K.M. Madhavakrishnan Vs. S.R. Sami and ors.

K.M. Madhavakrishnan Vs. S.R. Sami and ors.

SooperKanoon Citation : sooperkanoon.com/803721

Court : Chennai

Decided On : Feb-05-1980

Reported in : (1980)2MLJ398

Appellant : K.M. Madhavakrishnan

Respondent : S.R. Sami and ors.

Judgement :

S. Padmanabhan, J.

1. The Additional plaintiff in O.S. No. 71 of. 1968, who is the son and legal representative of Paramayee Animal, the deceased first plaintiff, is the appellant. Paramayee Ammal having died pending suit, her son the appellant was brought on record as her legal representative. Paramayee Ammal filed the suit for a declaration that the agreement of sale executed by her in favour of defendants 1 and 2 on 17th June, 1967 was void and inoperative and for other reliefs. The suit was dismissed by the trial Court and consequently the present appeal has been filed.

2. The facts of the case may be briefly set out as follows : One Marimuthu Pillai, the husband of Paramayee Animal was the owner of an extent of 4.04 acres of land comprised in T.S. No. 1332 in Erode Town. Marimuthu Pillai died in 1953 leaving two widows one of whom was Paramayee Ammal and two sons Venugopal and Rajagopal through his first wife and a son Madhavakrishnan, the appellant herein and a daughter Lakshmi though his second wife Paramayee Ammal. On the death of Marimuthu Pillai disputes arose between the first plaintiff on the one hand and her son, the second plaintiff and step-sons on the other. The deceased first plaintiff was living separately in Vellala Street in Erode while her sons were living in Kaveri Street. The second plaintiff filed O.S. No. 111 of 1954 on the file of the Sub-Court, Coimbatore for partition and recovery of his share in the suit property. In that suit a preliminary decree was passed and pursuant to the preliminary decree an interim final decree was passed on 19th November, 1954, by which the suit property was allotted to the deceased first plaintiff Paramayee Ammal. Purusuant to the interim final decree, the deceased first plaintiff took possession of the suit property. On 14th May, 1966 the deceased first plaintiff leased out the suit property to defendants 3 and 4 under Exhibit B-16. Pursuant to the lease, defendants 3 and 4 were enjoying the property. Besides the suit property, the deceased first plaintiff had other properties which were yielding considerable income. While so, the second defendant who was a relation and employee under Marimuthu Pillai pretended that he was very much interested in the welfare of the deceased first plaintiff and taking advantage of the strained relationship between her and her sons, gained her confidence. The result was that he was put in charge of the collection of rents, letting out the properties etc., on behalf of the deceased first plaintiff and she was acting as per his suggestions and instructions in routine matters for nearly fifteen years. While so, defendants 3 and 4 were not paying rents properly to the deceased first plaintiff and they fell into heavy arrears. They were not willing to surrender possession either. At the same time, they had inducted a number of persons as subtenants. The second defendant therefore informed the deceased first plaintiff that the first defendant who owned a turmeric mandi and a theatre was a very influential man of the locality. He further suggested that if a document was created in trust in the name of the first defendant with suitable

recitals it would intimidate and induce defendants 3 and 4 and their sub-tenats to surrender possession of the property. The second defendant is said to have further stated that if the fact of the execution of such document is circulated in the locality, her son, step-sons and other members of the family would come forward to take effective steps to get defendants 3 and 4 evicted from the suit property. The deceased first plaintiff, without realising the import and impact of the, suggestion of the second defendant and placing great reliance on the confidence she had in him, agreed to the proposal. Accordingly, on 17th June, 1967 an agreement purporting to convey the suit property of an extent of 4.04 acres in T.S. No. 1232 in Erode Town to defendants 1 and 2 was got up by the second defendant. The agreement contained recitals appropriate for the purpose though contrary to facts. The first plaintiff was made to execute the document . The said agreement for sale was marked as Exhibit A-13. In executing the, document, the first plaintiff had no independent advice but solely relied upon the confidence she had in the second defendant. The deceased first plaintiff also filed, on the advice of the second defendant, O.S. No. 155 of 1967 on the file of the Sub-Court, Erode against defendants 3 and 4 for recovery of arrears of rent. A month prior to the institution of the suit the second defendant informed the deceased first plaintiff that a sum of Rs. 40,000 would be required to secure vacant possession from the tenants and that therefore the first defendant should be put in possession of sufficient funds for that purpose. The deceased first plaintiff thereupon arranged with one Rangasamy Pillai a turmeric merchant in the locality for the required amount and went to the second defendant. However, since the second defendant did not like Rangasamy Pillai being associated in the matter, he gave an excuse that the first defendant was not in station and that the suit had been adjourned beyond the summer holidays. This conduct on the part of the second defendant created suspicion in the mind of the deceased first plaintiff. While so, her son and step sons caused a publication to be made in 'Malai Murasu' to prevent third parties from entering into any transaction of sale or otherwise with the deceased first plaintiff in respect of the suit properties as they formed part of Marimuthu Pillai's estate and were the subject-matter of pending litigation. Defendants 1 and 2 got notice of the publication of this notice in 'Malai Murasu'. They then obtained possession from defendants 3 and 4 by paying them Rs. 15,000 as if the deceased first plaintiff had been paid Rs. 10,000 as advance under Exhibit A-17 agreement for sale and as if she had asked them to take possession from defendants 3 and 4 on payment of Rs. 15,000. This was followed by the issue of a lawyer's notice dated 19th March, 1968 on behalf of defendants 1 and 2 and another notice on behalf of defendants 3 and 4 to the first plaintiff reciting the fact that the. suit property had been taken possession of by defendants 1 and 2 on payment of Rs. 15,000 to defendants 3 and 4 at the instance of the deceased first plaintiff.

3. According to the deceased first plaintiff there was no genuine or enforceable agreement for sale by her in favour of defendants 1 and 2. The recitals regarding consideration found in the agreement for sale were all false. She was induced to put her signature on the representation that the same was required for securing possession from defendants 3 and 4. She did not enter into any agreement for sale at all and the document was not intended to be acted upon as a genuine agreement to sell the suit property in favour of defendants 1 and 2. The deceased first plaintiff had inherited a large estate and she was receiving sufficient income from her agricultural lands and there was no necessity at all for her to sell the property. As a matter of fact, there is a prohibition by the authorised officer under the Land Reforms Act from selling her surplus lands. The deceased first plaintiff has also stated that the agreement for sale had been discovered along with the diary written by the second defendant in respect of the deceased first plaintiff's affairs in her house. No attestors were present when her signature was taken in the document and the partisans of defendants 1 and 2 were made to figure as attestors subsequently. The deceased first plaintiff has further alleged that the consideration mentioned in the agreement for sale was ridiculously low and did not represent even half the market value of the property. The agreement is said to be vitiated by undue influence, fraud and illegality. Therefore, the deceased first plaintiff has prayed that the agreement for sale dated 17th June, 1967 should be declared as void and inoperative and that the defendants 1 and 2 be restrained from enforcing the same. The deceased first plaintiff has further stated that she came to know that the second defendant has misappropriated large sums of money and also valuables, talcing advantage of the confidence she had reposed in him and that she has reserved her right to take appropriate action with respect to this in separate proceedings. There is also a prayer in the plaint for delivery of possession of the suit property from the

defendants and for mesne profits as determined by the Court.

4. Defendants 1 and 2 have filed a joint written statement. They have denied the-allegation in the plaint that the deceased first plaintiff had reposed absolute confidence and trust in the second defendant and was acting, according to his instructions, in her affairs. She was a very clever woman and was managing her affairs herself. She was keeping good health and was in full control of her mental powers. The allegation that she was not in good terms with her son has been denied. According to the written statement, the deceased first plaintiff on her own volition entered into the agreement for sale on 17th June, 1967. The recitals contained in the agreement for sale were all true and she was fully aware of the recitals in the document. At the time when the agreement for sale was entered into she had competent legal advisers and she had the benefit of their advice. The allegation that she entered into the agreement for sale blindly and implicitly relying on the suggestion of the second defendant is totally denied. Since the second defendant was residing near the residence of the deceased first plaintiff, occasionally, at her request the second defendant had written receipts for her. At the instance of the deceased first plaintiff defendants 1 and 2 were persuading defendants 3 and 4 to surrender possession of the suit property to the plaintiff. Finding that she was not able to realise the lease amounts from defendants 3 and 4 the deceased first plaintiff wanted to sell the property and invest the sale proceeds in business so that she could get income without any trouble from defendants 3 and 4 and the subtenants. The agreement was prepared in duplicate and one was handed over to the plaintiff at the time of execution. The attestors were present at the time of execution of the document and they duly attested the same. They have denied the allegation in the plaint that the property was worth Rs. 5,00,000. On the other hand, the consideration fixed under the agreement for sale was fair and proper. It is further stated that they have filed a suit for specific performance of the contract against the deceased first plaintiff in O.S. No. 83 of 1968. The deceased first plaintiff requested defendants 1 and 2 to pay Rs. 15,000 to defendants 3 and 4 and take possession of the property and accordingly the said amount was paid to defendants 3 and 4 and possession was taken from them. The publication in 'Malai Murasu' was done at the instance of the deceased first plaintiff's son and step-sons who wanted the deceased first plaintiff to resile from the agreement for sale. The allegation that the second defendant had misappropriated large amounts and valuables and not accounted for the same has been denied. The agreement for sale was not void or unenforceable or vitiated by undue influence or fraud. The deceased first plaintiff was fully aware of the nature and import of the document she was executing. The defendants have prayed that the suit should be dismissed. It is also stated that the value of the suit has been unnecessarily inflated to suit the case of the deceased first plaintiff:

On the above pleadings the following issues have been raised:

(1) Whether there is due execution of any agreement of sale by the deceased 1st plaintiff to defendants 1 and 2 on 17th June, 1967?

(2) Whether the 1st plaintiff's signature to the document dated 17th June, 1967 was taken under the circumstances alleged in the plaint and whether the same is vitiated by undue influence and fraud?

(3) Whether the alleged request by the 1st plaintiff to defendants 1 and 2 to pay defendants 3 and 4 the sum of Rs. 15,000 for delivery of possession to them is true?

(4) Whether the alleged payment and delivery of possession constitute part-performance by the plaintiff of the suit contract?

(5) Whether the plaintiff is entitled to> possession from the defendants?

(6) Whether the plaintiff is entitled to any and what mesne profits?

(7) Whether the 1st plaintiff was competent to effect any transfer in view of the Madras Land Reforms Act relating to ceiling on land?

(8) Whether the plaintiff is entitled to the declaration and injunction regarding the document dated 17th June, 1967, as prayed for?

(9) Whether the document dated 17th June, 1967 purporting to be an agreement of sale is not enforceable for any of the reasons in the plaint ?

(10) Whether defendants 1 and 2 are entitled to compensatory costs?

(11) To what reliefs are the parties entitled?

5. As already stated, the first plaintiff died pending suit and the second plaintiff her son who is the appellant herein was brought on record as her legal representative.

