

RANGAMMAL

v.

KUPPUSWAMI & ANR.

(Civil Appeal No. 562 of 2003)

MAY 13, 2011

**[J.M. PANCHAL AND GYAN SUDHA MISRA, JJ.]**

*Evidence Act, 1872:*

*s.101 – Burden of proof – Suit for partition – Property of third person (who later got herself impleaded as defendant no. 2), included in plaint-schedule property on the basis of a sale deed stated to have been executed by the alleged guardian of defendant no. 2 when she was a minor, on the ground of legal necessity to pay the debts of her deceased mother – Defendant no. 2 disputing genuineness of the sale deed – High Court placing the burden on defendant no. 2 that she should have challenged genuineness of the sale deed – HELD: The burden of proving a fact always lies upon the person who asserts – Until such burden is discharged, the other party is not required to be called upon to prove his case – In the instant matter, when the plaintiff pleaded that the disputed property fell into his share by virtue of the sale deed, then it was clearly for him to prove that it was executed for legal necessity of defendant no. 2 while she was a minor – It was not defendant no. 2/appellant who claimed any benefit from the sale deed or asserted its existence,, therefore, the burden of challenging the sale deed specifically when she had not even been dispossessed from the disputed share by virtue of the sale deed, did not arise at all – Since the High Court has misplaced the burden of proof, the impugned judgment of the High Court as also the judgments of the courts below are clearly vitiated, as it is a well established dictum of the*

- A *Evidence Act that misplacing the burden of proof would vitiate the judgment.*

*Partition:*

- B *Suit for partition – HELD: In a suit for partition, it is expected of the plaintiff to include only those properties for partition to which the family has clear title and unambiguously belong to the members of the joint family which is sought to be partitioned and if someone else's property i.e. disputed property is included in the schedule to the suit for partition,*
- C *and the same is contested by a third party who is allowed to be impleaded, obviously it is the plaintiff who will have to first of all discharge the burden of proof for establishing that the disputed property belongs to the joint family.*

- D *Pleadings:*

- Suit – Held: A suit has to be tried on the basis of the pleadings of the contesting parties filed in the suit before the trial court in the form of plaint and written statement and the nucleus of the case of the plaintiff and the contesting case of the defendant in the form of issues emerges out of that – In the instant case, the plaintiff/respondent no. 1 has miserably failed to prove his case as per his pleadings in the plaint and the burden to prove that the sale deed on which he based his claim, in fact was valid has not even been cast on him.*
- E
- F

*Delay/Laches:*

- G *Suit for partition – Property of a third person (who subsequently got herself impleaded as defendant no. 2) included in the plaint scheduled property on the basis of a sale deed executed 31 years back by the alleged guardian of defendant no. 2 while she was a minor – High Court holding that delay in challenging the sale deed should have been*

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*explained by defendant no. 2 – HELD: It is the plaintiff who based his case on execution of the sale deed of the property of defendant no. 2, and when there was a dispute about the genuineness of the sale deed and defendant no. 2 was in occupation of the property, it is the plaintiff who should have filed the suit claiming title on the basis of the sale deed, before the said property could be included in the suit for partition – Thus, there was no cause of action for defendant no. 2 to file a suit challenging the alleged sale deed as she asserted actual physical possession of the property and knowledge of sale deed could not be attributed to her prior to receiving the copy of the plaint disclosing execution of the alleged sale deed – Cause of action.*

**Costs:**

*Suit for partition – Property of third party (who later got herself impleaded as defendant no. 2) included in schedule to the plaint – HELD: Defendant no. 2 was unnecessarily dragged into this litigation at the instance of the plaintiff, who filed a partition suit which was apparently collusive in nature and was filed clearly with an oblique motive and evil design – It was a compulsion on the part of defendant no. 2 to contest the suit for decades wasting time, energy and expenses – Therefore, a token cost of Rs.25,000/- would be paid to her by plaintiff.*

**The plaintiff-respondent no. 1 filed a suit for partition and separate possession against the principal defendant (defendant no. 1/ respondent no. 2) including the property of the appellant in the schedule to the plaint without arraying her as a party to the suit. The case of the plaintiff was that the share which originally belonged to the appellant had been sold to the predecessors of the plaintiff and defendant no. 1 by way of a sale deed dated 24.2.1951 executed by the legal guardian of the appellant**

A when she was less than even three years of age. The sale deed was claimed to have been executed for legal necessity in order to discharge the debt of the appellant's deceased mother. The appellant filed an application for impleadment and was arrayed as defendant no. 2 in the

B said suit. She pleaded that the suit was collusive in nature so as to deprive her of her property by fraudulently stating that her deceased mother owed debt during her life time and in order to discharge the same, the so-called legal guardian executed the alleged sale

C deed dated 24.2.1991. The appellant-defendant no. 2 further pleaded that since she was a minor and was living with her maternal uncle, as she had lost both her parents, at the time of the alleged sale deed and, as such, the said sale deed ought not to be held legally binding on her so

D as to include her property for partition in the said collusive suit. The trial court decreed the suit. The first appellate court dismissed the appeal filed by defendant no. 2. Her second appeal was also dismissed by the High

E Court holding that it was for the appellant (defendant no. 2) to prove that the property shown in the sale deed, which fell into her share, was not sold for the purpose of discharging the liability of her deceased mother.

