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A.S.No.248 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 28.11.2023

PRONOUNCED ON : 08.03.2024

THE HONOURABLE Ms. JUSTICE P.T. ASHA

A.S.No.248 of 2021

M.Sundarraaj

... Appellant

V.s

1.S.Jayalakshmi

2.K.Shanmugam

... Respondents

Prayer: First Appeal is filed under Section 96 read with Order 41 Rule 1 of C.P.C against the Judgement and Decree in O.S.No.5 of 2016 on the file of the Principal District Judge, Dharmapuri dated 12.03.2021.

For Appellant : Mr. V.Raghavachari, Senior Counsel
for M/s. V.Srimathi

For Respondent : Mr. N.Manokaran for D.Ramesh Kumar
[R.1 and R.2.]



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A.S.No.248 of 2021

JUDGEMENT

The plaintiff in the suit O.S.No.5 of 2016 on the file of the Principal District Judge, Dharmapuri is the appellant before this Court challenging the dismissal of his suit which has been filed for the following reliefs:-

a) Pass a decree in favour of the plaintiff setting aside the alleged sale deed dated 11/02/2015 registered as document No.3305/2015 on the file of the Sub-registrar of Palacode executed by the 2nd defendant in favour of the 1st defendant as null, void, sham, nominal and not binding on the plaintiff and further direct the defendants to deliver possession of the suit property to the plaintiff within a period fixed by this Honourable Court and if the defendants fail to do so cause the same to be done by due



process of this Honourble Court;

b) Pass a decree for permanent injunction in favour of the plaintiff restraining the defendants 1 and 2 from in any way alienating or encumbering the suit properties;

c) Pass a decree directing the defendants to pay the cost of the suit.

d) Pass a decree granting such other relief or reliefs as this Honourable court may deem fit and proper in the circumstances of the case and thus render justice.

The parties are referred to in the same ranking as before the Principal District Court, Dharmapuri.

Plaintiff's Case:-

2. The plaintiff would submit that the 1st defendant is his sister and the 2nd defendant is his brother-in-law. The plaintiff would submit that he had completed his education in 1979 and was employed



in India for over 5 years. In the year 1985, he had gone to Kuwait for employment. The plaintiff would submit that thereafter he has been regularly coming to India. In the year 1991, the plaintiff had got married to one, Padmini and they are blessed with 3 children. The plaintiff was desirous of purchasing agricultural lands with a farm house so that he and his family would have a place of their own to stay when they came to India. His brother-in-law, the 2nd defendant has assured him that he would find a suitable property for him. Later, the 2nd defendant had informed the plaintiff that the suit property and its adjacent property was available for sale and the same suited the plaintiff's requirements. The plaintiff therefore proceeded to purchase the suit property and the adjacent property. On 22.11.2004, the plaintiff had purchased the suit property and thereafter the adjacent property was purchased in the name of his wife, Padmini.

3. The plaintiff would submit that since he was away from the country, the 2nd defendant had assured him that he would take care



and manage the property. In the light of the above, the plaintiff had permitted him to reside in the farm house as a care taker. The plaintiff having immense trust on his brother-in-law had executed and registered a general power of attorney in favour of the 2nd defendant on 22.11.2004. The 2nd defendant had taken a power of attorney stating that he would collect the original documents from the Sub Registrar's Office, effect mutation of records, transfer electricity service connection and all other things that are required for managing the property in the name of the plaintiff. In view of the trust that he had reposed on the 2nd defendant, the plaintiff had not gone through the contents of the power of attorney. The plaintiff would submit that he had never intended to sell the property as the property was purchased for his own use and the power of attorney had been given only to manage the property.

4. The plaintiff would submit that he had returned to Kuwait within 4 days after the registration of deeds and thereafter he has been



periodically sending funds to the 2nd defendant for the maintenance of the lands and for meeting the agricultural expenses. The plaintiff has not even checked the accounts on account of the trust that he reposed on the 2nd defendant. Most of the time, defendants would apologetically tell the plaintiff that due to one reason or another the agricultural operations were not viable. Though the plaintiff believed the words of the defendants, however, he did not want to sell the property as he had the satisfaction that he had given a rent free accommodation to his sister and brother-in-law and they were also enjoying other advantages which is associated with living of the land.

5. The plaintiff would submit that since the maintenance of the land was being unprofitable, he had decided to sell the property purchased in the name of his wife and retained the suit property for himself. Once, the plaintiff had taken this decision, there was a marked change in attitude of the defendants and it appears that they have thereafter taken steps to grab the property. To achieve their end



the 2nd defendant had fraudulently sold the suit property to the 1st defendant on the strength of the power of attorney given by the plaintiff. The sale was not informed to the plaintiff and it was only when he had come down to India and had applied for the encumbrance certificate that he came to know about the fraudulent sale in favour of the 1st defendant. Immediately, the plaintiff had issued a notice dated 05.01.2016 to the defendants not only cancelling the power of attorney but also demanding the surrender of possession. The notice was also addressed to the District Registrar of Dharmapuri and Sub Registrar of Palacode. The plaintiff received the encumbrance certificate on 06.01.2016 which confirmed the fraudulent act of the defendants.

6. The 2nd defendant had brought about the sham and nominal sale deed dated 11.12.2015 for an alleged consideration of Rs.15,50,000/- which was never given to the plaintiff. Further, the plaintiff came to learn that the original sale deed was not given to the 1st defendant as there were proceedings for undervaluation. The



plaintiff would submit that the defendants have misused the confidence and trust reposed by the plaintiff on them and the acts done by them amounts to cheating and criminal breach of trust. The plaintiff would submit that the suit property is worth several crores and the 2nd defendant has knocked it off without paying any consideration. The plaintiff would submit that he had also signed a blank stamp paper and certain blank green sheets which the 2nd defendant had stated was required for effecting the name transfer with the Electricity Board. The plaintiff would submit that despite giving the blank signed papers, when he had come down to India, the 2nd defendant had taken him in person to the Electricity Board for the execution of the Indemnity Bond. The plaintiff apprehends that these signatures would be misused at later point in time. The plaintiff left with no other alternative has come forward with the suit in question.

