. The respondent shall pay the expenses for the family. He should not refuse to pay the same and create a scene by seeking accounts for the expenses.

(3) Under no circumstances, the respondent should scold or beat the appellant and should not interfere with her going out and at the same time, the appellant also will not interfere and take any liberty with the respondent.

(4) On important occasions (marriage and functions), the respondent shall take the jewels and give it to the appellant.

(5) If any of the above conditions are violated, the appellant is entitled to take legal steps.

14. A reading of the above Panchayat Muchalika shows that it is written in plain words, coming out naturally. It makes clear that there is conflict and no peace in the family and that the appellant has agreed to live at the Tagore Nagar house

along with the children. The respondent had complete control over the income of the family and the jewellery of the appellant. Even this panchayat did not bring about peace in the family and the appellant left her house and joined her mother at Komarapalayam. After this, the appellant had sent a lawyer's notice Ex.A.2 dated 26.5.1988 wherein she had stated that the respondent had been treating her cruelly and subjected her to various acts of defamation in front of her own children and relatives. She was driven out of the family house and many panchayats were convened and on the repentance of the respondent that no such things will take place in future, the appellant used to come back. However, after a few days, again the harassment and mental agony will begin. The respondent had spread rumours among the relatives about the character of the appellant, which caused serious mental agony to the appellant. She has specifically stated in Ex.A.2 as follows :

'As you are also aware that all the jewels and cash belonging to the appellant are with the respondent in safe custody.'

Ultimately, she requested as follows :

'Our client, as per the agreed terms dated 20.4.1988, calls upon you to allow her to live peacefully, failing which our client will be forced to take legal steps against you in a court of law.'

Admittedly, there was no reply for this legal notice. However, according to the appellant, due to the intervention of the appellant's brothers and on the assurance of the respondent, who came down to her mother's place stating that she would behave properly, she came back to live with him. It is thereafter that the respondent gave a police complaint on 17.7.1988 against the appellant alleging that she had ran away with one Jayachandran and that she was missing. The fact that the respondent had given a police complaint on 17.7.1988 is admitted by the appellant. On the basis of this police complaint, a police officer came to the appellant's house and asked her to come to the police station. The respondent's uncle one Soosairaj had also threatened her at 7 p.m. that day to execute the documents as required. Thereafter, on the next day, i.e. on 28.7.1988, she executed three documents styling them as released deed, power of attorney and gift deed in favour of the

respondent. The appellant did not question the respondent in reference to the coercion and compulsion immediately thereafter, but could react only after two months, starting with the lawyer's notice dated 29.11.1988, Ex.A.4 and culminating in the filing of the suit on 29.1.1988.

15. The following circumstances would establish that the execution of the documents is quite unnatural, apart from the allegation of undue influence

(i) Ex.B.3 is the Release Deed executed by the appellant in favour of the respondent. There is no mention as to the items of property or the description of the property in the same. The document recites as though the appellant is releasing the property purchased in her name and that the property was purchased by the respondent out of his earnings. Obviously, the property is not a joint family property nor the respondent had any interest in the property. Therefore, there is no question of releasing the rights of the appellant in favour of the respondent. The reference in the release deed is to the effect that the respondent/husband had purchased the property in his wife's name from out of his income and that the said property has to be treated as family property and that the appellant/wife has to release the rights without any consideration. Obviously, it is a self-serving stand of the respondent/husband.

(ii) Ex.B.4 is the Power of Attorney executed by the appellant in favour of the respondent for the purpose of managing suit items 2 to 4. The reason stated in the document is that the appellant has to go to her mother's house and therefore, in order to manage the property, the husband is given the power. It is stated that the wife is not in a position to manage the properties and therefore, the husband is appointed as the person-in-confidence for giving the power of attorney. In the latter portion of the document, it is stated that the husband is given the right to make applications before the authorities and change the accounts from the bank and take the money, and if necessary, close the account. Here again, the question of alleged management does not arise, since according to him, he obtained a release deed. By virtue of this power of attorney, the respondent concedes that the properties still belonged to his wife and that he only wants to manage the same.