In the instant appeal filed by defendant no. 2, the

F questions for consideration before the Court were: (i) Whether in a partition suit filed by the plaintiff/respondent no. 1 the courts below could shift the burden of proof on the 2nd defendant-appellant regarding the validity of a sale deed, which was executed when the appellant was

G admittedly a minor, contrary to the pleading in the plaint claiming title to the suit land on the basis of the alleged sale deed? and (ii) Whether the question of limitation could arise against the 2nd defendant/appellant shifting the burden on her to challenge the sale deed, when the

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case of execution of the alleged sale deed was set up by the plaintiff/respondent no. 1 in the plaint for the first time when he filed partition suit against respondent no. 2, without impleading the appellant, but claimed benefit of title to the suit land on the basis of the alleged sale deed.

Partly allowing the appeal, the Court

HELD: 1.1. Section 101 of the Evidence Act, 1872 defines 'burden of proof' which clearly lays down that whosoever desires any court to give judgment as to any legal right or law dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person. Thus, the Evidence Act has clearly laid down that the burden of proving a fact always lies upon the person who asserts it. Until such burden is discharged, the other party is not required to be called upon to prove his case. The court has to examine as to whether the person upon whom the burden lies has been able to discharge the same. Until the court arrives at such a conclusion, it cannot proceed on the basis of weakness of the other party. [Para 14] [853-D-F]

1.2. In the instant case, it is the plaintiff/respondent No.1 who pleaded that the disputed property fell into his share and relied upon the alleged sale deed dated 24.2.1951 and included the subject-matter of the property which formed part of the sale deed and claimed partition. This sale deed was denied by the 2nd defendant/appellant on the ground that it was bogus and a sham transaction which was executed admittedly in 1951 when she was a minor. Thus, it was the plaintiff/respondent No.1 who should have first of all discharged the burden that the sale deed executed during the minority of the

A appellant was genuine and was fit to be relied upon. If the courts below including the High Court had felt satisfied on this aspect, only then the burden could be shifted on the 2nd defendant/appellant to dislodge the case of the plaintiff that the sale deed was not genuine. But when the plaintiff merely pleaded in the plaint but failed to lead any evidence – much less proof, that the sale deed was genuine and was executed in order to discharge the burden of legal necessity in the interest of minor, then the High Court clearly misdirected itself by recording in the impugned order that it is defendant no. 2/appellant who should have challenged the genuineness of the sale deed after attaining majority within the period of limitation, when she had not even been dispossessed from the disputed share. [Para 14 and 19] [853-G; 857-B-F]

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1.3. When the plaintiff-respondent No.1 came with a specific pleading for the first time in a partition suit that the appellant's share had been sold out by her *de facto* guardian without even the permission of the court, therefore, in view of s.101 of the Evidence Act, it was clearly the plaintiff/respondent No.1 who should have discharged the burden that the same was done for legal necessity of the minor in order to discharge the debt which the deceased mother of the appellant was alleged to have been owing to some one. When the plaintiff/respondent No.1 failed to discharge this burden, the question of discharge of burden to disprove the sale deed by the 2nd defendant/appellant does not arise at all as per the provisions of the Evidence Act. [Para 17-18] [855-E-G]

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*Subhra Mukherjee vs. Bharat Coaking Coal Ltd*, AIR 2000 SC 1203 – relied on.

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1.4. Since the High Court has misplaced burden of

proof, it clearly vitiated its own judgment as also the judgments of the courts below since it is well established dictum of the Evidence Act that misplacing of burden of proof would vitiate the judgment. It is also equally and undoubtedly true that the burden of proof may not be of much consequence after both the parties lay evidence, but while appreciating the question of burden of proof, misplacing of burden of proof on a particular party and recording the findings in a particular way definitely vitiates the judgment, as it has happened in the instant matter. [Para 20] [857-G-H; 858-A]

*Koppula Koteshwara Rao vs. Koppula Hemant Rao, 2002 AIHC 4950 (AP); State of J & K vs. Hindustan Forest Company, 2006 (12) SCC 198; Corporation of City of Bangalore vs. Zulekha Bi, 2008 (5) SCR 325 = 2008 (11) SCC 306 (308),* relied on.

1.5. The law on burden of proof as laid down in various decisions is, when a person after attaining majority, questions any sale of his property by his guardian during his minority, the burden lies on the person who upholds/asserts the purchase not only to show that the guardian had the power to sell but further that the whole transaction was bona fide. [Para 15] [854-C-D]

*Roop Narain vs. Gangadhar, 9WR 297; and Anna Malay vs. Na U Ma, 17C 990* –referred to.

1.6. The plaintiff/respondent No.1, therefore, has miserably failed to prove his case as per his pleading in the plaint and the burden to prove that the sale deed in fact was valid has not even been cast on him that the share of appellant had been sold out by the de facto guardian by sale deed dated 24.2.1951 for consideration

A without permission of the court when the appellant was a minor. [Para 16] [855-A-B]

B 2.1. It is further well-settled that a suit has to be tried on the basis of the pleadings of the contesting parties filed in the suit before the trial court in the form of plaint and written statement and the nucleus of the case of the plaintiff and the contesting case of the defendant in the form of issues emerges out of that. In the instant case, this basic principle, seems to have been missed not only C by the trial court but consistently by the first appellate court which has been compounded by the High Court. [Para 24] [859-B-C]

D 2.2. The basic case pleaded by the plaintiff had been misconstrued and the burden to prove genuineness, veracity and legal efficacy of the sale deed dated 24.2.1951 was shifted on the appellant clearly missing that it is the plaintiff/respondent No.1 who was bent upon to include the appellant's property also for partition by E relying upon the story of execution of sale deed when the partition suit was between the plaintiff and defendant No.1. [para 26] [859-F-G]