Written statement of the defendants:

7. The defendants 1 and 2 had filed a joint written statement



interalia denying the allegations contained in the plaint. The main fulcrum of of the defence that was put forward by the defendants was that the 2nd defendant was employed in the Dharmapuri District Co-operative Sugar Factory and he had entered into an agreement of sale with one Subramaniam. The defendants would submit that after negotiation, an agreement was entered into and the 2nd defendant had paid the advance and purchased the property.

8. Thereafter, since he was a Government employee and as there were several rules surrounding the purchase of property, the 2nd defendant had decided to purchase the property in the name of the plaintiff. At the time of the purchase, the plaintiff expressed his desire to purchase half of the property in the name of his wife. Therefore, the said Subramaniam and his sons had sold an extent of 1.90 acres out of the total extent of 3.80 acres in S.No.748 of Karakathahalli Village to the plaintiff and with reference to the remaining 1.90 acres of land the said Subramaniam had executed a general power of attorney in favour



of the 2nd defendant to sell the property on his behalf to the plaintiff's wife, Padmini. The 2nd defendant had also executed and got registered a sale deed in the name of the said Padmini. Since the plaintiff had only purchased the property for and on behalf of the 2nd defendant who was not in a position to purchase the same on account of his being a Government employee, the plaintiff had executed a power of attorney on 24.11.2004 in favour of the 2nd defendant and the 2nd defendant has been enjoying the suit properties as its absolute owner. The 2nd defendant would further submit that the original documents were with him for a very long time and after his retirement, in the year 2009, the 2nd defendant had shifted permanently to the suit property.

9. The defendants would further submit that the plaintiff had executed a power of attorney in favour of the 2nd defendant for selling his property at Keelkattalai, Chennai and also to sell the house at Bodinayakanpatti, Salem. While so, all of a sudden, in the year 2009



the plaintiff had requested the 2nd defendant to send the original documents in respect of the suit property so that he could show his solvency as he had intended to put his children into the school at Canada. Believing the words of the plaintiff, the 2nd defendant had sent the original documents to the plaintiff and now the plaintiff is misusing this original documents.

10. It is also the case of the defendants that there were several financial transactions between the 2nd defendant and the plaintiff. The defendants would also submit that they have purchased the property in the name of the plaintiff who was employed outside the country so as to enhance his stature. The plaintiff had executed a power of attorney knowing fully well that the property was purchased by the 2nd defendant and to avoid future problems from his wife and children. Now, the plaintiff wants somehow to grab the property. The 2nd defendant had legally sold the property using the power of attorney and after receiving the sale consideration. The defendants had



also submitted that in the unlikely event of the Court coming to the conclusion that the sale in favour of the plaintiff was a valid sale then the only question that is open for consideration is the passing of sale consideration.

11. The 2nd defendant would further submit that he had spent considerable sums of money for deepening the well and maintaining the plants and for this purpose the 2nd defendant had also purchased water, renovated the house existing on the suit property etc. The defendants would therefore seek to have the suit dismissed as there was no cause of action for filing the same.

Trial Court:-

12. The Trial Court had framed the following issues:-

1. Whether the sale deed dated 11.12.2015 executed by the 2nd defendant in favour of the 1st defendant is binded (Sic; binding on the) plaintiff or



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not?

2. Whether the plaintiff is entitled for permanent injunction as prayed for?

3. To what other relief the plaintiff is entitled?

13. The plaintiff had examined himself as P.W.1 and marked Ex.A.1 to A.20. The 1st defendant had examined herself as D.W.1, the 2nd defendant as D.W.2 and one Venkatasalam and Chinnapaiyan as D.W.3 and D.W.4 respectively and Ex.B.1 to B.12 were marked. Ultimately, the issues were answered in favour of the defendants and the suit was dismissed. Challenging the same, the plaintiff is before this Court.

Submissions:-

14. Though both the counsels had submitted extensive oral arguments the respective parties have also reduced their oral



arguments into writing in the form of written submissions. Therefore, the submissions made in the written submissions are being briefly extracted herein below:-

15. Mr.V.Raghavachari, learned Senior counsel appearing on behalf of the the appellant after taking the Court through the facts of the case and the documents would submit that the suit in question highlights the fraud committed by a power agent who claims to be the owner of the property under a general power of attorney. The learned Senior counsel has set out the arguments under various headings which are also extracted hereinbelow:-

(i) Mutually Destructive Pleas:-

16. The first plea that is raised is that the defendants have taken out a mutually destructive plea in as much as the 2nd defendant sets



up a case that he is the owner of the property and also the power agent. Therefore, once the defendants have taken such a plea in their written statement they have to elect the plea based on which they propose to adopt at the time of evidence. However, the learned Senior counsel would submit that in the instant case, the defendants have not opted to elect though they have taken two mutually destructive/inconsistent plea. The 2nd defendant on one hand claims to be the owner of the property pursuant to Ex.A.1, sale deed by contending that it is a Benami purchase. On the other hand, he also claims to be an owner of the property on the basis of Ex.A.2, General Power of Attorney executed by the plaintiff in his favour and Ex.B.1, agreement of sale entered into between himself and Subramaniam. In support of this argument, the learned Senior counsel would rely upon the judgments reported in *(2005) 7 SCC 653 - Devasahayam Vs. P.Savithramma* and *(2013) 2 MWN (Civil) 52 - D.Balaraman Vs.Saagopan*.