6. The trial Court found that the deceased first plaintiff was competent to enter into an agreement with defendants 1 and 2 to sell the suit property to them and that the said agree-ment for sale was genuine and bona fide and not vitiated by undue influence, fraud or illegality. The trial Court also found that the agreement for sale was not hit by any of the provisions of the Tamil Nadu Land Reforms Act, and that the said agreement was enforceable. The trial Court further held that defendants 1 and 2 took possession of the property in part-performance of the agreement for sale and that consequently the second plaintiff was not entitled either to recover possession or to claim mesne profits from the defendants. The claim for compensatory costs made by defendants 1 and 2 was however negatived. In the result, the suit was dismissed with costs.

7. The second plaintiff has consequently challenged the correctness of the judgment and decree of the trial Court dismissing the suit.

8. Admittedly defendants 1 and 2 have filed O.S. No. 83 of 1968 in the Sub-Court, Erode for specific performance of the agreement for sale dated 17 June, 1967. It was stated at the Bar that the said suit is pending as the same has been stayed under Section 10, Civil Procedure Code, in view of the pendency of the present suit and the appeal therefrom.

9. Admittedly, the suit property, belonged to Marimuthu Pillai, who died leaving his junior widow the deceased first plaintiff, her son the second plaintiff and her daughter Lakshmi and two sons by his first wife. On the death of Marimuthu Pillai misunderstandings had arisen between the deceased first plaintiff on the one hand and the second plaintiff and his step-brothers on the other and the second plaintiff filed O.S. No. 110 of 1954 on the file of the Sub-Court, Coimbatore, which was later transferred and renumbered as O.S. No, 87 of 1956 on the file of Sub-Court, Erode for partition and recovery of his share in the father's property. A preliminary decree for partition was passed followed by an interim final decree on 19th November, 1954. It is admitted that under the said interim final decree the suit property was allotted to Paramayee Ammal, the deceased first plaintiff and she took possession of the same. It is also admitted that on 16th November, 1956 she leased out the property to defendants 3 and 4 under Exhibit B-16. While so, under Exhibit A-13 dated 17th June, 1967 she is said to have executed an agreement for sale in favour of defendants 1 and 2. The sale consideration mentioned is Rs. 1,90,000. Under the agreement for sale the deceased first plaintiff had to evict the tenants within a period of six months, and the sale transaction was to be completed. In the event of there being any delay in evicting the tenants, within three months from the date of eviction of the tenants, defendants 1 and 2 had to pay the balance and take the sale deed. A sum of Rs. 10,011 was paid as advance by defendants 1 and 2 and the balance of Rs. 1,79,989 was to be paid by defendants 1 and 2 at the time when the possession of the property was given and the sale deed to be executed at the expense of defendants 1 and 2. In the event of the deceased first plaintiff not being able to evict the tenants liberty was given to the deceased first plaintiff as well as defendants 1 and 2 to cancel the agreement for sale. In such an event, the deceased first plaintiff was bound to return the advance amount of Rs. 10,011. It was also open to defendants 1 and 2 to take the sale deed even if the lessees were in possession of the property. There is a further clause that if any litigation arose in respect of the suit property, the deceased first plaintiff should prosecute the

same and should indemnify defendants 1 and 2 for the loss that might be occasioned to them. The deceased first plaintiff further agreed that she would do whatever was necessary to enable defendants 1 and 2 to get the lay-out of the property, sanctioned. It is the validity of this agreement for sale that is the subject-matter of attack in this appeal.

10. Mr. G. Ramaswami, learned Counsel for the appellant has raised the following principal contentions : (1) The agreement for sale, Exhibit A-13 dated 17th June, 1967, said to have been executed by the deceased first plaintiff in favour of defendants 1 and 2 is void and inoperative for various reasons which will be detailed hereunder. (2) The possession of defendants 1 and 2 cannot be said to be in part-performance of the agreement for sale. The present suit is for recovery of possession of the suit property from defendants 1 and 2 on the foot of the deceased first plaintiff's title to the same. Even if it is assumed that the said agreement for sale was valid and enforceable by defendants 1 and 2 it did not create any interest in the suit property in favour of the said defendants and that consequently so long as no sale deed has been executed in favour of defendants 1 and 2 conveying the title over the suit property to them or so long as the suit for specific performance has not been decreed, defendants 1 and 2 would not be entitled to resist the relief for recovery of possession of the property.

11. Mr. G. Ramaswami, learned Counsel for the, appellant elaborated the first of his contentions thus : The second defendant was originally employed under Marimuthu Pillai. On Marimuthu Pillai's death differences arose between the deceased first plaintiff on the one hand and her son and step-sons on the other which resulted in the filing of O.S. No. 111 of 1954 by her son the present appellant for partition and recovery of his share in Marimuthu Pillai's properties. In view of the differences of opinion between the deceased first plaintiff and her son and step-sons, she was living separately in Vellala Street in Erode, while the son and the step-sons were living in Kaveri Street in Erode. The deceased first plaintiff had a large estate to manage. The second defendant continued with the plaintiff even after the death of Marimuthu Pillai and was managing her affairs. He slowly managed to secure the full confidence of the deceased first plaintiff and began to occupy a portion of her own house on a pittance of a rent of Rs. 20 per month. The second defendant's mother was the cook of the deceased first plaintiff. The second defendant was maintaining the diary on behalf of the deceased first plaintiff. He was attending to her Court work and visiting her legal adviser on her behalf. He used to draw large sums of money from Court on behalf of the deceased first plaintiff. Such was the confidence reposed by the deceased first plaintiff in the second defendant. At that time defendants 3 and 4 were in possession of the suit property as tenants. The property was leased to defendants 3 and 4 on 14th May, 1956, under Exhibit B-46 for a period of one year on a rent of Rs. 1,200 per month. Even after the period of the lease they did not surrender possession. In 1959 the deceased first plaintiff erected about 21 huts on the suit property and the, defendants 3 and 4 were to pay Rs. 1,500 as rent for the 21 huts. However the tenants did not pay the rent to the deceased first plaintiff. She therefore caused Exhibit A-58, notice to be issued to them on 6th June, 1967, through counsel. The deceased first plaintiff was an old lady of 65 years and short of sight and hearing. Taking advantage of her physical weaknesses and also the absolute confidence she had placed in the second defendant, the latter abused his position as her confidant and informed her that the first defendant was the owner of a theatre as well as a turmeric mandi in Erode town and was a highly influential man of the locality. He further suggested that if a document was created in his name, it would be possible to secure possession of the suit property from defendants 3 and 4. Further the creation of such a document would enable her son and step-sons to take appropriate steps to recover possession of the suit property from defendants 3 and 4. With this object in view the second defendant got up Exhibit A-13 agreement for sale and got it signed by the deceased first plaintiff. In the same breath, the learned Counsel also contended that the deceased first plaintiff was not aware that she was putting her signature to an agreement for sale of the suit property in favour of defendants 1 and 2. The advance of Rs. 10,011 alleged to have been paid under the agreement for sale was not really paid. The sale consideration of Rs. 1,90,000 mentioned in the agreement for sale was ridiculously low. The property was worth Rs. 5,00,000 on the date of agreement for sale. There was no necessity for the deceased first plaintiff who was admittedly a rich lady, deriving large income from her properties, to sell the suit property for such a ridiculously low price. At no time

in her life she was engaged in business and the recital in the written statement that she wanted to dispose of the property to invest the sale proceeds in business was false. The manner in which the defendants 1 and 2 took possession of the property from defendants 3 and 4 under false pretences, as if the deceased first plaintiff had asked them to pay Rs. 15,000 to the tenants and take possession of the property in part performance of the agreement for sale, which was on the face of it totally false, would itself show that the execution of the agreement for sale was a result of fraud. The learned Counsel further laid emphasis on the fact that the attestors to the agreement for sale were all partisans of the defendants and no one connected with the deceased first plaintiff had been included as attestors to the document. The conduct of the deceased first plaintiff herself about the time of the execution of the alleged agreement for sale was inconsistent with her having voluntarily executed the agreement. She had already filed the suit for recovery of possession of the property from the tenants. There was no mention, in the said suit, of the agreement for sale. There was no scrutiny of the title deeds by the defendants 1 and 2 prior to the execution of the agreement for sale.

12. The question for our consideration is whether the agreement for sale Exhibit A-13, dated 17th June, 1967, executed by the deceased first plaintiff in favour of defendants 1 and 2 is liable to be declared void and inoperative for the reasons advanced by Mr. G. Rama-swami.

13. From a reading of the plaint it is not clear on what precise ground the agreement is sought to be set aside or declared void and inoperative. In paragraph 4 of the plaint it is stated that in order to enable the deceased first plaintiff to secure vacant possession of the property from the tenants, the second defendant suggested that a document should be brought about in trust in the name of the first defendant associating the name of the second defendant also as a safety measure for the protection of her interest with suitable recitals to intimidate and induce defendants 3 and 4 and sub-tenants to surrender possession of the property. The second defendant is alleged to have, further represented that the circulation of the proposal in the intended document in the locality might induce her son, step-sons and other members in the family to take effective steps to get defendants 3 and 4 from the lands evicted. Relying upon the suggestion and the representation of the second defendant, the deceased, first plaintiff is said to have agreed to act according to his suggestions. In paragraph 5 of the plaint it is stated that accordingly the second defendant got up the document with suitable recitals as he considered necessary and the deceased first plaintiff executed the document on account of the confidence she had reposed in the second defendant. This part of the plaint suggests that on the representation of the second defendant that, if such a document was executed it would be possible to evict the tenants and sub-tenants from the suit property, the first plaintiff executed the document. In this part of the plaint there is no suggestion that she was not aware of the contents and the nature of the document. The only averment is that she did not realise the import of the document she was executing and that she had implicitly acted on the suggestion of the second defendant and that no-independent legal advice was available to her. Even in paragraph 7 of the plaint the deceased first plaintiff has stated that the document was not intended to be acted upon as a genuine agreement to sell to defendants 1 and 2 or to anybody else, and that she was induced to put her signature on the representation of the same being required for securing possession. When we come to paragraph 10 of the plaint, we find the allegation that the deceased first plaintiff had not executed any document to the second defendant relating to the properties and that she apprehended that the second defendant might fraudulently make use of her signatures taken on blank papers for other purposes during his long association with her. In paragraph 13 of the plaint the stand taken is that the agreement for sale was vitiated by undue influence, fraud and illegality. There is a further allegation in the same paragraph that the second defendant was a man of slender means and he was associating with the first defendant in this questionable transaction with a view to give a colour of reality and procure illegal gain. It is significant that in the plaint there is absolutely no allegation that the first defendant made any representations to the deceased first plaintiff or played any part in the matter of the execution of the agreement for sale. Obviously, it is because of the nature of the pleadings Mr. G. Ramaswami, learned Counsel for the appellant was not able to take a specific stand before us whether Exhibit A-13 agreement for sale was vitiated by reason of the fact that the deceased first plaintiff was not aware of the nature and contents of the document she was executing or whether the agreement for sale was vitiated

by undue influence and fraud exercised by the second defendant on the deceased first plaintiff.

14. The general rule of law is that a party of full age and understanding is normally bound by his signature to a document whether he reads it or understands it or not. Equity does not save people from the consequences of their own folly but will save them from being victimised by other people. Sir Raymond Evershed, M..R. has observed in Tufton v. Sperni (1952)2TLR 516 at 519, as follows:

Extravagant liberality and immoderate folly do not of themselves provide a passport to equitable relief.