(iii) Ex.A.1 is a Gift Deed of Item 1 of 'B' Schedule Tagore Nagar house. The reason stated in the gift deed is that the appellant is executing the gift out of love and affection. This document also is in reference to the only house wherein the appellant is living, and the genuineness of this document, gifting away this property in favour of the respondent by the appellant, in the light of the allegations of cruelty as evidenced by Exhibits A.1 and A.2 appears to be difficult to accept, especially in view of the following statement in the document : 'By virtue of the fact that you (respondent) are my husband and out of love and affection and that you have earned and purchased the property in my name, I desire that you must keep and enjoy the property.'

16. By going through the recitals in the documents, we find that there is intrinsic evidence in the documents themselves positively suggesting that these documents were made to suit his requirements. The recitals are so couched in a language which is contrary to the actual state of affairs. Apart from this, the circumstances under which these documents came into existence would support an inference that the respondent is out to take away all the properties of the appellant and deprive her of any right of an independent existence. The case of the appellant is that these documents were obtained by coercion, compulsion and under threat to the life of her person and her children and in the light of the serious allegations of cruelty, including the doubting of her fidelity. The following are the circumstances set out by her in support of this allegation :

(i) Exhibit A.1, the Panchayat Muchalika.

(ii) Exhibit A.2, the notice issued by the appellant through her lawyer alleging acts of cruelty, defamation and harassment, for which there is no reply.

(iii) The police complaint dated 17.7.1988 alleging that the appellant had run away and is missing.

(iv) The visit of the police officers to the appellant's house asking her to come to the police station.

These facts have been spoken to by the witnesses and cannot be disputed.

17. Therefore, in the light of the alleged cruelty, defamation and threat by way of the police complaint, the appellant's case that she was compelled and forced and under the dominance of her husband she had to execute the three documents, has to be accepted.

18. On the contrary, the case of the respondent in reference to this allegation is contradicting. At one stage, he has stated that the properties were purchased by him benami in the appellant's name and therefore, she had executed the same in his favour. In another place, he says that the appellant had executed these documents in repentance of her misdeeds. He also says in Ex.A.10, reply notice dated 19.12.1988, that he never doubted his wife's character.

19. After the arrangement under Ex.A.1, on the specific condition of the appellant that on violation of the terms, she is entitled to take legal action, coupled with Ex.A.2 notice dated 26.5.1988 alleging cruelty, for which there is no reply, the fact is established that they were living together till 20.4.1988 and some time thereafter on the basis of the said arrangement, and that the appellant had left the house on the respondent's failure to keep up with the terms of the arrangement. After 26.5.1988, the fact that she had come back to Pondicherry is also not in dispute. The respondent had given a complaint to the police on 17.7.1988 that his wife had eloped. Therefore, the fact that the appellant was living under the dominance of her husband till the date of the execution of these three documents on 28.7.1988 cannot be disputed and coupled with the artificial, unnatural and questionable recitals found in those three deeds, the appellant has made out a case that they were brought about by coercion and compulsion. The appellant was also right in saying that the statutory presumption is raised in this case in favour of the appellant. The suit properties which stood in the name of the appellant were sought to be taken away at one stroke and on the basis of the evidence, it is seen that they are unconscionable, one-sided and therefore, the burden is on the respondent to establish that the documents were not induced by undue influence. The case of the respondent that the wife had executed the documents out of love and affection, in the light of his own allegation of police complaint on 17.7.1988, hardly ten days prior to the execution of the gift deed, is very difficult to accept. The argument that this court need not go into the aspect of the legal validity or otherwise of the

document cannot be accepted.

20. The appellant, apart from examining herself, examined three other witnesses on her side and the respondent examined himself and eight others. Both of them have marked Exhibits A.1 to A.36 and B.1 to B.36 respectively. Ex.A.1 is a crucial document, wherein the respondent admits that there was confusion and dispute in the family and wherein he agreed that he would not beat his wife and that the jewels were entrusted with the husband. Though at a later stage the respondent disowns his letter and stated that his signature was obtained in a blank white paper, in his earliest reply notice dated 19.12.1988, Ex.A.10, the respondent has admitted as follows :

'Your alleged letter given by my client on 20.4.1988 was again given by my client under the pressure of the so called henchmen of my client, namely the Parish Priest, my client's uncle, your client's brother (also a Priest) and other common friends and relatives. It is only given to satisfy your client as usual with the solemn assurance of the Parish Priest that it will be kept in his custody. But, your client's brother, who is also a Priest, fraudulently collected the letter from the Parish Priest of Thattanchavadi Rev. Fr. Lourdenadhan and misused it for some oblique purposes.'