(ii) Benami Transaction bar of suit under Section 4:-

17. The learned Senior counsel would further submit that by contending that the property was purchased by the 2nd defendant in the name of the plaintiff a plea of a Benami transaction is made. A defense of Benami transaction is barred under Section 4 (2) of the Benami Transactions (Prohibition) Act, 1988 (hereinafter referred to as the "Act"). The learned Senior counsel would submit that under Section 4 of the Act, no suit can be filed or a defense raised on the basis of a Benami Transaction. The learned Senior counsel would draw the attention of the Court to Paragraph No.24 of the written statement where the 2nd defendant had stated that since he was employed with the Cooperative Sugar Factory and as purchase of property would involve compliance of rules, he had requested the plaintiff and with his permission had purchased the property in the name of the plaintiff. Once again, in Paragraph No.28 of the written statement the 2nd defendant has stated that he has purchased the



property in the name of the plaintiff who was living abroad in order to enhance his stature. These statements would clearly show that the defendants have set up a plea of Benami Transaction. The 2nd defendant has reiterated the same in his oral evidence. Therefore, the 2nd defendant's clear case is that he had invested the money and purchased the property in the name of the plaintiff thereby setting up a case of Benami Transaction. In support of his contentions that such a claim is prohibited under the Act, the plaintiff would rely upon the following judgments:-

i) (2004) 7 SCC 233 - Valliammal Vs. Subramaniam.

ii) 2019 SCC OnLine Mad 10656 - T.Lalitha Vs. J.Ganesh &

Ors.

iii) 2019 SCC OnLine Mad 29937 - Govindammal

Dharmalingam Vs. Anjugam & Ors.

iv) (1995) 2 SCC 630 - R.Rajagopal Reddy Vs.Padmini

Chandrasekharan.



Therefore, he would submit that the plea of Benami Transaction is barred under Section 4 of the Act.

(iii) Power of Attorney will not convey title:-

18. He would next submit that power of attorney will not confer title on the power holder. The learned Senior counsel would submit that the power agent is merely a creation of the agency whereunder the grantor authorises the grantee to do specific acts. In the instant case, no consideration had passed under the power of attorney and this is clear from reading the recitals in Ex.A.2 power deed dated 24.11.2004. The power of attorney is revocable and terminable. He would rely upon the judgment reported in *(2012) 1 SCC 656 - Suraj Lamp & Industries Pvt. Ltd. Vs. State of Haryana* to state that the power of attorney will not confirm title and is not a mode of transfer of sale. The learned Senior counsel would rely upon Paragraph Nos.11 and 25 of the written statement in support of his plea that the



defendants are claiming title to the property on the basis of the power of attorney. He would contend that the conduct of the 2nd defendant who was the power agent of the plaintiff was detrimental to the interest of the plaintiff. That the 2nd defendant was only a power agent is amply evident from a mere reading of the sale deed executed by the 2nd defendant in favour of his wife, Ex.A.20 = Ex.B.4. In this deed the 2nd defendant has accepted the fact that the property belongs to the plaintiff and that the 2nd defendant was only acting on behalf of the plaintiff.

19. The learned Senior counsel would submit that the plaintiff had never intended to sell the suit property and the power of attorney was only given to manage the property. That the 2nd defendant has acted as if he is the owner of the property is evident from the evidence of D.W.1, the 1st defendant wherein she has stated that her husband,



the 2nd defendant had sold the property to her only on the belief that he was the owner of the property. That apart, the learned Senior counsel would submit that from the very evidence of D.W.1 it is clearly evident that sale consideration had not passed to the hands of the plaintiff. In her evidence, she would submit that the sale consideration of Rs.15,50,000/- was the money that she had saved over several years and also from the sale of property. She would also submit that the sale consideration that she had given to the 2nd defendant was given by him to their son and this is what her husband had told her. Therefore, this would clearly show that no part of the sale consideration of Rs.15,50,000/- had been received by the plaintiff. The cross examination of D.W.1 clearly establishes that she was not aware of any details. D.W.2, the 2nd defendant had admitted that he has not intimated the plaintiff about the sale in favour of the 1st defendant either before or after the sale. At one point in his cross examination the 2nd defendant has clearly submitted that he has sold the property only as its owner and not considering the property to be that of the

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plaintiff. However, later in point in time he would submit that he has executed the sale deed only as the power agent of the plaintiff.

Therefore, from the above statement it is amply clear that the 2nd defendant committed a breach of trust of his fiduciary capacity as power agent against the interest of his principal, namely, the plaintiff.

The evidence of D.W.1 would clinch the point that there has been no passing of consideration from the 2nd defendant to the plaintiff. The argument of the defendants that non-payment of sale consideration would not render a sale invalid will not apply to the instant case since this is not a sale between a vendor and a purchaser but by a power of attorney of a vendor and when consideration is absent, the entire transaction is rendered a nullity.

(iv) Sale in favour of Power Agent's wife is invalid:-

20. The next point that was put forward by the learned Senior counsel was that the sale by a power agent in favour of his wife is invalid and in support of this he would rely on the following

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judgements:-

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i. (1996) 11 SCC 655 - Bhatori Vs. Ram Piari.

ii. 2021 SCC OnLine SC 1097 - Kewal Krishnan Vs. Rajesh

Kumar & Ors.

iii. 2022 SCC OnLine 7959 - Suchitra Devi Vs. Nagineni

Sujathamma.

iv. 2017 SCC OnLine Mad 1564 - P.A.Ponnusamy & Anr. Vs.