But, if however, a party has been misled in executing a deed or signing a document essentially different from that which he intended to execute or sign, he can plead non est factum in an action against him and the deed or writing is completely void in whomsoever hands it may come. As Byles, J., said in Foster v. Mackinnon (1869)LR4CP704 at 711.

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

The doctrine of non est factum does not apply unless there is a misrepresentation inducing a mistaken belief as to the class or character of the supposed document and not a misrepresentation simply as to its contents. On the other hand, a mistake as to the contents of a deed or document is not sufficient.

15. In a recent case in Saunders v. Anglia Building Society (1971) AC1004, the House of Lords had to consider the scope of the doctrine of non est factum in the following circumstances. G., a widow aged 78, who had a leasehold interest in a house, gave the deeds to her trusted nephew, intending to make a gift to him to take effect immediately. She knew that her nephew wished to raise money on the house and that L., her nephew's business associate, was to collaborate with the nephew in raising money on the house. In June, 1962, L. asked her to sign a document. She had broken her spectacles and could not read it. She asked what it was and L. told her that it was a deed of gift of the house to her nephew. She executed it in that belief, and the nephew witnessed the execution, it being part of his arrangement with L., that L. should raise money on the house and repay it to the nephew by instalments. The document signed was in fact an assignment of the house by her to L. for 3,000. The 3,000 was never paid nor intended to be paid to her. L., having obtained the deeds and a reference as to his reliability from the nephew, mortgaged the house for 2,000 to a building society, but used the money so raised to pay his debts and defaulted on the mortgage instalments. The building society sought to obtain possession of the house. G., at the nephew's instigation began an action, in which she pleaded non est factum, against L., and the building society and asked for a declaration that the assignment was void and that the title deeds should be delivered to her. The trial Judge found that G. did not read the document, that L., represented it to her as a deed of gift to the nephew; that she executed it in that belief; and that a sale or gift to L. was something which she did not and would not ever have contemplated; and he held that the plea of non est factum was established and granted the declaration asked for. The Court of Appeal reversed the decision. On appeal to the House of Lords the following propositions were laid down : (1) The plea of non est factum can only rarely be established by a person of full capacity; and, although it is not confined to blind or illiterate persons, any extension in the scope of the plea will be kept within narrow limits. (2) The burden of establishing the plea falls on the signatory seeking to disown the document; and he must show that, in signing the document he acted with reasonable care. Carelessness which would preclude him from pleading non est factum is based on the principle that no man can take advantage of his own wrong and is not an instance of negligence operating by way of estoppel. (3) In relation to the extent and nature of the mistake relied upon to set up the plea, the distinction formerly drawn between the character and class and the contents of a document is unsatisfactory. For the plea to succeed, it is essential to show that there is as regards the transaction a radical or fundamental distinction between what the person seeking to set up the plea actually signed and what he thought he was signing'. The decision of the House of Lords in this case is particularly significant in so far as it has held that a person who signs a document may not be permitted to

raise the defence of non est factum where he has been guilty of careless-ness in appending his signature. It was formerly held in Carlisle and Cumberland Banking Co. v. Bragg (1911)1KB489, and other cases that negligence was only material where the document actually signed was a negotiable instrument, for there was not otherwise any duty of care owned by the person executing the document to an innocent third party who acted in reliance on it. The House of Lords in Saunders v. Anglia Building Society (1971)AC1004, has over-ruled Carlisle and Cumberland Banking Co. v. Bragg (1911)1KB489, and has held that no matter what class of document was in question, negligence or carelessness on the part of the person signing the document would exclude the defence of 'non est factum'.

16. Examining the allegations in the plaint in paragraphs 4 and 5 of the plaint we are not persuaded to accept the contention of Mr. G. Ramaswami, learned Counsel for the appellant that the deceased first plaintiff did not know what she was doing when she is said to have executed Exhibit A-3 and that her mind did not go with the hand when she signed Exhibit A-13. In paragraph 4 of the plaint it is admitted that the second defendant suggested that a document should be executed in trust in the name of the first defendant and that the name of the second defendant should also be associated to enable the deceased first plaintiff to get possession of the suit property. The deceased first plaintiff has not pleaded what exactly was the nature of the document which the second defendant suggested her to execute. However one thing is clear that is what was suggested by the second defendant to be executed by her, was a document in relation to the suit property and that the document should be executed in the names of defendants 1 and 2 in trust as the first defendant was said to be a very wealthy and influential person who could be trusted. Therefore, it is not the case of the deceased first plaintiff that when she put her signature to Exhibit A-13 she was under the impression that she was executing some other document as per the suggestion of the second defendant and that subsequently the document turned out to be an agreement for sale. Further, it is not stated in the plaint that she was prevented from reading and understand the contents of the document; nor has she stated that notwithstanding her request the document was not read over to her. On the other hand, she has clearly admitted that the document was prepared by the second defendant and she acted without suspicion as per his instructions. This amounts to a clear admission of the execution of the document on her part. If she put her signature to the document without attempting to understand the nature and contents of the document and without being prevented by anybody from understanding the nature and contents thereof, she must be deemed to be guilty of carelessness and that would preclude her from pleading that her mind did not go with her signature when she signed the document. The correct rule as regards carelessness which emerges from the decision of House of Lords in Sounders v. Anglia Building Society 1971 AG1004, is

leaving aside negotiable instruments to which special rules may apply, a person who signs a document, and parts with it so that it may come into other hands, has a responsibility, that of the normal man of prudence to take care what he signs, which if neglected prevents him from denying his liability under the document according to its tenor. The onus of proof in this matter rests upon him i.e., to prove that he acted carefully and not upon the third party to prove the contrary.

Whenever a person of full age and understanding puts his signature to a legal document without taking the trouble of reading it or without asking the document to be read and explained to him but signs it relying on the word of another as to its character, content or effect, he cannot be heard to say that it is not his document. Further, the very fact that the deceased first plaintiff herself has pleaded that she was made to execute Exhibit A-13 agreement for sale by reason of the undue influence and fraud exercised by the second defendant on her, amounts to an implied admission on her part that she executed Exhibit A-13 realising fully the nature of the document she was executing, but without being in a position to resist the undue influence exercised by the second defendant. Besides, there is evidence in the case that Exhibit A-13 was read out to her before she executed the same. D.W. 3 is one Abdul Muthalif, who is one of the attestors. D.W. 4, Ramakrishnan is a scribe of Exhibit A-13. Mr. G. Ramaswami, learned Counsel for the appellant vehemently contended that the evidence of these witnesses should not be accepted. However, for reasons which will follow during the discussion of the question whether Exhibit A-13 is vitiated by undue influence and fraud, we

are accepting their evidence. D.W. 3 has stated that the document Exhibit A-13 was executed in the house of Mr. Arjunan, who was the advocate of the deceased first plaintiff. The document was written by D.W. 4. Defendants 1 and 2 were also present. The first defendant gave an advance of Rs. 10,011. Exhibit A-13 was read by Mr. Arjunan. The deceased first plaintiff did not raise any objection and she signed the document. D.W. 4 the scribe has also corroborated the evidence of D.W. 3 by stating that the document was read over to the deceased first plaintiff by the advocate Mr. Arjunan. He has also stated that the first defendant gave an advance of Rs. 10,011. The first defendant has also given evidence that Exhibit A-13 agreement for sale was written at the residence of Mr. Arjunan, advocate and he read over the document to the deceased first plaintiff and that she signed the document after receiving the advance of Rs. 10,011. The second defendant has also stated that the document was read over to the deceased first plaintiff before she executed the document. In the circumstances, we are unable to sustain the contention of Mr. G. Ramaswami, that Exhibit A-13 agreement for sale is void and inoperative on the ground that the document was not read over to the deceased first plaintiff, that she was not aware of the nature and contents of the document and that she merely acted on the representation of the second defendant .

17. The next question for consideration is whether Exhibit A-43 is vitiated by undue influence and fraud. A contract may be avoided or set aside at the instance of one of the parties on the ground that it was obtained by undue influence. A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate, the will of the other and uses that position to obtain an unfair advantage over the other. A person is deemed to be in a position to dominate the will of another--(a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or (b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress (section 16 of the Indian Contract Act). But in all cases in which the party pleading relies on any misrepresentation, fraud or undue influence, particulars (with dates and items if necessary) shall be stated in the pleading, (vide Order 6, Rule 4). Justice requires one to define the accusation that he brings against the other. As Lord Penzance in Marriner v. Bishop of Bath and Wells (1893) P 145 at page 146, observed:

The Court will require of him who makes the charge that he shall state that charge with as much definiteness and particularity as may be done, both as regards time and place.

In Bishundeo v. Seogeni Rao : [1951]2SCR548 , Bose, J., speaking for the Bench observed thus:

Now if there is one rule which is better established than any other, it is that in cases of fraud, undue influence and coercion, the parties pleading it must set forth full particulars and the case can only be decided on the particulars as laid. There can be no departure from them in evidence. General allegations are insufficient even to amount to an averment of fraud of which any Court ought to take notice, however strong the language in which they are couched may be and the same applies to undue influence and coercion.

Again in Lalli Parshad v. Karnal Distillery Co. : [1964]1SCR270 , the reason of the rule in Order 6, Rule 4 is given as follows:

A plea that a transaction is vitiated because of undue influence of the other party thereto, gives notice merely that one or more of a variety of insidious forms of influence were brought to bear upon the party pleading undue influence, and by exercising such influence, an unfair advantage was obtained over him by the other. But the object of a pleading is to bring the parties to a trial by concentrating their attention on the matter in dispute, so as to narrow the controversy to precise issues, and to give notice to parties of the nature of testimony required on either side in support of their respective cases. A vague or general plea can never serve this purpose; the party pleading must therefore he required to plead the precise nature of the influence exercised, the manner of use of the influence, and the unfair advantage obtained by the other. This rule has been evolved with a view to narrow the issue and protect the party charged with improper conduct from being taken by surprise. A plea of undue influence must to serve that dual purpose, be precise and all

necessary particulars in support of the plea must be embodied in the pleading; if the particulars stated in the pleading are not sufficient and specific the Court should, before proceeding with the trial of the suit, insist upon the particulars, which give adequate notice to the other side of the case intended to be set up.