From the above, it is clear that the respondent is fully aware of the contents of the letter and the same was given under the alleged pressure and to satisfy the appellant. Whereas, in the written statement, in paragraph 7, he has stated that he was called upon to sign against his conscience in a blank white paper by the so called panchayatdars. To the same effect, he has repeated in his deposition as D.W.1, wherein he says that nothing was written in Ex.A.1 and that he did not know anything about the contents of the letter and the signature of the plaintiff and the witnesses. The respondent is not speaking the truth, especially after having admitted the same in his reply notice Ex.A.10.

21. It is further seen that at the earliest point of time, the appellant had issued Ex.A.2 letter when the respondent went back on his assurance of treating the appellant reasonably with the specific allegation of ill-treatment, cruelty and beating. She has also referred to Ex.A.1 dated 20.4.1988 therein. For this notice,

there was no reply by the respondent. After having stated in Ex.A.10 reply notice dated 19.12.1988 that he never doubted the appellant's chastity or her fidelity, the respondent went back and made all sorts of allegations against the appellant in the written statement and in his deposition. The respondent refers to the illicit relationship in a number of places in his written statement, which per se, amounts to cruelty, if it goes unsubstantiated. He has stated as follows :

'He never told about the said immoral conduct of the plaintiff since he was not aware of the same personally.'

'Thus, the plaintiff was induced to become unfaithful to the defendant.'

In paragraph 10, he says as follows :

'In the course of time during the said separation, the said illicit relationship of the plaintiff with the driver became an open secret in the month of July, 1988.'

He admits of giving a police complaint in his deposition about the plaintiff's missing, suspecting that she had ran away with one Jayachandran. D.W.7, in his evidence, admits that he saw police in the house of the appellant and he has stated that only on his request, the police went back. In spite of this clear evidence, the Family Court erroneously concluded that the appellant has admitted in her evidence that she was living separately from July 1988 onwards and hence, there was no domination by the husband against the wife and that therefore, there can be no presumption under Section 16 of the Contract Act.

22. The respondent has admitted in his evidence as D.W.1 as follows :

'On 13.7.1988, the appellant returned to Pondicherry from Hosur after the issue of Ex.A.2.'

The appellant, in her evidence as P.W.1, has clearly stated that even after the letter dated 20.4.1988, the respondent was ill-treating her after consuming liquor and that she went to her mother's house and issued the lawyer's notice Ex.A.2, for which no reply was given. She did not return to her husband's house. The respondent came to her house and took her back on a promise and consequently,

she had returned to her husband's house only after he went over to Dharmapuri and persuaded her brothers. She had resumed her marital life with her husband. It is only thereafter that a complaint dated 17.7.1988 is said to have been given and on 21.7.1988, the police officer came to her house and asked her to come to the police station and that the respondent's uncle Soosairaj threatened her over phone on the same night asking her to come to the Registrar Office on the next day. Therefore, the appellant, who went back to her mother's house, returned to Pondicherry and to her Tagore Nagar house, which was the only house as residence and was living there till she was made to sign the three documents at one stroke. The trial court failed to consider the continued cruelty undergone by the appellant and the fact that she was to bring up three children who are admittedly handicapped and the fact that she was branded as an immoral and unfaithful wife and also that a police complaint about her alleged eloping with the driver was given and the police was enquiring about her. All these facts cumulatively will definitely go to show that the documents said to have been executed on 28.7.1988 were obtained under those circumstances by coercion and undue influence.

23. The attempts of the respondent to justify the execution of the documents are conflicting and contradictory. At one stage, the respondent submits that all the properties were purchased by him benami in the name of the wife out of love and affection and that the wife wanted to go to her native place, entrusting the management of the properties with the respondent, and in another place, he has stated that the appellant, in repentance of her behaviour, had executed those documents. In Ex.A.10, another story is stated to the effect that the appellant had disposed of her Komarapalayam property for a low sale consideration without the knowledge of the respondent and when the respondent questioned about her conduct, she had informed him that she would give back to the respondent all the properties that were purchased in her name and only under those circumstances a panchayat was held and she executed the documents in question on her own free will and without any coercion or undue influence. The stand of the respondent that there was no proper pleading and proof cannot be accepted. In paragraph 9 of her plaint, the appellant has stated as follows :

'In the last week of July 1988, the petitioner was under the complete control and under the influence of the respondent. She was forced by the respondent against her will and was taken to the Sub Registrar's Office where she was forced to sign some document under threat and coercion. For fear of her life and the safety of her children, she signed the documents against her free will under the undue influence of the respondent. The respondent had a huge following to back him up in all his illegal and unlawful activities.'