R.V.Rajalakshmi.

(v) Ex.B.1 - Sale Agreement a fabricated document:-

21. The learned Senior counsel would further submit that Ex.B.1, the unregistered sale agreement executed between the 2nd defendant and V.Subramaniam cannot be looked into since there is no pleading with reference to this agreement of sale in the written statement and therefore no amount of evidence can be looked into without a pleading. Further, the 2nd defendant had not proved the said



document. D.W.1 has stated that she is not aware of this document.

She has, in her cross examination, clearly admitted that she has not seen Ex.B.1. The learned Senior counsel, would also submit that Ex.B.1 has to be considered as a whole and the defendants cannot claim a right to one part of the document. The defendants have not questioned the sale of an extent of 1.90 acres in S.F.No.748 by the plaintiff's wife. In support of his argument, he would rely upon a judgement of the Karnataka High Court reported in *ILR 2020 Kant 3597- M.S.Ananthamurthy Vs. J.Manjula*.

(vi) Possession:-

22. The learned Senior counsel would submit that the Trial Court had committed a grave error in presuming that the possession was with the defendants totally overlooking the fact that the 2nd defendant was only a power agent and was in possession of the property only in this capacity. The learned Senior Counsel would rely



upon the judgment reported in (2022) 7 SCC 90 - *Umadevi Nambiar*

Vs. Thamarasserai Roman Catholic Diocese.

(vii) Passing of consideration:

23. The learned Senior counsel would submit that the plaintiff has proved the passing of consideration by producing Ex.A.9 to Ex.A.19 which would clearly show that just before the sale deed, Ex.A.1 could be registered, amounts have been dispatched by the plaintiff to the defendants. Though the defendants had submitted that the plaintiff and the defendants had several transactions, the defendants has not sought to mark any of the documents in this regard. Therefore, it is clear that the property under Ex.A.1 was purchased from out of the amounts sent by the plaintiff to the 2nd defendant. The transactions have all been through the bank where the plaintiff has authorised the 2nd defendant to receive the amounts due under his Fixed Deposits. These transactions are evidenced by Ex.A.9 to A.19



and the 2nd defendant has admitted receipts of the amounts mentioned therein. D.W.1 has admitted that Ex.A.1 is the document under which the plaintiff has purchased the property. She has also admitted to the fact that the plaintiff has sent huge sums of money since the suit property was being managed very well by the defendants and the plaintiff had immense trust on them. That the sale deed Ex.A.1 is a true and valid document is evident from the fact that all the original document relating to the suit schedule property are in the custody of the plaintiff. The defendants has feebly stated that these documents were with them and subsequently the plaintiff has clandestinely removed the same from the hands of the defendants.

24. The learned Senior counsel would submit that the defendants have come to Court with a false case and the plaintiff having proved the factum of payment of consideration under Ex.A.1, the suit ought to have been decreed. Further, the 2nd defendant has sold the property to the 1st defendant as if the same belongs to him



and this sale is a fraudulent one and not binding on the plaintiff. The learned Senior counsel would pray that the appeal be allowed and the judgment and decree of the Trial Court be set aside.

25. Per contra, Mr.N.Manoharan, learned counsel appearing on behalf of the defendants would submit that the plaintiff has not pleaded the transfer of funds which is now sought to be projected through Ex.A.9 to A.19 either in the pre-suit notice Ex.A.3 or in the plaint. He would submit that Ex.A.9, Ex.A.10, Ex.A.15 to Ex.A.17 are all dated 19.07.2004 and Ex.A.11 to Ex.A14 and Ex.A.18 and Ex.A.19 are dated 23.09.2004. These documents would only show that the the deposits were pre-closed and the demand drafts were taken in the name of the 2nd defendant. He would also submit that there has been several transactions between the plaintiff and the 2nd defendant and Ex.A.9 to Ex.A.19 related to these transactions and did not form the basis for the sale consideration. He would further submit that a perusal of Ex.A.9 to Ex.A.19 would show that a total sum of



Rs.8,00,320/- was pre-closed. Under Ex.A.1 only a sum of Rs.4,97,000/- was shown as consideration. Therefore, reliance cannot be based upon Ex.A.9 to Ex.A.19. The plaintiff had not pleaded about the same in the plaint and therefore they cannot be relied upon and in support of this argument he would rely on the following Judgments:

(i)2015 (9) SCC 755 - Nandkishore Lalbhai Mehta

Vs. New Era Fabrics Pvt. Ltd.,

(ii)2017 (3) SCC 702 - Executive Officer, Arulmigu

Chokkanatha Swamy Koil Trust, Virudhunagar Vs.

Chandran & Ors. and

(iii)1999 (4) SCC 403 - Prataprai N. Kothari Vs.

John Braganza.

26. The cancellation of Ex.A.2 under Ex.A.7 had taken place on 08.01.2016 which is after the execution of the sale deed in favour of the 1st defendant i.e; 11.12.2015 (Ex.A.20). Therefore, the



cancellation of the deed would not affect the sale in favour of the 1st defendant. He would submit that the recitals in Ex.A.2 have to be read as a whole. The plaintiff had given the 2nd defendant a power of attorney to also sell the property and on the basis of this power of attorney he had also sold the property to the 1st defendant. For the proposition that where terms of the documents are unambiguous the Court should take into account the recitals, as a whole and the surrounding circumstances, he would rely on the following judgements:

(i) *AIR 1977 (3) SCC 474- Timblo Irmaos Ltd,*

Margo Vs. Jorge Anibal Matos Sequeira & Anr.,

(ii) *1979 (2) SCC 601-Syed Adbul Khader Vs.*

Rami Reddy & Ors.