This has been reiterated by Mittar, J., in Subhas Chandra v. Ganga Prasad : [1967]1SCR331 . It is therefore settled law that a vague and general plea will not be sufficient when the plaintiff comes forward with an action to set aside a contract on the ground of undue influence or fraud. It is the duty of the Court to scrutinise the pleadings to find out that a plea has been made out and full particulars thereof have been given before examining whether undue influence has been exercised or not. Tested in the light of the principles stated above, we are of the opinion, that the allegations in the plaint do not satisfy the rule in Order 6, Rule 4, Civil Procedure Code, It is the case of the deceased first plaintiff that the second defendant had been attending to the management of her properties and other routine matters and had gained her confidence and she was particularly relying upon the second defendant for guidance and advice in view of her advanced age, feeble sight and hearing. She therefore believed the second defendant and his representation that a document had to be created in the name of the first defendant associating the name of the second defendant also along with the name of the first defendant so that the property could be easily recovered possession of from defendants 3 and 4 and signed the document which was got up for that purpose by the second defendant. This plea clearly shows that the deceased first plaintiff was executing a document with respect to the property in the name of defendants 1 and 2 for the purpose of enabling them to recover possession of the property from the lessees and tenants. This plea is absolutely inconsistent with the plea of undue influence. As regards the plea of undue influence, we find a single averment in paragraph 13 of the plaint to the effect that the agreement for sale should he declared void and unenforceable as being vitiated by undue influence, fraud and illegality. Therefore, we see great force in the argument of Mr. M.R. Narayanaswami for the respondents that the plaint averments are not in conformity with the conditions laid down in Order 6, Rule 4, Civil Procedure Code.

18. However, in view of the fact that a plea had been taken though without giving particulars and an issue has been raised and evidence has been let in, it is but fair that we should consider the question whether the agreement for sale is the result of undue influence exercised by the second defendant on the deceased first plaintiff.

19. The doctrine of undue influence under common law was evolved in England to save people from being victimised by others. According to Halsbury's Laws of England, Fourth Edition, page 174 it is stated thus:

Undue influence may be defined as the unconscientious use by one person of power possessed by him over another in order to induce the other to enter into a contract. If the parties at the time of the transaction or shortly before then were in a particular confidential relationship to each other, e.g., that of parent and child, or trustee and beneficiary, or solicitor and client, there is a further rule of equity which is that the existence, of undue influence over the one party (namely the child, beneficiary or client) will be presumed unless it is shown by the other party that it did not exist; the burden of proving this has not uncommonly been discharged by showing that the transaction appeared fair and that the party who might have been subject to undue influence had competent independent advice. The power of the Court to grant equitable relief on the ground of undue influence is not limited however, to cases in which this presumption arises, and may be exercised in any case in which an unfair use has been made of influence poslatter class of cases, where a confidential relationship of the class indicated above does not exist, the burden is on the party alleging undue influence affirmatively to prove that the contract was procured thereby.

20. In India, the law as to undue influence is embodied in Section 16 of the Contract Act. In order to satisfy the terms of Section 16 and thereby render a contract voidable because of undue influence the following two conditions must be established by the person seeking to avoid the transaction; (1) the other party to the transaction must have been in a position to dominate his will; (2) the other party should have obtained an unfair advantage by using the position. Clause (2) of Section 16 lays down a special rule of presumption as to

when a person may be deemed to be in a position to dominate the will of another. They are among others : (1) where he holds a real or apparent authority over the other; (2) where he stands in a fiduciary relation to the other; (3) where he enters into a transaction with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress. Clause (3) of Section 16 provides that where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other. It is necessary to state that the rule in Clause (3) of Section 16 will only be attracted when it is established that one person is in a position to dominate the will of the other and that the transaction was on the face of it unconscionable. The above position has been made clear in Ladli Prasad Jaiswal v. Karnal Distillery Co., Ltd. : [1964]1SCR270 , and in Subhas Chandra v. Ganga Prasad : [1967]1SCR331 . The test has been laid down as follows in the latter decision : 'The three stages for consideration of a case of undue influence were expounded in the case of Raghunath Prasad v. Sarju Prasad 46 MLJ 610 : 19 IW 470 : 51IA101 : 2 IC 817 : AIR1924 PC60, in the following words:

In the first place relations between the parties to each other must be such that one is in a position to dominate the will of the other. Once that position is substantiated the second stage has been reached--namely, the issue whether the contract has been induced by undue influence. Upon the determination of this issue a third point emerges, which is that of the onus probandi. If the transaction appears to be unconscionable, then the burden of proving that the contract was not induced by undue influence is to lie upon the person who was in a position to dominate the will of the other. Error is almost sure to arise if the order of those propositions be changed. The unconscionableness of the bargain is not the first thing to be considered. The first thing to be considered is the relations of these parties. Were they such as to put one in a position to dominate the will of the other?

The learned Judge of the Supreme Court has extracted the following passage from the judgment of the Privy Council in Poosathurai v. Kannappa Chettiar 38 MLJ 349 : 11LW455 : 55 IC 447 : ILR 43 Mad 546 : 47 IA 1 : AIR 1920 PC 65:

It is a mistake (of which there are a good many traces in these proceedings) to treat undue influence as having been established by a proof of the relations of the parties having been such that the one naturally relied upon the other for advice and the other was in a position to dominate the will of the first in giving it. Up to that point 'influence' alone has been made out. Such influence may be used wisely, judiciously, helpfully. But whether by the law of India or the law of England, more than mere influence must be proved so as to render influence, in the language of the law, undue.

21. In the light of these principles, the first thing to be considered is whether the second defendant has been in a position to dominate the will of the deceased first plaintiff. The contention of Mr. G. Ramaswami, learned Counsel for the appellant is that the second defendant was employed under Marimuthu Pillai. After the death of Marimuthu Pillai, the second defendant was said to have continued under the employment of the deceased first plaintiff and was managing her affairs. He was staying in a portion of the house belonging to the deceased first plaintiff paying a nominal rent of Rs. 20 per month. His mother was said to have been cooking for the deceased first plaintiff. Thus, the second defendant is said to have gained the confidence of the deceased first plaintiff and taking, advantage of his position prevailed upon her to execute Exhibit A-13 agreement for sale. Unfortunately, in this case we have been denied the evidence of the deceased first plaintiff. P.W. 1 is one Arumugham. He is a retired employee of the Punjab National Bank. He had written accounts for the deceased first plaintiff prior to 1961. He was staying in a house situate to the north of the house of the deceased first plaintiff. He has given evidence that the second defendant was assisting the deceased first plaintiff. He was writing bar accounts before 1961. He has further deposed that the second defendant was a tenant of the deceased first plaintiff in her house and that the second defendant had to enter his residential portion only through the portion of the deceased first plaintiff. The second defendant wrote the accounts for the deceased first plaintiff till misunderstanding arose between them. Thereafter, the

second defendant left the house. The. evidence of P.W. 1 is not sufficient to inspire confidence in us to hold that the second defendant was in a position to dominate the will of the deceased first plaintiff. As against this, the second defendant has given evidence as D.W. 2. He has denied the fact that his mother was cooking for deceased first plain-tiff. He has admitted that he was living as a tenant in the house of the deceased first plaintiff. He has further admitted that after the death of Marimuthu Pillai he had written the diary of the deceased first plaintiff at her instance till 1968. He used to receive the rent from the tenants and enter the same in her diary. Exhibits A-42 and A-43 are the books relating to the entries regarding the receipt of rents. Exhibits A-16 to A-20 are the diaries. He used to write in the diary as and when the deceased first plaintiff asked him to do so. He has denied the suggestion that he was managing the affairs of the deceased first plaintiff. He admitted having measured paddy for levy and signed in the bills Exhibits A-3 and A-4 and received money on behalf of the deceased first plaintiff. The fact that the second defendant admitted that he had written certain diaries and entered the amounts received by the deceased first plaintiff and expenses incurred by her in the diaries cannot be sufficient to hold that the second defendant was holding a real or apparent authority over the deceased first plaintiff to draw a presumption that the second defendant was in a position to dominate the will of the deceased first plaintiff.

22. The next aspect to be considered is whether the deceased first plaintiff was a person whose mental capacity had been affected by reason of age, illness or mental or bodily distress, at the time when she executed Exhibit A-13 agreement for sale. In the plaint, the allegation is that the deceased first plaintiff was advanced in age and her sight and hearing were feeble and that there was a general decline in her faculties. In paragraph 6 of the plaintiff there is a further allegation that the defendants acted in collusion to make illegal gain due to the deceased first plaintiff's infirmity in mind and body. This fact is sought to be proved through the evidence of P.Ws. 2, 3 and 4. P.W. 4 is Dr. Hasari Ibrahim. She has been a medical practitioner for nearly 25 years. She served in the Erode Government Hospital for a period of 4 1/2 years. Since she was transferred to Nagapattinam she resigned her job and set up private practice. She had known the deceased first plaintiff for nearly 25 years. The deceased first plaintiff had an operation for cataract which was not successful and therefore her sight was poor. She was not able to say how long before the deceased first plaintiff died, she developed feeble sight. When she was treating the deceased first plaintiff, if she talked to her a little loud she was able to understand her. P.W. 4 was seeing the deceased first plaintiff, almost every day. It was the second defendant who was assisting her in purchasing medicines for her. In this context, it may be stated that though P.W. 4 did not specifically refer to the second defendant by his rank, it is admitted that it was the second defendant from P.W. 4 meant when she referred to the deceased first plaintiff's accountant as the son of Kudimikara Ramasamy Pillai. The deceased first plaintiff used to refuse to take the medicines and P.W. 4 therefore used to send P.W. 2 Raghavan to give her the medicine. P.W. 4 has further stated in chief-examination that the deceased first plaintiff was not in a position to attend to her affairs without others assisting her. In cross-examination P.W. 4 has deposed that for the last 10 to 12 years before her death the deceased first plaintiff was slightly short of hearing. P.W. 4 was categoric that the occasional discharge from her two ears was not such as to say that it was a disease. However, she was not having pain. This trouble did not either increase or decrease prior to her death. Similarly, her power of sight also did not either decline or increase till her death. Apart from the second defendant there was no other person to assist her, according to this witness. At the same time, it is significant to refer to the following statement of this witness:

The evidence of P.W. 4, the doctor far from supporting the case of the deceased first plaintiff that her mental faculties had been affected by reason of age, illness or mental or bodily distress, negatives such a case. The doctor has not given evidence that the mental faculties of the deceased first plaintiff had in any manner been affected by virtue of her feeble sight or hearing. On the other hand, the doctor has been categoric in her statement that for a period of ten years prior to her death she had only been attacked by ordinary illness such as cold, fever and indigestion which affects every normal individual. P.W. 2 is Raghavan who was a compounder in the municipal ayurvedic hospital. He had known the deceased first plaintiff for about 20 years prior to her death. He had treated hen for about 10 to 20 years, for pain in the legs, stomach ache and for her

eye trouble. Five years prior to her death she was suffering from bad sight. The second defendant used to obey the direction of the deceased first plaintiff. In cross-examination he has stated that on five occasions she wrongly gave him rupee notes and he had to return it. According to this witness, her hearing was defective. Between 1965 and 1969 the deceased first plaintiff was suffering from pain of her limbs and defect of sight and hearing . P.W. 3 is one Sundaresan. He was an Income-tax Officer. He retired from service in 1961. It was P.W. 3. who wrote Exhibit B-15 will for the deceased first plaintiff on 18th February, 1971 under which the deceased first plaintiff had bequeathed the suit property to the second plaintiff. He had deposed that when he met the deceased first plaintiff five years after he last saw her in 1961 her eye-sight was not good. In 1971 she was able to recognise him only after he revealed his identity. It is important to refer to the following passage in his evidence:

The deceased first plaintiff was only aged 65 years at the time she executed A-13 agreement for sale. At that age, a person cannot be said to be too old to understand the nature and import of what she was doing. P.Ws. 2 to 4 have not even formally given evidence in chief-examination that the mental condition of the deceased first plaintiff was so bad as to warrant an inference that she would not have been able to understand what she was doing. In this connection, it will be relevant to refer to Exhibit B-37 which is a notice published by the second plaintiff and his step-brother in the issue of 'Malai Murasu' dated 20th March, 1968. Therein it is stated that some persons were attempting to take advantage of the enfeebled mind and power of thinking and helplessness of the deceased first plaintiff and attempting to take, a sale-deed in respect of the suit property. There is nothing in the evidence of P.W. 2 or P.W. 4 the doctor that the mental capacity of the deceased first plaintiff had in any manner been impaired. It is significant that neither the second plaintiff nor his step-brother has been examined to speak to the state of the mental capacity of the deceased first plaintiff at or about the time of execution of Exhibit A-13 agreement for sale. This assumes greater importance in view of the fact that they had already issued a publication as early as in March, 1968 regarding the mental capacity of the deceased first plaintiff. We are therefore not convinced that at the time the deceased first plaintiff entered into Exhibit A-13 agreement for sale her mental capacity was so affected or impaired by reason of age illness or mental or bodily distress as to compel us to draw a presumption that second defendant was in a position to dominate the will of the deceased first plaintiff.