F 2.3. The High Court as also the courts below have clearly misconstrued the entire case of the plaintiff and tried it contrary to the pleadings. The High Court has recorded that "*the present suit which was filed in the year 1982, is after 31 years*" i.e. after 31 years of the execution of the sale deed dated 24.2.1951. But, the High Court has fallen into a crystal clear error as it has patently missed G that the suit had not been filed by the appellant as she was the 2nd defendant who was later impleaded in the suit. [para 11] [851-G-H; 852-A]

H 3.1. The High Court has held that the delay in

challenging the sale deed of 1951 should have been explained at the instance of the 2nd defendant-appellant when it is the plaintiff who brought the story of execution of the sale deed of appellant's property in their favour. In fact, if there was a dispute about the genuineness and veracity of the sale deed and the appellant was in occupation of her share, then it is the plaintiff who should have filed a suit claiming title on the basis of the sale deed which was claimed to have been executed in their favour by the *de facto* guardian of the appellant when she was a minor before the said property could be included in the suit for partition between the plaintiff and the defendant excluding the 2nd defendant/appellant and the consequence of not doing so or the delay in this regard, obviously will have to be attributed to the plaintiff/respondent no. 1. [Para 27] [859-H; 860-A-D]

3.2. The High Court, therefore, has fallen into an error while observing that the appellant/defendant No.2 in the suit should have assailed the sale deed and cannot do so after 31 years of its execution when it is unambiguously an admitted factual position that it is the plaintiff/respondent No.1 who had filed a suit for partition against defendant No.1/respondent No.2 and in that partition suit it was plaintiff/respondent No.1 who banked upon the story that the sale deed had been executed by the legal guardian of the appellant, for legal necessity which was to discharge the debt of the appellant's deceased mother. The High Court has clearly missed that the suit had not been filed by the appellant but she was merely contesting the suit as the 2nd defendant by getting herself impleaded in the partition suit when it came to her knowledge that the property which is in her occupation and possession has also been included in the schedule in the suit for partition between plaintiff/

A respondent No.1 and the 1st defendant/respondent No.2 and when she received the copy of the plaint, execution of the alleged sale deed way back in 1951 was disclosed to her for the first time. Therefore, there was no cause of action for her to file a suit challenging the alleged sale deed, as knowledge of the same cannot be attributed to her in this regard as she asserted actual physical possession on her share. [Para 17 and 28] [855-C-D; 860-E-H]

C 4. In a suit for partition, it is expected of the plaintiff to include only those properties for partition to which the family has clear title and unambiguously belong to the members of the joint family which is sought to be partitioned and if someone else's property, meaning thereby, a disputed property is included in the schedule of the suit for partition, and the same is contested by a third party who is allowed to be impleaded by order of the trial court, obviously it is the plaintiff who will have to first of all discharge the burden of proof for establishing that the disputed property belongs to the joint family which should be partitioned excluding someone who claims that some portion of the joint family property did not belong to the plaintiff's joint family in regard to which decree for partition is sought. [Para 31] F [861-F-H; 862-A]

G 5.1. In the result, the judgment and order of the High Court in so far as the share of the 2nd defendant/appellant is concerned, is set aside and, consequently, the decree passed by the trial court, upheld by the first appellate court and the High Court in so far as it illegally includes the share of the appellant which had not devolved on the family of the plaintiff/respondent No.1 and defendant No.1/respondent No.2, but was claimed on the basis of a sale deed which could not be proved either by evidence or H

law, is set aside. However, it is made clear that the decree which has been passed by the trial court in so far as partition between plaintiff/respondent No.1 and defendant No.1/respondent No.2 is concerned, shall remain intact. The trial court accordingly shall modify the decree passed in O.S. No.255 of 1982 by excluding the share of the appellant claimed on the basis of the sale deed dated 24.2.1951. [Para 30 and 32] [861-D-E; 862-A-D]

5.2. It is a matter of concern of this Court that the appellant who was in actual physical and peaceful possession of her property which she had inherited from her deceased parents, was unnecessarily dragged into this litigation at the instance of the plaintiff, who filed a partition suit which was apparently collusive in nature as it included the share of a third party to which the plaintiff and 1st defendant's family had no clear title. It was clearly a compulsion on the part of 2nd defendant/appellant to contest the collusive suit for decades wasting time, energy and expense over a litigation which was started by the plaintiff clearly with an oblique motive and evil design. Therefore, a token cost of Rs.25,000/- shall be paid by plaintiff/respondent No.1 to the appellant. [Para 33] [862-F-H; 863-A-B]

#### Case Law Reference:

9WR 297	referred to	para 15
17C 990	referred to	para 15
AIR 2000 SC 1203	relied on	para 18
2002 AIHC 4950 (AP)	relied on	Para 20
2006 (12) SCC 198	relied on	para 21
2008 (5 ) SCR 325	relied on	Para 22

A CIVIL APPELLATE JURISIDCTION : Civil Appeal No. 562 of 2003.

From the Judgment & Order dated 11.7.2002 of the High Court of Judicature at Madras in S.A. No. 703 of 1992.

B Jayanth Muth Raj, T.N. Rao for the Appellant.

Krishnamurthi Swami, Prabha Swami, S.J. Aristole, Prabu Ramasubramani, L.A.J. Selvan, Priya Aristotle, V.G. Pragasam for the Respondents.