(iii) *AIR 1966 SC 902 -P.L. Bapuswami Vs.*

N.Pattay Gounder which is a four judges Bench.



27. Mr. Manoharan would further submit that Ex.A.20 is a registered sale deed and therefore it is presumed that the same has been validly executed by the 2nd defendant as General Power of Attorney of the plaintiff. It is for the plaintiff to rebut the presumption. However, this duty has not been discharged by the plaintiff/principal. Therefore, he would submit that Ex.A.20 is a valid document executed by the 2nd defendant as general power of attorney of the plaintiff. He would rely upon the following judgements:

*(i) AIR 1967 SC 181 (3J) - Gordon Woodroffe and
Company (Madras) Ltd. Vs. Shaik M.A. Majid and
Company and*

*(ii) 2019 (2) SCC 727 - Jamila Begum (Dead) Vs.
Shami Mohd (Dead) and Anrs.*

28. The learned counsel would further argue that once there is a written document the parties have to rely upon its contents and the



plaintiff is estopped from pleading otherwise. He would rely upon Sections 92 and 95 of the Evidence Act to contend that the plaintiff was debarred from letting in evidence to deny or contradict the recitals in Ex.A.2 and A.20. He would rely on the judgment reported in **2021 (6) SCC 139 - Mangala Waman Karandikar (dead) through legal rep. Vs. Prakash Damodar Ranade.**

29. The learned counsel would submit that no fraud has been played by defendants 1 and 2 in execution of Ex.A.20. Ex.A.20 is a registered document and except for a vague plea the plaintiff has not proved fraud. The general power of attorney which was executed on 24.11.2004 has been cancelled on 08.01.2016 nearly 12 years after the execution of the power and before the cancellation the 2nd defendant has used the power of attorney to sell the property in favour of the 1st defendant. The learned counsel would submit that it is the plaintiff who has committed fraud to gain an advantage.



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30. He would further submit that the failure to prove consideration for sale will not render the sale deed void. He would rely upon Section 54 of the Transfer of property Act to contend that the actual payment of the sale price at the time of execution of the sale deed is not a *sine qua none* for completing the sale. In support of this contention he would rely upon the following judgments:-

(i) 2020 (7) SCC 366 - Dahiben Vs. Arvindbhai

Kalyanji Bhanusali (Gajra) (Dead) & Ors.

(ii) 2009 (4) SCC 193 -Kaliaperumal Vs.

Rajagopal & Anr.

(iii) 1999(3) SCC 573-Vidhyadhar Vs.Manikrao

& Anr.

(iv)RFA No.922/2023(DB) -M.Ponnuswamy &

Ors. Vs. Dharmendra Kumar Sharma.

(v) 2021(2) CTC 1 (FB)- Latif Estate Line India



Vs. Hadeeja Ammal.

(vi) AIR 1974 Mad 30 - The Melur Co-operative

Marketing Society, rep. by its President, P.R.M.

Periakaruppan Ambalam Vs. Salia Maniam & Ors.

(vii) AIR 2010 Kant 63 - Smt. A.Bhagyamma &

Anr. Vs. The Bangalore Development Authority.

(viii) AIR 2009 Ori. 122- Laxmidhar Naik & Ors

Vs.Sridhar Nair & Ors.

(ix) AIR 2004 P & H - Chanan Kaur alias

Channo Vs. Pakhar Singh.

31. It is also his contention that the plaintiff who has come to Court to declare a document as null and void has failed to prove his case. Further, except for examining P.W.1 no other oral evidence has been let in by the plaintiff to corroborate his version. With regard to this proposition regarding burden of proof he would rely upon the



judgment reported in **2014 2 SCC page 269-Union of India and Ors.**

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Vs. Vasari Cooperative Housing Society. The learned counsel would submit that the defendants have not raised the plea of Benami Transaction in their written statement and therefore no issue has been framed. However, the plaintiff is projecting a case as if the defendants had raised the plea of Benami transaction.

32. The learned counsel would submit that the prayer in the suit is not maintainable in as much as the plaintiff has only sought to declare Ex.A.20 as null and void and not binding on the plaintiff and not for its cancellation. Further, the plaintiff has not deemed it fit to seek to have his title declared to the suit property and therefore, a simple relief to declare Ex.A.20 sale deed as null and void without a prayer for declaration of title will not serve any purpose. Reliance in this regard was placed by him on the judgements reported in **2021 1 CTC 320-P.Suresh Vs. R.Rangasamy** and **Manu/TN/ 0274/2022-**

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33. The counsel for the defendants would submit that equity is not in favour of the plaintiff in view of his conduct. There is no explanation for the inaction by the plaintiff between the period 24.11.2004 and 08.01.2016. In the pre-suit notice the plaintiff had not mentioned Ex.A.20 sale deed. That apart, the plaintiff as P.W.1 has admitted that he has not seen Ex.A.20 sale deed before filing the suit. That the 2nd defendant has not acted against the interest of the plaintiff is evident from the fact that the plaintiff and his wife had given a general power of attorney on 15.07.2020 to deal with their property at Chennai and on the basis of this General Power of Attorney the property was also sold on 11.11.2005. Another General Power of Attorney was given with reference to the property at Salem on 01.04.1997 and the same was also sold on 15.04.1997. It is only in the instant case that the power of attorney has been cancelled that too after 11 and a half years. The defendants would submit that the 2nd



defendant is financially sound and has the wherewithal to purchase the property. He had entered into an agreement to purchase the total extent of 3.80 acres for a total sale consideration of Rs.12,50,000/- and Ex.B.1 agreement of sale has been proved by examining D.W.4.