23. Mr. G. Ramaswami, learned Counsel for the appellant then strenuously contended that the transaction was so unconscionable that we should draw a presumption that Exhibit A-13 agreement for sale was got executed by the second defendant by the exercise of undue influence practised on the deceased first plaintiff. According to the learned Counsel, the property which is an extent of 4.04 acres within the limits of Erode town was worth Rs. 5,00,000. The deceased first plaintiff was owning a large estate and her income from the properties was said to be Rs. 30,000. There was no necessity at all for her either financially or otherwise to sell the suit property for a ridiculously low price of Rs. 1,90,000. The mere fact that a transaction between two parties is unconscionable will not by itself be sufficient to make the transaction as having been vitiated by undue influence, unless the person benefited under the transaction was in a position to dominate the will of the other. It has been held by the Privy Council in Raghunath Prasad v. Sarju Prasad 46 MLJ 610 : AIR 1924 PC 60, as follows:

The unconscionableness of the bargain is not the first thing to be considered. The first thing to be considered is the relations of the parties. Even though the bargain had been unconscionable a remedy under the Contract Act, does not come into view until the initial fact of a position to dominate the will has been established. Once that fact is established, then the unconscionable nature of the bargain and the burden of proof on the issue of undue influence come into operation.

We have already found in this case that the appellant has not established that the second defendant was in a position of dominance over the deceased first plaintiff. This apart, we are unable to accept the contention of the learned Counsel for the appellant that the evidence in the case would justify a conclusion that the transaction was on the face of it unconscionable. To substantiate his argument that the consideration recited in Exhibit A-13 was ridiculously low, the learned Counsel relied upon Exhibits A-5, A-11, A-41, A-63, A-64 and A-

12 which are registration copies of certain sale-deeds. Exhibits A-5, A-63 and A-64 relate to the sale of certain plots in what is known as Venugopal lay-out in Erode Town. The lay-out was sanctioned as early as in 1961. Under Exhibit A-5 dated 19th December, 1965, 3,200 sq. ft. is sold for a consideration of Rs. 6,000. The rate per sq. ft. works out at Rs. 1-87. Under Exhibit A-63 dated 7th December, 1966 an extent of 1900 sq. ft. has been sold for Rs. 7,750. The rate per sq. ft. works out at Rs. 4.07. Exhibit A-64 is dated 21st October, 1967 and subsequent to Exhibit A-63. Under Exhibit A-64 an extent of 380 sq. ft. is sold for Rs. 1,500 and the rate per sq. ft. works out at Rs. 3-94. It is admitted that the plots sold under Exhibits A-5, A-63 and A-64 were part of a well developed housing colony at the time of their sale. Further, the extent sold under each of the documents is very small. It is well-known that properties of small extent will fetch much more price than large extents. Exhibit A-11 is dated 29th April 1968 and under it an extent of 3200 sq. ft. has been sold for Rs. 6,000 and the rate per sq. ft. works out at Rs. 1-87. It is interesting to note notwithstanding the fact that three years had elapsed after Exhibit A-5, the rate under Exhibit A-11 was only Rs. 1-87 per sq. ft. The extent sold under Exhibit A-41 dated 20th July, 1963 is only 800 sq. ft. and the rate works out at Rs. 5 per sq. ft. The extent sold under Exhibit A-12 dated 13th March, 1972 is 1600 sq. ft. for Rs. 4,000 and the rate works out at Rs. 2-50 per sq. ft. The difference between the rate for Exhibit A-41 of the year 1963 and Exhibit A-12 of the year 1972 is glaring. On the basis of the market value of the land afforded by Exhibits A-5, A-11, A-41, A-63, A-64 and A-12 Mr. G. Ramaswami would contend that the market value of the suit property as on the date of Exhibit A-13 would have been not less than Rs. 5,00,000. We are unable to accept the contention advanced by the learned Counsel for the appellant. It is well-known that the price that would fetch for a small extent of land would be much higher than the price that would fetch for a larger area of land. On the other hand, the defendants have filed Exhibits B-4 to R-5. Under Exhibit B-1 an extent of 1.90 acres has been sold on 2nd September, 1969 by the second plaintiff and another for a sum of Rs. 80,000. The rate per sq. ft. works out at Rs. 0-97. D.W. 3 Abdul Muthalif who is one of the attestors to Exhibit A-13 is an attestor to Exhibit B-1 and his wife is one of the vendees under the document. Exhibits B-2 and B-3 are both dated 1st May, 1968 by the same vendor in favour of D.W. 3 and others and the price per sq. ft. comes to Rs. 1-04. An extent of 1.48 acres has been sold under Exhibit B-4 on 16th September, 1970 for Rs. 64,000 and the rate per sq. ft. comes to Rs. 1, while an extent of 58 cents has been sold under Exhibit B-5 on 17th September, 1970 for Rs. 30,000 and the rate per sq. ft. comes to Rs. 1-19. It is not disputed that the suit property of an extent of 4.04 acres has been sold for the purpose of a lay-out being made for the sale of the plots as house sites. Dealing with the principle of valuation in determining the market value of the land under the Land Acquisition Act, Veeraswami, J., in Kannia Lal v. Collector of Madras : AIR1966Mad82 , has observed as follows:

Where the value of an undeveloped land in a developed area is to be assessed on a comparison with the value of the latter, the process of estimating should necessarily involve deduction of the cost of the factors required to bring the undeveloped land on a par with the developed lands, where a large extent of land is acquired for being laid out into smaller plots, as house-sites allowance will have to be made for the space which will be taken up for roads and the cost of the rest of the amenities including the costs of laying roads as without such roads the land cannot be valued as house-sites. And an extent of 20% of the total extent acquired may be a reasonable deduction for the roads in the absence of any specific date.

Veeraswami, J. (as he then was) made the following observation in Additional Special Land Acquisition Officer v. S.S. Ghole AIR1960Bom 448.

In assessing the market value on the basis of a hypothetical scheme for residential buildings by laying out the land into plots, it is not what the claimant may have expected to receive by sale of one or two plots out of the land which is to be decisive of the value of the land, but what the valuer may regard as the value of the plots aggregated after taking into consideration the expenses of providing the amenities which the purchasers may normally expect to obtain in the section in which the land is situate.

It is further noteworthy that the learned Judge fixed Rs. 600 per ground as the cost for developing the land into house-sites. If we calculate the value of the land on the basis of the principles adopted by Courts for arriving at the market value of the land under land acquisition cases, it will be seen that the price per square

foot for the suit property on the basis of the sale consideration of Rs. 1,90,000 will compare favourably with the sale consideration mentioned in Exhibits B-2 to B-5. Yet another aspect to be considered, apart from this, is that it cannot be said on a comparison of the valuation given in Exhibits B-1 to B-5 and Exhibits A-5, A-11, A-41, A-63, A-64 and A-12 and the further fact that the extents sold as per the documents filed on the side of the plaintiffs are very small extents, that the sale consideration fixed for the suit property is unconscionably low or inadequate. We therefore agree with the finding of the trial Court that the sale consideration fixed under Exhibit A-13 was fair and reasonable.

24. Even if it is assumed that the consideration fixed under Exhibit A-13 is inadequate, mere inadequacy of consideration will not be sufficient to set aside the bargain arrived at between two parties. It has been repeatedly held that inadequacy of consideration alone is not a ground for holding that a contract was induced by fraud or undue influence. In Tennent v. Tennents (1870) LR 2 Se. and Div. 6(H.L.), Lord Westbury stated the law as follows:

The transaction having been clearly a real one, it is impugned by the appellant on the ground that he parted with valuable property for a most inadequate consideration. My Lords, it is true that there is an equity which may be founded upon gross inadequacy of consideration, but it can only be where the inadequacy is such as to involve the conclusion that the party either did not understand what he was about, or was the victim of some imposition.

25. In Santhappa Rai v. Santhiraja : AIR1938Mad426 , Mockett, J. speaking for the Bench held:

Inadequacy of consideration alone is not a ground for holding that a contract was influenced by fraud or undue influence unless the inadequacy is so gross as to raise a presumption that the party either did not understand what he was doing or was the victim of some imposition.

26. In Muthukumaraswami Gounder v. Ranga Rao 1965 MWN 121 : ILR(1964)2Mad500 : 78LW136, Jagadisan, J., in dealing with the question whether a party is entitled to specifically enforce a contract when the, consideration agreed upon was not adequate, has observed as follows:

Inadequacy of price is not a ground for refusing specific performance, unless the purchaser stands in a fiduciary position to the vendor or fraud enters into the contract (Coles v. Trecothick (1804)9Ves 234. Unless the inadequacy of the price shocks the conscience and amounts in itself to evidence of fraud in the transaction it is not a sufficient ground for refusing specific performance.

The learned Judge has extracted the following passage from Fry in his classic on Specific Performance:

To make a contract for an insufficient consideration incapable of enforcement by the purchaser, would be practically to prevent a man from selling his property at less than its value-however impossible it might be to sell it at its value, however, desirous he might be to sell it for the price actually obtained, however, desirable it might be for his interest that he should do so, and however unwilling or unable the purchaser might be to purchase at its full value. The freedom of contract including in it the freedom to enter into enforceable contracts should never be infringed without sufficient cause. But, furthermore, if inadequacy of consideration short of fraud were a bar to specific performance, the question would arise as to the amount of inadequocy which should so operate, a question not easy to answer.

27. We have already found that the consideration fixed under Exhibit A-13 agreement for sale was fair and reasonable. Even assuming, without finding, that the consideration does not arithmetically represent the correct market value of the property as on that date, in the light of the decisions referred to above, the said assumed inadequacy of consideration cannot at all vitiate the contract. We therefore overrule the contention of Mr. G. Ramaswami, that Exhibit A-13 transaction is unconscionable and liable to be set aside.