C The Judgment of the Court was delivered by

D **GYAN SUDHA MISRA, J.** 1. This appeal by special leave has been filed by the appellant Tmt. Rangammal against the order dated 11.07.2002 passed by the learned single Judge of the High Court of Judicature at Madras in Second Appeal No. 703/1992 by which the appeal was dismissed by practically a summary order although the substantial question of law which was formulated at the time of admission of the appeal was as follows:

E “Whether the sale deed executed by the *de facto* guardian on behalf of the minor without the permission of the court could be held to be valid ?

F 2. However, on hearing the appeal in the light of the prevailing facts and circumstances of the instant matter, we are of the view that the question also arises whether in a partition suit filed by the plaintiff/respondent No.1 herein, the courts below could shift the burden of proof on the defendant - appellant regarding the validity of a sale deed, which was executed when the appellant was admittedly a minor, contrary to the pleading in the plaint filed in a suit for partition, who claimed title to the suit land on the basis of the alleged sale deed. Still further the question arises whether the question of limitation could arise

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against the defendant/appellant shifting the burden on her to challenge the sale deed, when the story of execution of the alleged sale deed was set up by the plaintiff/respondent No.1 in the plaint for the first time when he filed partition suit against his brother, without impleading the appellant, but claimed benefit of title to the suit land on the basis of the alleged sale deed.

3. In order to decide the aforesaid controversy, it is necessary to relate the facts giving rise to this appeal in so far as it is relevant which disclose that the appellant Tmt. Rangammal was impleaded as second defendant in a suit for partition bearing O.S. No. 255/1982 which had been filed by one Kuppuswami plaintiff-respondent No.1 herein in the court of District Munsif, Palani, against his brother Andivelu who was the principal defendant/1st defendant/respondent No.2 herein for partition and separate possession, but the plaintiff also included the property of the appellant-Rangammal in the schedule to the plaint without including her as a party to the suit as it was pleaded by the plaintiff-respondent No.1-Kuppuswami that the share which originally belonged to the appellant-Rangammal, was transferred to their predecessors, who were father and uncle of the plaintiff and defendant No.1/Respondent No.1 Andivelu, by way of a sale deed dated 24.2.1951 executed in their favour by Kumara Naicker who claimed to be the legal guardian of the Rangammal when the appellant/Rangammal was admittedly a minor and was barely few years old, less than even three years. The sale deed was claimed to have been executed for legal necessity in order to discharge the debt of the deceased mother of the appellant in the year 1951 which according to the case of the plaintiff-respondent No. 1 had been transferred to their branch by virtue of the aforesaid sale deed executed on 24.2.1951 by the alleged guardian of the appellant Kumara Naicker.

4. Since the appellant had not been impleaded in the suit

A for partition although her property was included in the partition  
suit between the two brothers i.e. plaintiff Kuppuswami-  
respondent No.1 herein and Andivelu 1st defendant –  
respondent No.2 herein, the appellant filed an application for  
impleadment in the partition suit before the trial court which was  
B allowed.

5. The appellant herein who was impleaded as a second  
defendant in the suit clearly pleaded that the partition suit filed  
by Kuppuswami-plaintiff against his brother Andivelu 1st  
C defendant –respondent No.2 herein, was collusive in nature as  
this was clearly to deprive the appellant from her share by  
relying on an alleged sale deed dated 24.2.1951 by fraudulently  
stating that the deceased mother of the appellant was owing  
certain debt during her lifetime and in order to discharge the  
D same, the so-called legal guardian of the appellant Kumara  
Naicker executed a sale deed in favour of the father and uncle  
of the plaintiff and defendant No.1 who are respondents herein.  
It was, therefore, submitted by the appellant/2nd defendant in  
the suit that the sale deed dated 24.2.1951 alleged to have  
E been executed in order to discharge the debt of her deceased  
mother, when the appellant was a minor, ought not to be held  
legally binding on her and so as to include her property for  
partition in the partition suit which had been instituted by an  
altogether different branch of the family who had separated  
F more than three generations ago. Hence she specifically  
pleaded that the partition suit including her property was clearly  
collusive in nature and therefore the suit was fit to be dismissed.

6. In order to appreciate whether the courts below were  
G justified in depriving the appellant Tmt. Rangammal from her  
share, it appears necessary to relate some other salient facts  
of the case leading up to the filing of this appeal. The schedule-  
property comprising an area of 4 acres and 10 cents described  
in various survey numbers originally belonged to one Laksmi

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Naicker-the common ancestor of contesting parties who had two sons and an oral partition had taken place between them in regard to the properties of the joint family including the schedule-property. Thereafter, a sale deed dated 24.2.1951 in respect of the schedule-property was executed by Kumara Naicker –alleged legal guardian of appellant-Rangammal who was one of the sons of late Kumara Naicker and wife of the elder son of Laksmi Naicker-Thottammal a cousin of her son, who was descendent of Kumara Naicker. Kumara Naicker, i.e. the son of the elder son of Laksmi Naicker executed the sale deed on behalf of the appellant herein, who was the daughter of younger son of Laksmi Naicker and Andi Naicker was admittedly a minor, representing himself as her guardian since she had lost both her father and her mother at the time of the execution of the sale deed. However, the appellant according to her case continued in possession of half of the schedule property according to the oral partition which had fallen into the share of her father since the only brother of the appellant/Rangammal had died unmarried. Thus, the appellant continued to be in possession of half of the property without any knowledge about the alleged sale deed.