34. The learned counsel would submit that much reliance need not be placed on the evidence of D.W.1 who is only a home maker and not conversant with the legal proceedings. Therefore, he would submit that the appeal lacks merits and should be dismissed.

Points for consideration:-

35. Upon considering the arguments advanced on both sides the following points arise for consideration in the above First Appeal:-

i) Whether the property was intended to be purchased by the 2nd defendant and the plaintiff has lent his name to help the 2nd defendant to get over the



procedural glitches as he was a government servant?

ii) Whether the 2nd defendant has proved the passing of sale consideration from him to the vendor under Ex.A.1?

iii) Whether the plaintiff has proved that he has paid the sale consideration for Ex.A.1, sale deed?

iv) Whether the defendants were in possession of the property as owners of the property or as permissive occupants/care takers of the plaintiff?

v) Whether the claim of the plaintiff is barred by Section 4(1) of the Prohibition of Benami Transaction Act?

vi) Whether the defendants have proved that the 1st defendant has paid the sale consideration under Ex.A.20 and the 2nd defendant had paid the same to the plaintiff?



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vii) *Whether non-payment of the entire sale consideration would still not be a ground to set aside the sale deed?*

viii) *Whether the defendants have set up mutually destructive pleas?*

ix) *Whether sale by the power agent is a valid one if not supported by consideration?*

36. Heard the submissions on either side.

Discussion:-

37. Before proceeding to discuss the arguments, it would be appropriate to put the case of the parties in perspective.

38. The plaintiff has come to Court stating that he has purchased the suit property under Ex.A.1 and the other half of the



property measuring 1.90 acres had been purchased in the name of his wife Padmini. The plaintiff had desired to purchase property as he wanted to have a place to stay when and his family came down to India and he wanted a Farm house with certain agricultural activities and the suit property fitted the bill.

39. It is also his case that he had authorized the 2nd defendant, by executing the power of attorney Ex.A.2 only to manage the properties for and on his behalf. For this purpose he has also being periodically sending money to the defendants. It is also his case that since the properties had not proved profitable he had decided to sell a portion of the property and therefore he had sold the portion purchased by his wife and retained the suit property. It is his further case that he had come to suspect the conduct of the defendants which prompted him to apply for an encumbrance certificate wherein he found that the power of attorney had been misused by the 2nd defendant to sell the property to the 1st defendant. Therefore the Power of attorney came to be



cancelled by the plaintiff under Ex.A.7 and the plaintiff has come to Court for the reliefs claimed therein.

40. The case that has been set up by the defendants jointly is that the larger extent of the suit property, namely, the property purchased by the plaintiff and the property that was purchased in the name of his wife was to be purchased by the 2nd defendant for himself. However, since he was a Government Servant and as the procedure involved would be cumbersome the property had been purchased in the name of the plaintiff. However the defendants have also admitted that one half was purchased in the name of the plaintiff's wife as the plaintiff wanted to have a property in the name of his wife. The defendants would contend that the 2nd defendant was the owner of the property and therefore the plaintiff had executed a power in favour of the 2nd defendant. The documents in respect of the property were in their custody and they have been in possession and enjoyment of the property since its purchase. Since the property, though purchased by



the 2nd defendant, stood in the name of the plaintiff, the 2nd defendant had sold the property to his wife under Ex.A.20 sale deed using the power of attorney executed by the plaintiff. In his chief examination, in the proof affidavit, the 2nd defendant as D.W.2 would submit that he had paid the sum of Rs.60,000/- as advance when signing the agreement and thereafter he had paid the balance sum of Rs.11,90,000/- to the vendor, Subramaniam. It is pertinent to mention that such a statement has not been made in the written statement. This fact has also been admitted by the 2nd defendant as D.W.2 in his cross examination. Therefore, the defence that has been set up is that the property had been purchased from out of the funds of the defendant in the name of the plaintiff. However, there is no evidence let in by the defendants to show how and when the balance sale consideration has been paid. Further, if the statement of the defendant is accepted then there is no answer from the defendants as to how they had permitted the plaintiff's wife Padmini to sell the portion purchased by her under Ex.B.10 as her property particularly when it is the case



of the defendant that under the agreement of sale Ex.B.1 the total sale consideration of Rs.12,50,000/- had been fixed for the total extent of 3.80 acres.

41. In the light of contention by both the parties that each have paid the consideration, the first question that requires the attention of this Court is the source of money for the purchase of the property under Ex.A.1 and under Ex.B.10. The plaintiff has produced Ex.A.9 to A.19 which would show that nearly a sum of Rs.8,00,320/- had been given to the 2nd defendant. The defendant had not denied receipt of the above sums. The sale consideration under Ex.A.1 is a sum of Rs.4,97,000/- and the sale deed was executed on 22.11.2004. The sum of Rs.8,00,320/- has been paid to the 2nd defendant over a period from 19.07.2004 to 23.09.2004. Under Ex.B.10 the sale consideration is a sum of Rs.1,70,000/-.The property under Ex.B.10 was purchased on 15.07.2005. The defendant had received a sum of Rs.8,00,320/- from the plaintiff out of which a sum of Rs.4,97,000/- came to be adjusted



towards sale consideration for Ex.A.1 leaving a balance of Rs.3,03,320/-. Therefore, it is clear that the plaintiff would have contributed the consideration for the purchase of Ex.A.1 property as well as the Ex.B.10 property. This conclusion has to be drawn in the light of the fact that nowhere in the written statement has the defendants pleaded that they have paid the sale consideration. The defendant has pleaded that he has paid the advance amount of a sum of Rs.60,000/- which has evident from a perusal of Ex.B.1 which is the agreement of sale that is alleged to have been entered into between the 2nd defendant and V.Subramaniam on 19.08.2004. In fact, even before the agreement of sale the plaintiff has paid over a sum of Rs.4 lakhs and odd to the defendants as is evident from Ex.A.9, Ex.A.10, Ex.15, Ex.16 and Ex.17. However, in his oral evidence as D.W.2, the 2nd defendant would submit that he had paid balance sum of Rs.11,90,000/- to the vendor, Mr.Subramaniam. However, there is nothing to prove such payment. D.W.2 has further stated that the amounts received from the plaintiff i.e; Rs.8,00,320/- has been taken



back by him. However, neither is this fact pleaded in the written statement and nor is there proof of the same.