28. We shall now consider some of the other aspects of the case adverted to by Mr. G. Ramaswami learned Counsel for the appellant. Mr. G. Ramaswami contended that there was absolutely no necessity for the

deceased first plaintiff to enter into Exhibit A-13 agreement for sale with defendants 1 and 2. We do not see any force in this contention of the learned Counsel. When once it is found that the agreement for sale was not the result of any undue influence exercised by the second defendant on the deceased first plaintiff, it is unnecessary that there should have been any particular reason which should have prompted the deceased first plaintiff to decide upon the disposal of the suit property. Even otherwise, it cannot be said that the deceased first plaintiff had no motive at all to enter into the agreement for sale. Admittedly, the entire suit property was in the possession of defendants 3 and 4 and their sub-tenants. The annual rent for the land alone was Rs. 1,200 per annum and for huts Rs. 1,500. Defendants 3 and 4 were not paying the rent regularly to her. She therefore caused Exhibit A-58 notice issued through her advocate Mr. Arjunan to defendants 3 and 4 and their sub-tenants. It is seen from Exhibit A-58 that the rent was in arrears for nearly three years prior to the issue of notice and the amount of arrears came to Rs. 9,100. Exhibit A-59 is the reply, dated 19th June, 1967 to Exhibit A-58. Exhibit A-59 was sent by Mr. Chenthamarai Kannan, advocate, on behalf of the defendants 3 and 4 and the tenants. In the said reply notice they took the stand that the property was in possession of the father of defendants 3 and 4 for a period of 50 years even prior to the purchase of the property by the husband of the deceased first plaintiff from one Srinivasan Pillai and that thereafter defendants 3 and 4 have been continuing as lessees. They denied the claim of the deceased first plaintiff that she had put up the huts and stated that the deceased first plaintiff was not entitled to any rent for the huts in question. They further pleaded that they were not in arrears of rent as alleged in Exhibit A-58 notice and that the rent for the year 1967-68 was due only in the month of Thai. They have further gone to the extent of claiming a sum of Rs. 4,800 by way of damages on account of the failure of the deceased first plaintiff to provide irrigation facilities. They have also pleaded that they were not liable to be evicted from the suit property. Thereafter, the deceased first plaintiff filed O.S. No. 155 of 1967 on the file of the Court of the Subordinate Judge of Erode against defendants 3 and 4 for recovery of possession of the suit property on the foot of the lease. The suit was filed on 13th July, 1967. Exhibit A-61 is the copy of the plaint. It can therefore be seen from Exhibits A-58, A-59 and A-61 that the deceased first plaintiff was not getting rents from the tenants regularly and that she was not in a position at the same time to recover possession of the property from the tenants. It was therefore quite likely that she would have thought of disposing the property for the best price that would be available. In view of these circumstances, the case of the defendants 1 and 2, that the deceased first plaintiff was not able to evict the tenance and therefore she wanted to dispose of the property and invest the sale proceeds in business is entitled to weight.

Mr. G. Ramaswami, then contended that the circumstances in which and the manner of execution of Exhibit A-13 would probabilisa the case of the deceased first plaintiff that Exhibit A-13 was the result of a scheme of fraud practised by defendants 1 and 2 on the deceased first plaintiff. It was strenuously contended that the recital in Exhibit A-13, that a sum of Rs. 10,011 was paid on the date of agreement for sale was false. It was also argued that the attestors and the scribe to Exhibit A-13 were partisans of the second defendant and had merely obliged the latter by putting the signatures subsequent to the deceased first plaintiff's signing the document. There is no force in this contention also. According to the learned Counsel if really defendants 1 and 2 had paid a sum of Rs. 10,011 by way of advance on 17th June, 1967 there should have been an entry in Exhibit A-20 diary for the year 1967. The second defendant has explained the absence of the entry relating to Rs. 10,011 in Exhibit A-20 by stating that he was entering the entries in the diaries only as and when directed by the deceased first plaintiff and that she did not ask him to enter this payment in the diary. If the second defendant had access to Exhibit A-20 and made entries in any manner as he pleased, he would have certainly entered this payment also in Exhibit A-20 diary so as to bring it in conformity with the recitals in Exhibit A-13. In the circumstances, the fact that the amount has not been entered in Exhibit A-20 diary cannot assume much importance. On the other hand, there is the day book of the first defendant for the year 1967-68, which has been marked as Exhibit D-22 in the case. Exhibit B-23 is the entry, dated 17th June, 1967 in Exhibit B-22. That shows a sum of Rs. 10,011 had been paid as advance to the de-ceased first plaintiff and that a sum of Rs. 5 was incurred for the purchase of stamp paper. Exhibit B-26 is the entry in Exhibit B-25 ledger maintained by the first defendant in the name of Paramayee Ammal (deceased first plaintiff). That also shows that a sum of Rs. 10,011 had been paid to the deceased first plaintiff on 17th June, 1967. Nothing has been shown why the

account books of the first defendant should not be accepted. The first defendant has been examined as D. W. 1. We have already referred to his evidence that before the deceased first plaintiff signed the document, the document was read out to her by her advocate Mr. Arjunan. D.W. 1 has further deposed that he paid the money to the deceased first plaintiff, that she handed it over to Mr. Arjunan, who, after verifying that the amount was correct, handed over the same to her. D.W. 1 has also proved Exhibits B-22, B-23, B-25 and B-26. A point was sought to be made that Exhibits B-22, B-23, B-25 and B-26 should not be accepted in view of the fact that D.W. 1 has stated that the entries in Exhibits B-22 and B-25 were in the handwriting of Venkoji Rao and he has not been, examined. But D.W. 1 has given evidence that Venkoji Rao was away in Bombay. Naturally therefore he could not be examined. There is no suggestion in the cross-examination of D.W. 1, that Exhibits B-22, B-23, B-25 and B-26 have been created for the purpose of the suit. So far as the defendant is concerned there is absolutely no allegation in the plaint that he had exercised any undue influence or fraud over the deceased first plaintiff. It is freely admitted on the side of the plaintiffs that D.W. 1 is a man of influence in Erode town, that he runs a cinema theatre and that he is a leading turmeric merchant. In the absence of a clear allegation of fraud on the part of D. W. 1 and clinching evidence to prove the same, it is not possible to believe the argument that the first defendant would have conceded Exhibits B-22, B-23, B-25 and B-26 to create evidence for the payment of the advance amount of Rs. 10,011 as recited in Exhibit A-13. It was strenuously contended by Mr. G. Ramaswami that both D.Ws. 1 and 2 have stated in their evidence that the negotiations were originally finalised by one Rama Pannaiar and that the said Rama Pannaiar died thereafter and that subsequently Exhibit A-13 was executed in the house of Mr. Arjunan and in this presence and that these facts have not been stated in the written statement filed by the defendants. As we have already stated, the deceased first plaintiff herself has not taken any precise and clear stand in her plaint. Therefore the circumstance that the proposals for sale were first mooted in the presence of Rama Pannaiar and that Exhibit A-13 was executed in the residence of Mr. Arjunan and in his presence were not stated in their written statement will not be sufficient to disbelieve the evidence of D.Ws. 1 and 2. The evidence of D.W. 2 corroborates the evidence of D.W. 1. D.W. 2 has also stated that at the time of execution of Exhibit A-13, Rs. 10,011 was paid by the first defendant. D.W. 3 is one of the attestors and D.W. 4 is the scribe of Exhibit A-13. Both of them have stated that Exhibit A-13 was prepared in duplicate that Mr. Arjunan gave one agreement to the deceased first plaintiff and the other to the first defendant. They have also stated that the first defendant paid a sum of Rs. 10,011 to the deceased first plaintiff and that she handed over the same to Mr. Arjunan for the purpose of verification and that she got the same back. There is no force in the contention that the evidence of D.Ws. 3 and 4 have to be disbelieved on the ground that they are partisans of defendants 1 and 2. It is seen that D.W. 3 is an identifying witness in Exhibit B-15 which is a will executed by the deceased first plaintiff on 18th February, 1971, under which the suit property has been bequeathed to the second plaintiff. He is also an identifying witness to Exhibit B-30, which is a gift deed executed by the second plaintiff in favour of his daughter Santhi on 9th September, 1973. If really D.W. 3 was a partisan of defendants 1 and 2, it is improbable that the deceased first plaintiff and also the second plaintiff would have called D.W. 3 to act as an identifying witness. D.W. 4 was also the scribe for Exhibits B-27, B-28, B-29, B-30 and B-31. Exhibits B-27 and B-28 are prior to the institution of the suit and at a time when the relationship between the second plaintiff and the deceased first plaintiff was not cordial. Exhibits B-29 to B-31 were executed by the second plaintiff subsequent to the institution of the suit. If really D.W. 4 was acting according to the dictates of D.Ws. 1 and 2 and to the detriment of the plaintiffs, he would not have been called upon by the second plaintiff to write Exhibits B-29 to B-31. We have therefore no hesitation in accepting the evidence of D.Ws. 3 and 4 as regards the fact that the deceased first plaintiff freely and voluntarily executed Exhibit A-13 in favour of defendants 1 and 2 and that she received an advance of Rs. 10,011 under the agreement for sale.

29. Mr. G. Ramaswami laid great stress on the fact that if it had been mentioned in the written statement that the agreement for sale was written in the house of Mr. Arjunan, the plaintiffs would have examined him as a witness and that the plaintiffs were denied this opportunity because it was only at the stage of evidence that D.Ws. 1 and 2 have stated that the agreement was written in the house of Mr. Arjunan. It is not disputed that Mr. Arjunan has been throughout acting as the legal adviser of the deceased first plaintiff. Exhibit A-23 shows that a sum of Rs. 35,719.25 was received from Court towards, compensation for land acquisition and that a

sum of Rs. 2,000 was paid to Mr. Arjunan towards his fees. This is dated 27th February, 1967. Exhibit A-58 notice was sent by Mr. Arjunan on behalf of the deceased first plaintiff and Exhibit A-61 plaint was also filed by Mr. Arjunan. In paragraph 5 of the written statement it is stated that the deceased first plaintiff had her own legal adviser whom she had consulted. It is not contended on behalf of the plaintiffs that apart from Mr. Arjunan the deceased first plaintiff had any other legal adviser. Therefore, it was upto the plaintiffs to have examined Mr. Arjunan on their side and proved that he was not consulted at all by the deceased first plaintiff with regard to Exhibit A-13. Even after the defence witnesses had given evidence to the effect that Exhibit A-13 was written in the residence of Mr. Arjunan and the document was read out by him to her and that he verified the advance amount given to her, Mr. Arjunan could have been asked to withdraw from the case and give evidence. No such thing has been done. Therefore, the failure of the plaintiffs to examine Mr. Arjunan goes a long way to negative the case of the plaintiffs that Exhibit A-13 was the result of undue influence and fraud exercised by defendants 1 and 2 on the deceased first plaintiff.