7. The appellant's case is that as she was a minor and had lost both her parents, she was living with her maternal uncle even at the time of the alleged sale. The appellant's case is that the suit was instituted between the plaintiff-respondent No.1 herein and 1st defendant-respondent No.2 herein under the pretext of partition but in fact the idea behind institution of the suit was to oust the appellant who continued to be in possession of half of the share of the property being the sole legal representative of the younger son of Laksmi Naicker who was Andi Naicker. As already stated, the appellant in fact was not even made a party in the partition suit initially but was later impleaded as 2nd defendant after she filed an application for her impleadment.

A 8. However, the High Court while dealing with the second  
B appeal arising out of the partition suit, cast the burden  
C completely on the appellant/2nd defendant to prove that the  
D property shown in the sale deed which fell into the share of the  
E appellant, was not for the purpose of discharge of the liability  
F of her deceased mother who according to her case was not  
G owing any debt to anyone including Kumara Naicker. But the  
H suit was finally decreed in favour of the plaintiff/respondent No.1  
holding therein that the appellant's deceased mother was  
owing certain debts and for discharge of the same, the so-  
called legal guardian of the appellant who was Kumara Naicker  
executed a sale deed in favour of the plaintiff's father and  
defendant No.1's father in respect of the entire property of  
Rangammal and this was done ostensibly as the appellant's  
mother had to discharge certain debts which she was owing  
to the plaintiff's father during her lifetime. Thus, the District  
Munsif, Palani, decreed the suit in favour of the plaintiff/1st  
respondent herein Kuppuswami. While doing so, the trial court  
recorded a finding that the sale deed dated 24.2.1951 by which  
half share of the appellant in the suit property was transferred  
when the appellant was a minor had been executed by legal  
guardian Kumara Naicker for legal necessity according to the  
case of the appellant herein, Kumara Naicker the so-called legal  
guardian was neither her natural guardian nor guardian  
appointed by the court and hence the sale deed executed by  
him to the extent of half share of the schedule property of  
appellant-Rangammal was clearly void, illegal, inoperative and  
hence not binding on her. The trial court decreed the suit against  
which the appeal before the 1st appellate court was dismissed.  
The matter then came up to the High Court by way of a second  
appeal.

9. Learned counsel for the appellant while challenging the  
judgment and orders of the courts below submitted that the sale  
deed executed by the so-called *de facto* guardian Kumara

Naicker and Thottammal cannot be held to be binding on her as she was a minor in the custody of her maternal uncle and not Kumara Naicker –father of the respondent No.2 and hence the sale deed executed by him on her behalf was not binding on her as the same was executed in order to deprive her of her half share in the disputed property which is situated on the eastern portion of the schedule property.

10. The learned single Judge of the High Court however was pleased to dismiss the second appeal holding therein that the present suit out of which the second appeal arose was filed in the year 1982 which was after 31 years of the execution of the sale deed dated 24.2.1951. The single Judge further observed that if the appellant Tmt. Rangammal was aggrieved of the sale deed executed by the *de facto* guardian, she ought to have challenged it within three years from the date of attaining majority. The High Court went on to hold that until the date of filing of the present suit by the 1st respondent and even thereafter, the appellant had not chosen to challenge the sale deed executed by the *de facto* guardian and she never asserted any title in respect of the suit property irrespective of the sale deed in order to establish that she was aggrieved of the sale deed and hence it was too late for the appellant to raise such a plea in the High Court by way of a second appeal.

11. We have heard learned counsel for the parties at length and on a consideration of their submissions in the light of the judgments and orders of the courts below, specially the High Court, we are clearly of the view that the High Court as also the courts below have clearly misconstrued the entire case of the plaintiff as well as the respondents and tried it contrary to the pleadings. The High Court has recorded that "*the present suit which was filed in the year 1982, is after 31 years*" i.e. after 31 years of the execution of the sale deed dated 24.2.1951. But it can be instantly noticed that the High Court has fallen into a crystal clear error as it has patently and unambiguously

- A missed that the suit had not been filed by the appellant Tmt. Rangammal as she was the 2nd defendant who was later impleaded in the suit but the partition suit had been filed by the plaintiff-Kuppuswami-respondent No.1 herein against his brother the 2nd respondent-Andivelu-1st defendant which was
- B a suit for partition of the property but while doing so he included and asserted title to the property in the schedule of the plaint which admittedly had fallen into the share of the appellant's deceased-father which devolved upon her after the death of her father, mother and brother who died unmarried. But it is the
- C plaintiff/respondent No.1 who came up with a case in the plaint that this property was transferred for legal necessity by the so-called legal guardian of the appellant by executing a sale deed on 24.2.1951 in favour of the respondents predecessors who were father and uncle of the plaintiff and 1st defendants/
- D respondents herein.

12. The learned single Judge of the High Court as also the trial court and the lower appellate court thus have lost sight of the fact that it is the plaintiff/respondent No.1 herein who had
- E come up with a case that the half share of the disputed property which on partition had fallen into the share of the appellant's father was sold out by Kumara Naicker as guardian of the appellant-who was a minor in order to discharge some debt which the appellant's deceased mother was alleged to be
- F owing. However the disputed property which was sold in order to discharge the alleged burden of debt vide sale deed dated 24.2.1951 was purchased by the plaintiff-1st respondent's father Arumuga Gounder and their uncle Kumara Naicker which means that the legal guardian Kumara Naicker claims the
- G property of the appellant who was minor and then sold it to himself and nephew Arumuga Gounder. Furthermore, it is also the plaintiff's case that the property which had fallen into the share of Tmt. Rangammal had been sold out by Kumara Naicker to the father of Kuppuswami-Arumuga Gounder and
- H Andivelu who was his own son.