In her evidence as P.W.1, the appellant, in her chief-examination, has stated as follows :

'Even subsequent to the documents, he has ill-treated me. He used to ill-treat me after consuming liquor. I went to my mother's house and issued a lawyer's notice to the defendant. Ex.A.2 is the copy of the lawyer's notice issued by me to the defendant. No reply was given by the defendant even after receipt of the notice. I did not return to my husband's house. The defendant came to my house and has taken me back on a promise in the result I have returned to my husband's house only after my husband went over to Dharmapuri and my husband has persuaded my brothers Gasper and Filominaraj. I resumed my marital life with my husband. On 27.7.88, a Police Officer came to my house and asked me to come to Police Station on the allegation that my husband has given a complaint against me. The defendant's uncle Soosairaj has threatened me over phone on the same night at 7.00 p.m. and threatened me to come on the next day to the Registrar Office for putting signature before the Registrar. I also rang up to my uncle Advocate Mr. Jayaraj and stated to him about the threat of Soosairaj and asked me his advice. He has also advised me not to put signature in any document and advised me not to put signature in any document and advised me to leave Pondicherry immediately. Next day the defendant's uncle Soosairaj came along with two persons and the police Constable. I do not know who the persons who accompanied Soosairaj. They obtained my signatures in several printed forms and plain papers and stamped papers in the house. They have taken me to the Registrar Office in a van. The defendant went to the Registrar Office along with his uncle and came after about fifteen minutes. They brought me inside the Registrar Office and asked my thumb impressions and signatures. I have done so in ten or

fifteen papers. I was taken back to my house at Tagore Nagar. On the same night the defendant along with his friends have ill-treated me and misbehaved with me. When I enquired my husband, he has assaulted me and I have sustained cut injury in my middle finger.'

24. It is seen that all the three documents were executed consecutively within a short span of 15 minutes. Assuming that undue influence is not established for the sake of argument, a reading of the documents in question will show that the transaction, on the face of it, on the basis of the evidence adduced, appears to be unconscionable in the absence of any acceptable reason for the appellant to execute those documents. Even the learned counsel for the respondent has to concede that the validity of the documents in question cannot be the subject matter in these proceedings and the same has to be separately raised and decided. We are unable to accept such a stand. The documents are under question, both on the basis of the manner of their execution as well as on the validity of their effect. The respondent has not satisfactorily explained as to how a release deed could be executed when the property, which was purchased in the name of the appellant with all the records and being enjoyed by her, can be released in favour of the respondent. Similarly, the question of giving a power of attorney for the very same property also does not arise for consideration. Again, the reasons for executing the gift deed in favour of the respondent who is said to have caused so much of ill-treatment and cruelty and was suspecting the fidelity of the appellant are not at all acceptable. It is too artificial to accept the case of the respondent that the appellant executed a gift out of love and affection for her husband. Yet another aspect is that by these deeds, the appellant has parted away with all her properties without anything to fall back upon for herself. We have to remember that the appellant's father is no more and her brothers have obtained release deed from her and that she had sold away the only property through power of attorney obtained from her by her brothers and therefore, it is difficult to accept the case of the respondent that all the properties were thus parted away in favour of the respondent. We must also appreciate the fact that the mental condition of the wife, when the husband makes allegations of suspicion of her character and gives a police complaint and the police comes to her house to take her to the police station, would definitely form part of coercion to get the documents executed. 25. In