42. The learned counsel for the defendants had contended that Ex.A.9 to Ex.A.19 cannot be taken into consideration as there is no pleadings to this effect. However, the plaintiff in paragraph no.6 of his plaint has stated as follows:-

"The plaintiff states that with his savings, he wanted to purchase agricultural lands with a farm house for him and his family to come and stay whenever they visit India. The plaintiff is basically interest in village way of life in general and agriculture in particular"

In paragraph No.8, the plaintiff has stated that *"after negotiations and deliberations"*, the plaintiff purchased the suit properties in his name on 22.11.2004. Therefore, the plaintiff has



clearly stated that from out of his savings he has purchased the suit properties. Ex.A.9 to Ex.A.19 are documents which show the the pre-closure of the fixed deposits receipt by the plaintiff and the instructions given by the plaintiff to his bank to issue demand drafts in the name of the 2nd defendant. The fact that these documents are closer in time to the purchase under Ex.A.1 it can be safely concluded that these amounts have been used for the purchase of the suit property and the adjacent property particularly when there is no evidence on the side of the defendants to show proof of their having paid the sale consideration.

43. Further, the recitals in the sale deed Ex.A.1 which is executed by Subramaniam and his sons in favour of the plaintiff, it is clearly stated that the vendor had received a sum of Rs.4,97,000/- from the purchaser. The sale deed has been executed by the plaintiff himself and not by the 2nd defendant as a power agent. The recitals in Ex.A.1 would read as follows:-



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"கீழ்க்கண்ட சொத்தை எங்கள் குடும்ப அபிவிருத்தி செலவிற்காகவும் வேறு சொத்து வாங்கும் பொருட்டாக வேண்டி உமக்கு ரூபாய் 4,97,000.00 நான்கு இலட்சத்து தொன்னுற்றி எராயிரம் ரூபாய்களுக்கு கிரயத்திற்கு கொடுப்பதாக ஒப்புக்கொண்டு அவ்வித கிரய தொகைகள் பூராவும் நாங்கள் கீழ்க்கண்ட சாட்சிகளின் முன் பெற்றுக்கொண்டு சொத்துக்களை இன்றே நாங்கள் கிரயம் செய்து கொடுத்து சொத்துக்களை அதன் சகலஉரிமைகளையும் இன்றே உம்முடைய சுவாதீன அனுபவத்தில் விட்டுவிட்டோம்."

44. The Trial Court has not even raised an issue with reference Ex.A.1 and Ex.A.2 sale deed which is the basis for the subsequent sale deed Ex.A.20. The learned Judge has glossed over the details regarding the payment of sale consideration under Ex.A.1 and Ex.B.10. The learned Judge has not returned a finding as to who had paid the sale consideration, whether it was the plaintiff or the defendants. The learned has observed that the defendants have not produced any documents to show that they had paid the sale consideration as alleged in Ex.B.1. The learned Judge has in paragraph no.31 of the Judgement observed that it was the plaintiff who had paid the sale consideration for Ex.A.1, sale deed. Therefore,



the points for consideration nos. (ii) and (iii) are answered in favour of the plaintiff.

45. The plaintiff in his pleadings would submit that he had great respect and love for his sister and brother-in-law and he had left the properties in their care and permitted them to reside in the farm house. The defendants were only care takers of the properties. In his cross examination on 17.07.2017, the plaintiff as P.W.1 has stated that in 2004 defendants 1 and 2 were living in the quarter that was allotted to the 2nd defendant. In 2009, the 2nd defendant had retired and therefore, the plaintiff had requested them to stay in the suit property and from the year 2009, the defendants have been in occupation of the property. The defendants as D.W.1 and D.W.2 have both stated that they have started living in the suit property only in the year 2009. As stated earlier, the defendants had taken a plea that they are in possession of the property as its owner since the 2nd defendant had purchased the suit property.



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46. In the light of the findings given in respect of points for consideration ii and iii where this Court has held that the plaintiff has proved that he had paid the sale consideration for the suit property and the defendants have failed to prove the same, the possession of the suit property by the defendants is not in their capacity as owner but only as a power agent of the plaintiff. The plaintiff has himself deposed that it was he who had permitted the defendants to occupy the suit property. Therefore, the defendants are permissive occupants of the suit property since the plaintiff had nominated them to take care of the property. The Judgement of the Hon'ble Supreme Court reported in **2022 (7) SCC 90 – Umadevi Nambiar Vs. Thamarasseri Roman Catholic Diocese** would support the contention of the plaintiff. Therefore, the point for consideration no.(iv) is also answered against the defendants.