13. Therefore, it is more than apparent that when the plaintiff/respondent came up with a case of execution of sale deed on 24.2.1951 for half of the schedule property/disputed property alleged to have been sold out for legal necessity which had fallen into the share of appellant Rangammal, the burden clearly lay on the plaintiff/respondent No.1 to discharge that the sale deed executed by Kumara Naicker to his own son and nephew Arumuga Gounder in regard to the share which had admittedly fallen into the appellant share Rangammal who was a minor, was sold for the legal necessity. But this burden by the trial court was wrongly cast upon the appellant/Rangammal to discharge, although, it is well-settled that the party who pleads has also to prove his case.

14. *Section 101 of the Indian Evidence Act, 1872 defines 'burden of proof' which clearly lays down that whosoever desires any court to give judgment as to any legal right or law dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person. Thus, the Evidence Act has clearly laid down that the burden of proving fact always lies upon the person who asserts. Until such burden is discharged, the other party is not required to be called upon to prove his case. The court has to examine as to whether the person upon whom burden lies has been able to discharge his burden. Until he arrives at such conclusion, he cannot proceed on the basis of weakness of the other party. In view of this legal position of the Evidence Act, it is clear that in the instant matter, when the plaintiff/respondent No.1 pleaded that the disputed property fell into the share of the plaintiff by virtue of the sale deed dated 24.2.1951, then it was clearly for the plaintiff/respondent No.1 to prove that it was executed for legal necessity of the appellant-while she was a minor. But, the High Court clearly took an erroneous view while holding that it is the defendant/appellant*

A who should have challenged the sale deed after attaining majority as she had no reason to do so since the plaintiff /  
respondent No.1 failed to first of all discharge the burden that  
the sale deed in fact had been executed for legal necessity of  
B the minor's predecessor mother was without permission of the  
court. It was not the defendant/respondent who first of all  
claimed benefit of the sale deed or asserted its genuineness,  
hence the burden of challenging the sale deed specifically when  
she had not even been dispossessed from the disputed share,  
did not arise at all.

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15. Plethora of commentaries emerging from series of  
case laws on burden of proof which are too numerous to cite,  
lay down that *when a person after attaining majority, questions  
any sale of his property by his guardian during his minority,  
D the burden lies on the person who upholds/asserts the  
purchase not only to show that the guardian had the power to  
sell but further that the whole transaction was bona fide.* This  
was held in the case of *Roop Narain vs. Gangadhar*, 9WR 297,  
as also in *Anna Malay vs. Na U Ma*, 17C 990. Thus when the  
E plaintiff/respondent No.1 came up with a case that the minor's  
share/appellant herein was sold for legal necessity by her uncle  
Kumara Naicker, then it was the plaintiff/respondent No.1 who  
should have discharged the burden to prove that the minor/  
appellant's share had been sold of by the *de facto* guardian  
F Kumara Naicker without permission of the court, could be held  
to be legal and valid so as to include the same in the partition  
suit between two brothers, which has not been discharged at  
all by the plaintiff/respondent No.1. In fact, the real brother of  
plaintiff Kuppuswami who is defendant No.1/respondent No.1  
G herein Andivelu has also not supported the case of the plaintiff  
that the half share of appellant/Rangammal in the disputed  
property was sold out vide sale deed dated 24.2.1951 for legal  
necessity without permission of the Court and hence defendant  
No.1/respondent No.2 also has not supported the case of the

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plaintiff/respondent No.1 on this count.

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16. The plaintiff/respondent No.1 therefore has miserably failed to prove his case as per his pleading in the plaint and the burden to prove that the sale deed in fact was valid has not even been cast on plaintiff/respondent No.1 that the share of appellant-Rangammal had been sold out by Kumara Naicker vide sale deed dated 24.2.1951 for consideration without permission of the Court when the appellant was a minor.

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17. The High Court, therefore, has fallen into an error while observing that the appellant/defendant No.2 in the suit should have assailed the sale deed and cannot do so after 31 years of its execution when it is unambiguously an admitted factual position that it is the plaintiff/respondent No.1 who had filed a suit for partition against his brother defendant No.1/respondent No.2 and in that partition suit it was plaintiff/respondent No.1 who banked upon the story that a sale deed had been executed by his Uncle Kumara Naicker who claimed it to be the legal guardian of the appellant-Rangammal who admittedly was a minor for legal necessity which was to discharge the debt of the appellant's deceased mother. Hence, in view of Section 101 of the Indian Evidence Act, 1872 it is the plaintiff/respondent No.1 who should have first of all discharged the burden that in fact a sale deed had been executed for the share which admittedly belonged to appellant-Rangammal in order to discharge the burden of debt for legal necessity and for the benefit of the appellant who admittedly was a minor.

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18. When the plaintiff-respondent No.1-Kuppuswami came with a specific pleading for the first time in a partition suit that the appellant's share had been sold out by her *de facto* guardian Kumara Naicker without even the permission of the court, it was clearly the plaintiff/respondent No.1 who should have discharged the burden that the same was done for legal necessity of the minor in order to discharge the debt which the

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A deceased mother of the appellant was alleged to have been owing to some one. When the plaintiff/respondent No.1 failed to discharge this burden, the question of discharge of burden to disprove the sale deed by the 2nd defendant/appellant-Rangammal do not arise at all as per the provisions of Evidence Act. It may be relevant at this stage to cite the ratio of the decision of this Court delivered in the matter of *Subhra Mukherjee vs. Bharat Coaking Coal Ltd*, AIR 2000 SC 1203, whether the document in question was genuine or sham or bogus, the party who alleged it to be bogus had to prove nothing until the party relying upon the document established its genuineness. This was the view expressed by this Court in the matter of *Subhra Mukherjee vs. Bharat Coaking Coal Ltd*, AIR 2000 SC 1203 = 2000 (3) SCC 312. This case although did not relate to a suit for partition or question relating to minority, it was a case wherein the appellant refused to hand over possession of property to the respondent-government company when ordered to do so. Instead she filed a suit for declaration of title in respect of property. The evidence of plaintiff/appellant indicated several discrepancies and inconsistencies due to which the trial court dismissed the suit but the 1st appellate court and the High Court, had allowed the appeal which was upheld by the Supreme Court as it was held that the High Court rightly allowed the respondent's/government company's second appeal and rightly found that the sale in favour of the appellant was not bona fide and thus confer no rights on them.