30. Mr. G. Ramaswami then referred to the fact that defendants 1 and 2 took possession? of the property from defendants 3 and 4 and that the manner in which they took possession of the property from defendants 3 and 4 would show that the entire transaction was vitiated by fraud. Exhibit B-21 is the possession receipt executed by defendants 3 and 4 in favour of the defendants 1 and 2 on 19th March, 1968. Exhibit B-21 recites that as per the instructions from Paramayee Ammal (deceased first plaintiff) defendants 3 and 4 had received a sum of Rs. 15,000 from defendants 1 and 2* and surrendered possession of the property to them. It is further stated that the possession of the property was being delivered over to defendants 1 and 2 in part-performance of the agreement for sale, dated 17th June, 1967. Exhibit B-37 is a notice published in Malai Murasu on 20th March, 1968. The said publication states that there was litigation pending in the Sub-Court, Erode and in the High Court at Madras regarding the properties of deceased Marimuthu Pillai and that while so some persons were trying to purchase the property of an extent of 4-04 acres comprised in S. No. 1332 in Erode town from Paramayee Ammal taking advantage of her feeble mind and her helplessness. It is further stated that if anybody entered into any agreement for sale with the said Paramayee Ammal whose mind and power of thinking have become enfeebled such agreement for sale would be ineffective. The publication was given by the second plaintiff and his step-brother. The publication is dated 19th March, 1968, and it appeared in the issue of 'Malai Murasu' on 20th March, 1968. It is the contention of Mr. G. Ramaswami for the appellant that since defendants 1 and 2 came to know about the intended publication of Exhibit B-37, they took possession receipt with a recital that possession was being handed over by defendants 3 and 4 under instructions from Paramayee Ammal, the deceased first plaintiff and in part-performance of the agreement for sale dated 17th June, 1967. Whatever might be the impact of Exhibit B-21 on the plea of defendants 1 and 2 that they are now in possession of the property in part-performance of Exhibit A-13 agreement for sale, we have no doubt in our minds that Exhibit B-21 which has come into existence nearly nine months after the execution of Exhibit A-13, would have no relevance at all in deciding the question whether Exhibit A-13 agreement for sale is vitiated by fraud and undue influence. There is no evidence to show that defendants 1 and 2 were aware of the intended publication of Exhibit B-37 prior to their taking Exhibit B-21 from defendants 3 and 4. Even if it is assumed that they would have been aware of the intended publication of Exhibit B-37 notice by the son and step-son of the deceased first plaintiff, there was nothing unnatural in their attempting to make their position secure by taking possession of the property from defendants 3 and 4 in view of the admitted threat held out by the son and step-son of the deceased first plaintiff. In the circumstances, we repel the contention of Mr. G. Ramaswami that the simultaneous publication of Exhibit B-37 and the execution of Exhibit B-21 possession receipt would be evidence of undue influence and fraud exercised by defendants 1 and 2 on the deceased first plaintiff.

31. Much was made of the fact that no encumbrance certificate was taken by defendants 1 and 2 and that no scrutiny of title deeds was made. This theory does not at all fit in with the contention of the deceased first plaintiff that Exhibit A-13 agreement for sale was vitiated by undue influence and fraud. It is for the defendants to satisfy themselves if they so choose by taking encumbrance certificate that the title to the property was clear. It is clearly stated in Exhibit A-13 itself that the suit property was allotted to the deceased

first plaintiff under the interim final decree in O.S. No. 111 of 1954. In the circumstances, there was no necessity at all for any further scrutiny of title deeds.

32. Another contention raised by Mr. G. Ramaswami is that the agreement for sale was in the name of defendants 1 and 2. While so, the second defendant has subsequent to Exhibit A-13 agreement for sale executed Exhibit B-20 dated 2nd February, 1972, assigning his rights under Exhibit A-13 in favour of the first defendant for a paltry sum of Rs. 500. The fact that Exhibit B-23 showed that the advance amount of Rs. 10,011 was paid solely by the first defendant or that the second defendant assigned his rights under Exhibit A-13 in favour of the first defendant for a consideration of Rs. 500 would not be of any help to the appellant to establish the case of undue influence and fraud.

33. Mr. G. Ramaswami strenuously contended that an extent of 1-63 acres out of the suit property had been notified by the authorised officer as surplus land under the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act, 1961. Exhibit A-38 is the relevant notification issued by the authorised officer on 17th March, 1966. Mr. Ramaswami's contention was that the agreement to transfer the suit property in respect of which Exhibit A-38 notification had been published under the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act, 1961 was void under Section 22 of the Act. In support of his contention the learned Counsel relied on the recent decision of the Supreme Court in Authorised Officer, Thanjavur v. Naganatha Ayyar : [1979]3SCR1121 . The decision of the Supreme Court cited by Mr. G. Ramaswami was given in an appeal filed against the decision of Ramanujam, J., in Naganatha Ayyar v. The Authorised Officer (1971)84LW 69. In that case, Ramanujam, J., was concerned with the effect of Section 22 of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act, 1961. Ramanujam, J., held that under Section 22 of the Act, the authorised officer was entitled to declare as void only those transactions which were sham and nominal and entered into with the object of defeating the provisions of the Act without any bona fide intention to transfer title. Reversing the decision of Ramanujam, J., the Supreme Court held thus:

Section 22, literally read, leads only to one conclusion, that any transfer, bona fide executed or not, is liable to be declared void by the authorised officer, if he finds that the transfer defeats any of the provisions of the Act. There is not the slightest doubt that severally and cumulatively the provisions of the Act seek to make available the maximum extent of land, in excess of the ceiling, to be vested in Government for fulfilment of its purposes.

However, we are of the opinion that the decision of the Supreme Court that any transfer was liable to be declared void by the authorised officer if he found that the transfer defeat-ed the provisions of the Act irrespective of the question whether it was bona fide or not, does not in anyway affect the maintainability of the present suit. Under Section 22 it is for the authorised officer to make appropriate enquiry as he thinks fit and to pass appropriate orders. We are not now concerned with the question whether Exhibit A-13 agreement for sale is void as it violated the provisions of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act, 1961. We therefore reject the contention of Mr. G. Ramaswami that Exhibit A-13 agreement for sale was void as it offended the provisions of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act, 1961.

34. The net result of the analysis is that Exhibit A-13 must be held to have been freely and voluntarily executed by the deceased first plaintiff in favour of defendants 1 and 2 and that the same is not liable to be declared. void or liable to be set aside for any of the reasons urged on behalf of the appellant. Therefore, we confirm the finding of the trial Court on this aspect of the matter.

35. Mr. G. Ramaswami then contended that, in any event the plaintiff having asked for the relief of possession in the plaint on the basis of her title, the appellant would be entitled to a decree for recovery of possession from defendants 1 and 2. Elaborating his contention Mr. Ramaswami argued that Exhibit A-13 would not itself create any interest in the suit property and that consequently so long as no sale deed has been executed by Paramayee Ammal in favour of defendants 1 and 2 pursuant to Exhibit A-13 agreement for sale, they did not acquire any interest in the suit property and that consequently the appellant would be entitled to a decree for

recovery of possession on the basis of his title. This argument was vehemently opposed by Mr. M. R. Narayanaswami oh the ground that defendants 1 and 2 have been put in possession of the suit property pursuant to the terms of Exhibit A-13 agreement for sale in part-performance of the contract and that consequently defendants 1 and 2 would be entitled to resist the delivery of possession under Section 53-A of the Transfer of Property Act. But Mr. G. Ramaswami contended that defendants 1 and 2 had not pleaded specifically the plea of part-performance in their written statement and therefore we should not consider the plea of part performance at all.

36. No doubt it is settled law that a defendant should specifically plead in the written statement that he was entitled to protection under Section 53-A of the Transfer of Property Act. In Illikkal Dewaswom v. Narayanan : AIR1966Ker96 , it has been held by a Full Bench of the Kerala High Court that the foundation for a plea of part performance under Section 53-A of the Transfer of Property Act, should be laid in the pleadings and in the absence of specific pleadings the Court should decline to investigate the question. This has been followed by the Orissa High Court in Sadhob Bhotra v. Hori : AIR1973Ori21 , and the Court observed:

In the absence of a specific plea raised in the written statement that the defendant was entitled to protection under Section 53-A the Court was not justified in applying the provisions of the section.

But, on the facts this case, we are not inclined to agree, with Mr. G. Ramaswami, learned Counsel for the appellant that there has been no plea with regard to part-performance. In paragraph 6 of the plaint the deceased first plaintiff had referred to the fact that defendants 1 and 2 had published a notification in 'Malai Murasu' stating that they had taken possession of the suit property from defendants 3 and 4 in part-performance of the agreement for sale on payment of Rs. 15,000 to defendants 3 and 4. In paragraph 7 of the written statement with reference to the allegation in paragraph 6 of the plaint, defendants 1 and 2 have stated that the payment of Rs. 15,000 was made to the defendants 3 and 4 at the request of the deceased first plaintiff for getting possession of the property. On the basis of these pleadings Issue No. 4 was raised as to whether the alleged payment and delivery of possession constitute part-performance by the plaintiff of the suit contract. We therefore overrule the contention of Mr. G. Ramaswami that we should decline to consider the plea of part performance on its merits.

37. The first defendant as D.W. 1 has stated that since the deceased first plaintiff was not in a position to evict the tenants she asked him to pay money to defendants 3 and 4 and take possession of the suit property. Accordingly, he. paid them Rs. 15,000 and took possession under Exhibit P-21 possession receipt. The second defendant as D.W. 2 has deposed that the third defendant demanded Rs. 15,000 for surrendering possession of the property. He therefore took him to the deceased first plaintiff. She then told the second defendant to recover possession on payment of money to defendants 3 and 4. Accordingly, Rs. 15,000 was paid to defendants 3 and 4 and possession was taken under Exhibit B-21 possession receipt. Exhibit B-21 is dated 19th March, 1968, and this has been. executed by defendants 3 and 4 in favour of defendants 1 and 2. It states that they have received Rs. 15,000 under instructions from the deceased first plaintiff and have surrendered possession to defendants 1 and 2. It further recites that possession was being given in part-performance of the agreement for sale dated 17th June, 1967. On the same day, i.e., 19th March, 1968 defendants 1 and 2' caused Exhibit A-14 notice to be issued to the deceased first plaintiff through counsel Mr. Vetrivel Mudaliar. The said notice called upon the deceased first plaintiff to execute and register the sale deed in respect of the suit property pursuant to Exhibit A-13 agreement for sale dated 17th June, 1967, on receipt of the balance of sale consideration. The said notice further mentions the fact that it was not possible for the deceased first plaintiff to evict the lessees from the suit property within six months from the date of agreement for sale and that on that day as per her instructions they had paid Rs. 15,000 to the lessees and taken possession in part-performance of the agreement for sale. It is on these facts the question will have to be considered whether defendants 1 and 2 can seek the protection of Section 53-A of the Transfer of Property Act. Section 53-A reads as follows:

Where any person contracts to transfer for consideration any immovable property by writing signed by him or

on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has, in part-performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part-performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that the contract though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract : (proviso omitted.)