support of the submission that the respondent had not discharged the burden of proof and the law on this aspect, reference was made to a judgment of the Division Bench of this Court in *ANDALAMMAL VS . RAJESWARI VEDACHALAM* : AIR 1985 Mad 321 , wherein the Division Bench was dealing with a case of similar nature. In that case, their lordships held that if it is established that a person, who is in a position to dominate the will of another, entered into a contract with him and if the transaction appeared, either on the face of it or on evidence adduced, to be unconscionable, then the burden is upon the person who was dominating the will of the other person, to prove that such contract was not induced by undue influence. The word 'shall' found in Section 16(3) of the Contract Act indicates that the presumption is mandatory. The concomitant position is that if the burden is not discharged, the presumption shall prevail. It is further significant to note that either on the evidence or on the face of the transaction, it is enough if it appeared to be unconscionable. In other words, it is enough for the appellant to substantiate that the transaction was prima facie unconscionable and that she was under the domination of her husband. The Division Bench also held that if a person were to stand in a fiduciary relationship with another, the former would be deemed to have dominated the will of the latter. They have also referred and followed the decision of the Privy Council in *INCHE NORIAH VS. SHAIK ALLIE* A.I.R. 1929 P.C. 3, wherein the Privy Council had held that the relationship between the donor and the donee were sufficient to raise the presumption of the influence of the donee over the donor and to render it incumbent upon him to prove that the gift was a spontaneous act of the donor acting under the circumstances which enabled her to exercise an independent will and which would justify the Court in holding that the gift was the result of a free exercise of her will. Their lordships also referred to the judgment of the Supreme Court in *SUBASH CHANDRA VS. GANGA PRASAD* and held in reference to the observation of the Supreme Court as follows :

'Merely because the parties were nearly related to each other, no presumption of undue influence can arise. Therefore, it cannot be understood that the Supreme Court had subscribed their concurrence to the above observation. We had taken some pains to refer to this passage because the Section as such does not make any reference to relationship. It may be stated that in that case, the Supreme Court set aside the judgment and decree of the High Court particularly because the case

of undue influence had not been sufficiently alleged either in the pleadings or substantiated in the evidence adduced.'

On going through the evidence in this case, we find that there are sufficient pleadings and evidence as set out above, apart from the intrinsic material available in the documents themselves to prove that the documents were brought about by undue influence.

26. In the light of the above, we have no hesitation in holding that the appellant has clearly established undue influence and also her allegation that the execution of the documents was unconscionable and that the respondent has not discharged his burden and that the Family Court has erroneously failed to consider all these aspects and hence, the judgment of the Family Court is liable to be set aside.

27. The case of the respondent that the properties were originally purchased by the respondent in the name of the wife has not been established. It is well settled that the burden of proving that the transactions were made benami and that the apparent purchaser is not the real owner rests on the respondent. There is absolutely no acceptable legal evidence in this case to establish the benami character. When the respondent alleged that the wife had no source to purchase these properties during the period from 1984 to 1988, he has neither explained as to how he had the source to purchase these properties. On the contrary, it is admitted that the wife comes from an affluent family and that she is an Income Tax Assessee, whereas there is no evidence to show about any independent source of income for the respondent to purchase all these properties in the name of his wife. The Family Court has failed to see whether the respondent had discharged his burden of proving the case of benami. It is by now well settled that the burden is upon the person who sets up the case of benami to prove the same. The relevant factors for the purpose of establishing the benami transaction, namely the passing of consideration, motive for the transaction and mutation of the records were not proved by the respondent. The respondent has not proved that he had the source to offer the consideration and that he was in exclusive possession and enjoyment of the property and hence, his statement that these properties were purchased out of love and affection also cannot be accepted.

28. There is a bar under Section 4 of the Benami Transactions (Prohibition) Act, 1988 to make any claim in respect of any property held benami. There is a legal presumption, unless the contrary is proved, that the property had been purchased for the benefit of the wife. The said Act received the assent of the President on 5.9.1988. Sections 3, 5 and 8 of the Act came into force on 5.9.1988 and the remaining Sections were deemed to have come into force on 19.5.1988. In the case on hand, the documents were executed on 28.7.1988 and the suit was filed on 29.1.1990. The respondent filed his written statement on 9.12.1991. As per Section 4(2) of the Act, no defence based on any right in respect of any property held benami shall be allowed in any suit by a person claiming to be the real owner of such property. These provisions were the subject matter of interpretation by the Supreme Court in P. RAJAGOPAL REDDY & OTHERS VS . PADMINI CHANDRASEKARAN , wherein, while upholding Section 4(2) of the Act, their lordships held that all real owners who stake their claim regarding benami transaction, after Sections 4(1) and 4(2) came into operation, are given uniform treatment by these provisions, whether they come as plaintiffs or as defendants. Their lordships held as follows :

'Even though such a suit might have been filed prior to 19.5.1988, if before the stage of filing of defence by the real owner is reached Section 4(2) becomes operative from 19.5.1988, then such a defence as laid down under Section 4(2) will not be allowed to such a defendant.'