19. Application of Section 101 of the Evidence Act, 1872 thus came up for discussion in this matter and while discussing the law on the burden of proof in the context of dealing with the allegation of sham and bogus transaction, it was held that party which makes allegation must prove it. But the court was further pleased to hold wherein the question before the court was "whether the transaction in question was a bona fide and

genuine one" so that the party/plaintiff relying on the transaction had to first of all prove its genuineness and only thereafter would the defendant be required to discharge the burden in order to dislodge such proof and establish that the transaction was sham and fictitious. This ratio can aptly be relied upon in this matter as in this particular case, it is the plaintiff/respondent No.1-Kuppuswami who relied upon the alleged sale deed dated 24.2.1951 and included the subject-matter of the property which formed part of the sale deed and claimed partition. This sale deed was denied by the defendant/appellant on the ground that it was bogus and a sham transaction which was executed admittedly in 1951 when she was a minor. Thus, it was the plaintiff/respondent No.1 who should have first of all discharged the burden that the sale deed executed during the minority of the appellant was genuine and was fit to be relied upon. If the courts below including the High Court had felt satisfied on this aspect, only then the burden could be shifted on the defendant/appellant to dislodge the case of the plaintiff that the sale deed was not genuine. But when the plaintiff merely pleaded in the plaint but failed to lead any evidence – much less proof, that the sale deed was genuine and was executed in order to discharge the burden of legal necessity in the interest of minor, then the High Court clearly misdirected itself by recording in the impugned order that it is the defendant/appellant herein who should have challenged the genuineness of the sale deed after attaining majority within the period of limitation.

20. Since the High Court has misplaced burden of proof, it clearly vitiated its own judgments as also of the courts below *since it is well established dictum of the Evidence Act that misplacing burden of proof would vitiate judgment.* It is also equally and undoubtedly true that the burden of proof may not be of much consequence after both the parties lay evidence, but while appreciating the question of burden of proof, misplacing of burden of proof on a particular party and

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A recording findings in a particular way definitely vitiates the judgment as it has happened in the instant matter. This position stands reinforced by several authorities including the one delivered in the case of *Koppula Koteshwara Rao vs. Koppula Hemant Rao*, 2002 AIHC 4950 (AP).

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21. It has been further held by the Supreme Court in the case of *State of J & K vs. Hindustan Forest Company*, 2006 (12) SCC 198, wherein it was held that the onus is on the plaintiff to positively establish its case on the basis of material available and it cannot rely on the weakness or absence of defence to discharge onus.

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22. It was still further held by this Court in the matter of *Corporation of City of Bangalore vs. Zulekha Bi*, 2008 (11) SCC 306 (308) that it is for the plaintiff to prove his title to the property. This ratio can clearly be made applicable to the facts of this case for it is the plaintiff who claimed title to the property which was a subject-matter of the alleged sale deed of 24.2.1951 for which he had sought partition against his brother and, therefore, it was clearly the plaintiff who should have first of all established his case establishing title of the property to the joint family out of which he was claiming his share. When the plaintiff himself failed to discharge the burden to prove that the sale deed which he executed in favour of his own son and nephew by selling the property of a minor of whom he claimed to be legal guardian without permission of the court, it was clearly fit to be set aside by the High Court which the High Court as also the courts below have miserably failed to discharge. The onus was clearly on the plaintiff to positively establish his case on the basis of material available and could not have been allowed by the High Court to rely on the weakness or absence of defence of the defendant/appellant herein to discharge such onus.

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23. The courts below thus have illegally and erroneously

failed not to cast this burden on the plaintiff/respondent No.1 by clearly misconstruing the whole case and thus resulted into recording of findings which are wholly perverse and even against the admitted case of the parties.

24. *It is further well-settled that a suit has to be tried on the basis of the pleadings of the contesting parties which is filed in the suit before the trial court in the form of plaint and written statement and the nucleus of the case of the plaintiff and the contesting case of the defendant in the form of issues emerges out of that.* This basic principle, seems to have been missed not only by the trial court in this case but consistently by the first appellate court which has been compounded by the High Court.

25. Thus, we are of the view, that the whole case out of which this appeal arises had been practically made a mess by missing the basic principle that the suit should be decided on the basis of the pleading of the contesting parties after which Section 101 of The Evidence Act would come into play in order to determine on whom the burden falls for proving the issues which have been determined.

26. We further fail to comprehend as to how the basic case pleaded by the plaintiff had been misconstrued and the burden of discharge of genuineness, veracity and legal efficacy of the sale deed dated 24.2.1951 was shifted on the appellant-Rangammal clearly missing that it is the plaintiff's/respondent No.1 case who was bent upon to include Rangammal's property also for partition by relying upon the story of execution of sale deed when the partition suit was between the two brothers who were plaintiff-Kuppuswami and defendant No.1-Andivelu.