The section furnishes a statutory defence to a person to maintain his possession if he can prove a written and signed contract in his favour and further establish that he took possession of the property or did any acts in furtherance of the contract. The conditions necessary for the applicability of Section 53-A are : (1) The contract must be in writing signed by the transferor claiming to recover possession. (2) The transferee must have taken possession. (3) If he was already in possession, he must have continued in possession and must have further done some act in furtherance of the contract. (4) The possession taken or continued must have been in pursuance of the contract to transfer. (5) Such possession may be actual or constructive. In this case, admittedly, defendants 1 and 2 were not put in possession of the property in pursuance of the contract of transfer. Nor did the parties intend to transfer possession to defendants 1 and 2 before the execution and registration of the sale deed. Under the terms of Exhibit A-13 agreement for sale the deceased first plaintiff had undertaken to evict the lessees from the suit property within six months and surrender vacant possession at the time of the execution of the sale deed. If there was delay on the part of the deceased first plaintiff in evicting the lessees within three months from the date of her being able to surrender vacant possession, defendants 1 and 2 were entitled to pay the balance sale consideration and take the sale deed. There is a further recital that at the time when the deceased first plaintiff would be in a position 1o evict the lessees from the suit property and execute the sale deed, she should be paid the balance sale consideration and surrender vacant possession of the property to defendants 1 and 2. If in the event of the deceased first plaintiff not being able to evict the lessees from the suit property all the three parties to the contract were at liberty to cancel the same and in such an event the deceased first plaintiff was liable to refund the advance amount of Rs. 10,011. However, if defendants 1 and 2 were agreeable they could take the sale deed even if the lessees were in occupation of the property. From the language of Exhibit A-13 it is clear that defendants 1 and 2 would be entitled to possession of the property only at the time of the sale deed and that only on payment of the balance sum of Rs. 1,79,989. Further, the clause giving a right to the deceased first plaintiff as well as defendants 1 and 2 to cancel the agreement in the event the deceased first plaintiff not being able to recover possession of the property from the tenants is very significant. That shows that deceased first plaintiff too had a right to revoke the agreement for sale in the event of her not being able to evict the lessees from the suit property. In the circumstances, it was not one of the terms of Exhibit A-13 agreement for sale that defendants 1 and 2 should be put either in physical or constructive possession of the suit property. Mr. M. R. Narayana-swami strenuously contended that it was not necessary to attract the applicability of Section 53-A that defendants 1 and 2 should have been put in possession on the date of agreement for sale itself or that the deceased first plaintiff should have obtained possession from the lessees and then put defendants 1 and 2 in possession of the property. As we have already stated, for attracting the applicability of Section 53-A it would be sufficient if the transferee is put in possession either actually or constructively. However, such act of putting the transferee in possession of the property either actually or constructively must be in pursuance to the terms of the agreement for sale. Further, the very plea of defendants 1 and 2 is not that they were put in possession either actually or constructively under the agreement for sale. It is not even their case that under Exhibit A-13 they were asked to take possession of the property from the tenants. On the other hand, it is their definite case that nine months after the agreement for sale, since the deceased first plain-tiff was not in

a position to evict the tenants, she empowered defendants 1 and 2 to pay money to defendants 3 and 4 and take possession of the property. Accordingly, acting under the instruction of the deceased first plaintiff they paid Rs. 15,000 and took possession of the property from the lessees in part performance of the agreement for sale. This certainly amounts to a novation of the original agreement for sale, as rightly pointed out by Mr. G. Ramaswami. Taking of possession under such a subsequent oral agreement will definitely not attract the applicability of Section 53-A of the Transfer of Property Act. When once there has been a variation or modification of the original written agreement for sale, the written contract would cease to be a contract which would bind the parties and the contract has to be taken along with the subsequent variation. There being no writ-ten contract that would bind the parties, to the written contract authorising defendants 1 and 2 to take possession of the property from defendants 3 and 4, Section 53-A of the Transfer of Property Act, would not be attracted.

38. A similar situation arose for consideration before a Bench of this Court in Yasodammal v. Janaki Ammal : AIR1968Mad294 . In that case, there was a written agreement for sale under which the first plaintiff agreed to sell the suit property to the first defendant for a sum of Rs. 6,500, of which Rs. 3,500 was paid at the time of the agreement and the balance was to be paid within 2 or 3 months thereafter and the sale transaction completed. Subsequently there was an oral alteration of a material condition of the contract viz., that the first defendant need not pay the balance of Rs. 3,000 within 2 or 3 months after the agreement for sale, but could take her own time to discharge the mortgage in favour of the second defendant. The agreement for sale was unstamped. Apart from the question whether any relief could be granted to the first defendant on the basis of the unstamped agreement for sale, a question arose whether the alleged agreement for sale satisfied the requirements of Section 53-A of the Transfer of Property Act and whether it was open to the first defendant to invoke the doctrine of part performance when all the conditions and terms of the agreement for sale were not embodied in writing viz., some terms have been in writing while some essential terms have been oral. In such a context, Ramamurti, J., speaking for the Bench held as follows:

Under Section 53-A the party, who invokes the doctrine of part performance, must have the document reduced to writing containing all the terms and conditions. Once it is found that the material portion particularly the time for payment of the price has been orally varied or modified, it is clear that there is no written agreement of sale containing all the terms of the agreement satisfying the requirements of Section 53-A of the Transfer of Property Act. It has there-fore to be held that the first defendant on : her own showing is not entitled to invoke Section 53-A of the Transfer of Property Act.

In this case also the agreement under which defendants 1 and 2 claim to have paid Rs. 15,000 to defendants 3 and 4 and taken possession of the property was oral. It clearly amounts to a variation of the written terms of Exhibit A-l3 which as we have already seen provided for surrender of possession of the property to defendants 1 and 2 only at the time of registration of the sale deed and on payment of the balance of consideration. In the circumstances, we are clearly of the opinion that the principle stated by Ramamurthi, J., in Yasodammal v. Janaki Ammal : AIR1968Mad294 , is applicable to the facts of this case and that consequently the provisions of Section 53-A of the Transfer of Property Act, are not attracted.

39. Mr. M. R. Narayanaswami, relied upon the following two cases : Somiredly Veeraiah v. Nagabandi Ranganaikulu (1967)2Andh LT 133, and Nagar Khan v. Gopi Ram : AIR1976Pat2 . The decision in Somu Reddy Veeraiah's case (1967)2Andh LT 133, is of no use to him. In that case, the only question that arose for consideration with respect to the applicability of Section 53-A of the Transfer of Property Act, was whether the transferee who was already in possession continued to be in possession and did some act in furtherance of the con-tract. The suit in that case was filed by a mortgagee for redemption and recovery of possession of the properties from the prior mortgagees who were in possession of the property under a usufructuary mortgage. The owners of the equity of redemption were impleaded as defendants 1 to 3, while the prior usufructuary mortgagees were impleaded as defendants 3 and 5. Defendants 4 and 5 contended that defendants 1 to 3 had executed an agreement in their favour for the sale of the suit property and that from the date of the agreement for sale their possession as mortgagees was converted into that of a vendee in

pursuance of the agreement for sale and that consequently the plaintiff was not entitled to recover possession from them. It is in that connection the learned Judge of the Andhra Pradesh High Court held that:

Section 53-A does not require any concurrent act or any specific consent on the part of the transferor to the continuance of possession by the transferee in pursuance of the contract. It depends upon the language of the contract and the surrounding circumstances.

On the facts of that case the learned Judge held that the parties should have continued in possession in part-performance of the contract. This case is clearly distinguishable on its facts and does not apply to the facts of our case.

40. Nagar Khan Gopi Ram : AIR1976Pat2 , also cannot be of any assistance to Mr. M. R. Narayanaswami. In that case, in paragraph 10 it was clearly found that on the facts of that case all the conditions for application of the doctrine of part performance of the contract as provided in Section 53-A of the Transfer of of Property Act, had been satisfied. It was proved in that case that 'there was a con-tract for sale of the land to the defendant by its admitted owner Lakhan Sao, who also came into possession in part-performance of the said agreement, which is for consideration and enforceable in law and the defendant has also established that he has not (sic.) always willing to perform his part of the contract'. Mr. M. R. Narayanaswami relied on this decision for the proposition that delivery of possession contemplated under section S3-A need not be at the instance of the vendor in part performance of the contract in furtherance of his intention to complete the contract. However, this decision is not an authority for the proposition that the taking of possession by the transferee need not be pursuant to the terms of the contract. We are therefore dearly of the opinion that defendants 1 and 2 are not entitled to the protection of Section 53-A of the Transfer of Property Act, even assuming that the deceased first plaintiff authorised them to pay Rs. 15,000 to defendants 3 and 4 and take possession from them. As rightly pointed out by the trial Court there is absolutely no evidence to prove that the deceased first plaintiff authorised defendants 1 and 2 to pay a sum of Rs. 15,000 to defendants 3 and 4 and take possession from them as she found it difficult to evict defendants 3 and 4 from the suit property. But the trial Court has erroneously found that the act of defendants 1 and 2 in taking possession of the property from defendants 3 arid 4 could only be considered to be pursuant to the agreement Exhibit A-13. For reasons already discussed, we are of the view that the trial Court fell into an error in coming to that conclusion . When once we find that the possession of defendants 1 and 2 cannot be traced to Exhibit A-13 agreement for sale, they cannot resist the claim of the appellant to recover possession of the property on the foot of his title. It is well known that under Section 54 of the Transfer of Property Act an agreement for sale does not create any interest in or charge on such property in favour of the transferee.

41. Mr. M. R. Narayanaswami then contended that in any event the right of the appellant would be to take appropriate proceedings under the Tamil Nadu Cultivating Tenants Protection Act for recovery of possession of the suit property against defendants 3 and 4 and he cannot maintain a civil suit for the same. Defendants who were originally inducted into possession as lessees by the deceased first plaintiff have remained ex parte. They have not claimed any protection under the Tamil Nadu Cultivating Tenants Protection Act. On the other hand, they have executed Exhibit B-21 possession receipt in favour of defendants 1 and 2 stating that they were surrendering possession in their favour as per instructions from the deceased first plaintiff. Defendants 1 and 2 have not claimed any tenancy right, either directly or under defendants 3 and 4 in their written statement. Consequently, we have no hesitation in holding that the suit as filed by the plaintiffs for recovery of possession on the foot of the first plaintiff's title is maintainable.

42. To sum up, we confirm the finding of the trial Court that Exhibit A-13 agreement for sale is not vitiated by undue influence and fraud or other infirmities put forward on the side of the plaintiffs and that the same is neither liable to be declared void nor set aside. However, differing from the finding of the trial Court we have found that defendants 1 and 2 are not in possession of the suit property pursuant to Exhibit A-13 agreement for sale and that consequently, they are not entitled to protection under Section 53-A of the Transfer of Property Act. Therefore, we set aside the finding of the trial Court on this point. The net result is the appeal is

partly allowed. The appellant will be entitled to a decree for recovery of possession of the suit property from the defendants. The appellant will be entitled to mesne profits from the date of plaint. The determination of the quantum of mesne profits is relegated to separate proceedings under Order 20, Rule 12, Code of Civil Procedure. The appellant will be entitled to his costs of the appeal from the contesting defendants 1 and 2.

43. Before parting with the judgment, we wish to make it clear that our finding on the validity of Exhibit A-13, the agreement for sale is not to be treated as concluding the rights of parties in the suit for specific performance, viz., O.S. No. 83 of 1968 on the file of the Sub-Court, Erode, and that the passing of a decree in the suit will depend upon the plaintiff therein convincing the Court that he is entitled to the equitable relief of specific performance.