Applying this ratio in reference to the interpretation of Section 4(2) of the Act, the respondent herein cannot be allowed to raise the plea of benami transaction in reference to the properties in question.

29. Insofar as the entrustment of jewels is concerned, in Ex.A.1 notice, the respondent had categorically agreed that on important occasions, he will take and give the jewels to the appellant. In Ex.A.2 notice, it is categorically stated that all the jewels and cash belonging to the appellant was in safe custody, for which there is no reply. P.W.1 has stated in her evidence that she had handed over 150 sovereigns of jewels to the respondent in the presence of the panchayatdars. The respondent had admitted in his written statement that the appellant was adorned

with 75 sovereigns at the time of her marriage and that the respondent gave the appellant 30 sovereigns. The respondent, as R.W.1 in O.P. No.234 of 1990, has categorically admitted in the cross-examination as follows :

'I have not operated so many lockers after the petitioner (wife) left me. On the date of execution of Ex.A.1, the jewels were with me. Afterwards, on her demand, the jewels were returned to her. I have not mentioned in my previous notice that the petitioner had taken 105 sovereigns of jewels with her.'

In the counter filed in O.P. No.234 of 1990 to the Pauper Application, the respondent has stated that the appellant was having 105 sovereigns of gold jewels with her. Therefore, it is clear that the appellant was having 105 sovereigns of gold jewels and in the light of Ex.A.1, Panchayat Muchalika, the respondent has admitted of the entrustment of the jewellery to him. Therefore, it is clear that the respondent is retaining the 105 sovereigns of jewels belonging to the appellant from 20.4.1988 onwards. The Family Court failed to consider the conflicting stand of the respondent and the admitted case that the appellant was adorned with 105 sovereigns of gold jewellery. Therefore, the only question that remained to be determined was whether the jewels were entrusted with the respondent or whether the appellant had taken all the jewellery with her. In Ex.A.10 notice, the case of the respondent is that the jewels were handed over to her father and were with him till his death. Whereas, in Ex.A.19, the respondent says that the appellant had taken her 75 sovereigns of jewels along with the 35 sovereigns of jewels of his mother when she left her matrimonial home. A different story is stated in the written statement, wherein it is stated that the appellant's father had entrusted her jewels with one Irudayaselvam, the brother-in-law of the respondent. All these things ought not have been accepted by the Family Court in the light of Ex.A.2, the letter given by the respondent himself. The appellant, in her plaint, has specifically pleaded that during April 1988, the respondent threatened the petitioner to hand over all her jewels of gold weighing 150 sovereigns. A Panchayat was convened in the presence of one Rev. Father Lourdusamy on 20.4.1988 about the jewels. The Panchayatdars asked the petitioner to hand over the jewels to the respondent for safe custody. A letter to this effect was signed by the petitioner and the respondent had affirmed in the letter about the handing over the jewels to the respondent. This

is evidenced by Ex.A.2, the appellant's notice to the respondent, wherein it was stated as follows :

'You are also aware that all the jewels and cash belonging to our client are with you in safe custody.'

The respondent was in the custody of the locker as evidenced by his own admission in the cross-examination referred to earlier and that is why in Ex.A.1, it was stated that the respondent has to take those jewels during important functions like marriage and other ceremonies and give them to the appellant to wear. From the above, it can safely be concluded that the respondent had been entrusted with 105 sovereigns of gold jewels belonging to the appellant and that he has retained them and therefore, he is bound to return the same. The order of the trial court, therefore, to that extent is liable to be set aside.