27. Coming now to the next question, we are unable to appreciate as to how the High Court has held that the delay in challenging the sale deed of 1951 should have been done at

- A the instance of the 2nd defendant-appellant herein when it is the plaintiff who brought the theory/story of execution of the sale deed of appellant Rangammal's property into the branch of plaintiff/respondents' branch by pleading and asserting that this had fallen into the share of their predecessor as one of the
- B predecessors was the *de facto* guardian of the appellant Rangammal. In fact, if there was a dispute about the genuineness and veracity of the sale deed and the appellant was in occupation of her share, then it is the plaintiff who should have filed a suit claiming title on the basis of the sale deed
- C which was claimed to have been executed in their favour by the *de facto* guardian of Rangammal when she was a minor before this property could be included in the suit for partition between the brothers excluding the 2nd defendant/appellant Rangammal and the consequence of not doing so or delay in this regard,
- D obviously will have to be attributed to the plaintiff/respondent.

28. Thus, the High Court fell into a clear error when it observed that the suit was barred by limitation as it had been filed after 31 years of the execution of the sale deed which on
- E the face of it is factually incorrect. The High Court has clearly erred while recording so, as it seems to have missed that the suit had not been filed by the appellant herein but she was merely contesting the suit as the 2nd defendant by getting herself impleaded in the partition suit when it came to her
- F knowledge that the property which is in her occupation and possession has also been included in the schedule in the suit for partition between plaintiff/respondent No.1 herein-Kuppuswamy and the 1st defendant/respondent No.2 herein-Andivelu and when she received the copy of the plaint,
- G execution of the alleged sale deed way back in 1951 was disclosed to her for the first time. Hence, there was no cause of action for her to file a suit challenging the alleged sale deed as knowledge of the same cannot be attributed to her in this
- H regard as she asserted actual physical possession on her share.

29. The appellant who claimed to be in occupation and peaceful possession of her share to the extent of half which is situated on the eastern side of the schedule property, had no reason to file a suit assailing the sale deed when she was in actual physical possession of her share and suddenly out of the blue, a partition suit was filed by the plaintiff/respondent No.1 wherein the property of the appellant also was included in the schedule of the partition suit which was to be partitioned between the two brothers by metes and bounds by setting a cooked up story that the appellant's share, who belonged to an altogether different branch of the family, had been given away by her *de facto* guardian Kumara Naicker by executing a sale deed in favour of the respondents' predecessor way back on 24.2.1951 when the appellant admittedly was a minor.

30. We are, therefore, constrained to partly set aside the judgment and order of the High Court in so far as the share of the appellant Rangammal is concerned and consequently the decree passed by the trial court, upheld by the first appellate court and the High Court which had been illegally decreed including the share of the appellant -Rangammal which had not devolved on the family of the plaintiff/respondent No.1 and defendant No.1/respondent No.2, but was claimed on the basis of a sale deed which could not be proved either by evidence or law, is fit to be set aside.

31. It hardly needs to be highlighted that *in a suit for partition, it is expected of the plaintiff to include only those properties for partition to which the family has clear title and unambiguously belong to the members of the joint family which is sought to be partitioned and if someone else's property meaning thereby disputed property is included in the schedule of the suit for partition, and the same is contested by a third party who is allowed to be impleaded by order of the trial court, obviously it is the plaintiff who will have to first of all discharge the burden of proof for establishing that the disputed property*

A *belongs to the joint family which should be partitioned excluding someone who claims that some portion of the joint family property did not belong to the plaintiff's joint family in regard to which decree for partition is sought.*

B 32. However, we make it clear that the decree which has been passed by the trial court in so far as partition between plaintiff/respondent No.1 and defendant No.1/respondent No.2 is concerned, shall remain in tact but the said decree shall exclude the property which had fallen into the share of  
 C appellant-Rangammal but was claimed to have been transferred to the branch of the plaintiff and 1st defendant-respondents herein vide sale deed dated 24.2.1951 The trial court being the court of District Munsif, Palani, accordingly shall modify the  
 D decree passed in O.S. No.255 of 1982 by excluding the share of the appellant –Rangammal claimed on the basis of the sale deed dated 24.2.1951. Thereafter, if the decree is put to execution, the executing court shall ensure that such portion of the property which is in occupation of Rangammal which was alleged to have been sold vide sale deed dated 24.2.1951,  
 E shall not be put into execution while partitioning the remaining property between the plaintiff-Kuppuswami and 1st defendant -Andivelu - respondent No.2.

F 33. Thus, this appeal in so far as the claim of the appellant-Rangammal to the extent of half of the share in the schedule to the suit property, situated on the eastern portion is concerned, stands allowed with a token cost which is quantified at rupees twenty five thousand as we are of the view that the appellant who was in actual physical and peaceful possession of her  
 G property which she had inherited from her deceased parents, was unnecessarily dragged into this litigation at the instance of the plaintiff-Kuppuswami who filed a partition suit which was apparently collusive in nature as it included the share of a third party to which the plaintiff and 1st defendant's family had no  
 H clear title. Under the facts and circumstance of the instant case,

it was clearly a compulsion on the part of the appellant/Tmt. Rangammal to contest the collusive suit for decades Kwasting time, energy and expense over a litigation which was started by the plaintiff clearly with an oblique motive and evil design. Hence the cost shall be paid by the respondent No.1-Kuppuswami to the appellant-Rangammal as indicated above.

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34. Accordingly, this appeal stands allowed with costs.

R.P.

Appeal allowed.