30. It is submitted by the Senior Counsel for the respondent that the respondent had sold all but one of the properties, the subject matter of the impugned documents. The judgment of the Family Court was rendered on 30.6.1994. The respondent had sold Item 3 of the 'B' Schedule land on 5.12.1995 and another portion in March, 1996. He further sold Item 1 of the 'B' Schedule property namely the Tagore Nagar house on 12.12.1998. According to him, he has put up a construction in Item 2 of the 'B' Schedule land and let in tenants and this appears to have been done to see that she may not be able to physically get at the properties. All these alleged transactions would only show that the respondent has dealt with these properties as his own on the basis of the alleged release deed, power of attorney and gift deed. The suit was dismissed along with the petitions by a common judgment dated 30.6.1994. The appellant filed her appeal on 23.8.1994. The respondent admittedly had notice and in spite of the same, had transferred these properties, which are the subject matter of the appeals, on 5.12.1995, March 1996 and on 12.2.1998. The appeal has to be held to be a continuation of the suit so as to make the transfer made pending the appeal liable to be hit by Section 52 of the Transfer of Property Act. A Division Bench of the Madras High Court, in KRISHNAPPA CHETTY VS. ABDUL KHADER SAHEB

A.I.R. 1915 MAD 495, has accepted the argument that alienations made during the continuance of the proceedings originated by the claim petition till the disposal of the suit are affected by the doctrine of lis pendens. The said principle will apply to the present case in reference to appeal also. Hence, the transactions are clearly hit by lis pendens.

31. Learned counsel for the appellant referred to these transactions and also the talks of compromise. It is seen that several panchayats and compromises are freely referred to, right from the beginning, at several stages. We are of the view that the respondent has made these transactions as a fait accompli and his offer of these properties in favour of the children is only an after-thought. As a matter of fact, the counsel for the appellant submitted that at one particular stage of compromise talk, what all the appellant had requested was a life estate in the properties and the remainder to the children, since she had no other property or income to sustain herself. We have no doubt that the appellant is as affectionate as the respondent and is interested in the welfare of the three unfortunate children. The respondent cannot take advantage of the disability of the children and on that score, deprive the interest of the respondent. It is stated that the first daughter, aged 29 years, got married to a Law graduate during the year 1994 and she is also a Law graduate. She has now got a son aged six years. The second daughter is said to be mentally retarded and is aged 27 years. The third son, with certain immunity deficiency, is studying. We are unable to appreciate the action of the respondent to dispose of all these properties when the appeals are pending and come forward to settle the properties in favour of the children. We are not persuaded to accept these proposals as there were a number of such attempts, proposals and counter-proposals in the past, which did not fructify to the satisfaction of the parties, all along.

32. In the light of the unsubstantiated allegations touching on the character of the appellant and the cruelty caused on her, as evidenced by the false police complaint and coercion to execute the documents, the appellant has made out a case for judicial separation. According to the appellant, she was put to constant threat for her life and she had apprehension that she will be murdered, bodily harmed, molested or her modesty outraged by the respondent or his henchmen if she

made any protest for all the brutality shown to her. She has stated that she was beaten up and ill-treated and forcibly driven out of the house and thereafter, she issued a registered notice dated 26.5.1988, for which there is no reply. She was thereafter persuaded by the respondent to come back to live with him and even thereafter, the police complaint was given against her. She had alleged that the respondent had filed a written statement in the suit on 9.12.1991, wherein he has, without any regard for the truth, alleged that she was living in criminal intimacy with one Jayachandran. The allegations are, per se, false, malicious, atrocious and motivated. She has also stated that the respondent had wantonly deserted her without any justifiable cause and put her in a horrible state of mind. Though the allegations are denied in the counter, it is clearly established on the admitted statement of the respondent himself that he made accusations about her character and the same remains unsubstantiated. No attempt has been made before this court to justify the said stand of the respondent. For all other reasons stated above in the above suit, we find that the appellant has made out a case for judicial separation. The Family Court has erroneously held that the appellant had not proved the alleged cruelty and therefore, there has to be an order of restitution of conjugal rights. We have found that the appellant has clearly and cogently established her allegation of cruelty against the respondent. Hence, the order directing restitution of conjugal rights has to be set aside.

33. In the result, the suit O.S. No.25 of 1991 is decreed as prayed for in reference to the documents impugned and to the extent indicated in reference to the jewellery. O.P. No.16 of 1993 for a decree of judicial separation is allowed. O.P. No.24 of 1992 is dismissed. All the three appeals namely C.M.A. Nos.1397, 1398 and 1399 of 1996 are allowed with costs.

34. Consequently, the connected C.M.Ps. are closed.