47. Though the defendants have not in so many words stated that the purchase of the suit property was Benami in the name of the plaintiff. However, the pleadings and the evidence would clearly highlight the fact that it is the contention of the defendants that since the 2nd defendant had some issues for purchasing the property in his name being a government employee, he had purchased the property in the name of the plaintiff. The 2nd defendant through his pleadings and oral evidence would hold out that it is he who had purchased the property implying that he has contributed the sale consideration. In his cross examination, he would categorically state that he has paid a sum of Rs.11,90,000/- being the balance amount due under Ex.B.1 agreement of sale. Since the defendants have set up a case that Ex.A.1 was taken Benami in the name of the plaintiff, a burden is cast upon them to prove the source of money for the purchase of the property, the nature and possession of the property after such purchase. They have to also provide the motive for purchasing a property Benami. As



regards the (v)th point, the defendant has pleaded his employment as a reason for the purchasing the property in favour of the plaintiff.

However, he has not proved that the source from which the purchase money had come is himself. Therefore, the fact that has to be considered is whether such a plea can be taken in the light of Section 4 of the Act. Section 4 of the Act would read as follows:-

(1) No suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property.

(2) No defence based on any right in respect of any property held benami, whether against the person in whose name the property is held or against any other person, shall be allowed in any suit, claim or



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action by or on behalf of a person claiming to be the real owner of such property.

(3) Nothing in this Section shall apply:

(a) Where the person in whose name the property is held is a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family; or

(b) Where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity, and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity.

48. Section 4(2) of the Act would be applicable in the instant case since it is the defence of Benami transaction that has been taken



and the defendant does not come within the exception carved out in Sub Section 3 of Section 4.

49. In the judgement of the Hon'ble Supreme Court reported in **(1995) 2 SCC 630 - R.Rajagopal Reddy Vs.Padmini Chandrasekharan** the three judges bench of the Hon'ble Supreme Court had held that the bar under Section 4 of the Act would come into effect from the date on which the Act had come into force. Therefore, the bar under Section 4(2) of the Act would squarely apply to the case on hand. The learned counsel for the defendants would submit that the plea of Benami transaction was not in issue before the Trial Court and there was no necessity to deal with this factor. However, the arguments have been addressed in this regard which is evident from a reading of paragraphs 29 to 31 of the of the Trial Court judgment.



50. The learned Trial Judge has dealt with the issue of Benami Transaction and has observed as follows:-

"The plaintiff has spoken that the 20 defendant was working in Sugar Mills and due to practical difficulties in obtaining the permission from the employer to purchase the property. The Ex.A1 has consideration and payment of amount by plaintiff alone. As per the evidence, the PW1, DW1 and DW2 have admitted that the consideration amount was done through bank transfers in favour of vendor of Subramani and sons. No question of Benami Transaction in respect of the 2nd defendant."

51. A reading of this observation would clearly show that the learned Judge has arrived at a conclusion that the sale consideration under Ex.A.1 has been paid only by the plaintiff. He has also stated



that from the oral evidence of P.W.1, D.W.1 and D.W.2 it is an admitted fact that the consideration amount had been done through the bank transfers in favour of the vendors. Therefore, the point for consideration no.(v) is also answered in favour of the plaintiff.

52. The defendants have set up a defense that the 2nd defendant had entered into an agreement under Ex.B.1 to purchase a total extent of 3.80 acres and that he has paid the entire consideration. They have not provided any evidence in support of their defense that the 2nd defendant being a Government servant could not purchase the property in his name. Except for the plea in the written statement there is no evidence to prove the same. The (i) point for consideration is therefore answered in favour of the appellant.

53. Before answering the points for consideration nos. (vi) and (vii), it would be necessary to discuss point for consideration no.(viii)



regarding the mutually destructive pleas that has been taken by the defendants. The defendants have both in their written statement as well as in their evidence taken a stand that the suit property had been purchased by the 2nd defendant and that he is the owner of the property pursuant to the execution of Ex.B.1. In this regard, it would be necessary to extract relevant portion from their written statement.

In paragraph no. 25, he has stated as follows:-

"2ம் பிரதிவாதி தனது பெயரில் கிரயம் பெற்றுக்கொள்ள தான் வகித்த பதவி, இடஞ்சல் என்று தயங்கியதால் வாதி, 2-ம் பிரதிவாதிக்கு சேரவேண்டிய சொத்து என்பதால் மீண்டும் 24.11.2004ல் வாதி ஒரு பொது அதிகார பத்திரம் எழுதிக் கொடுத்து 2ம் பிரதிவாதியை சட்டபூர்வ உரிமையாளராக அனுபவிக்க அதிகாரம் கொடுத்தார். இப்பிரதிவாதியிடமே பல ஆண்டுகள் அசல் ஆவணங்கள் இருந்து வந்தது. கிரயம் வாங்கிய தேதியில் இருந்து இப்பிரதிவாதிகள் தாவா நிலத்தினை மேம்படுத்தி, பராமரித்து வருகிறார். 2009-ல் பணி ஓய்வு பெற்ற பிறகு தாவா நிலத்தில் நிரந்தரமாக குடியிருந்து வருகிறார்.ரு

In paragraph no.30, he has stated as follows:-



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2-ம் பிரதிவாதி தான் உழைத்து தனது சேமிப்பில் சம்பாதித்த சொத்தை வாதியின்

பெயரில் கிரயம் பெற்றிருந்ததாலும் அவரிடம் இருந்து பொது அதிகாரம் பெற்று தனது சொந்த சொத்தாக அனுபவித்து வந்தார்.

தனது சொந்த சொத்து என்பதால் தானே செய்து வந்தார். 2ம்

பிரதிவாதி தனக்கு அளிக்கப்பட்ட அதிகாரத்தை பயன்படுத்தி எப்போதே கிரயம்

செய்திருக்கலாம். ஆனால் மைத்துனரான வாதி தன்னை எப்போதும் ஏமாற்ற

மாட்டார் என்று அளவு கடந்த நம்பிக்கை வைத்திருந்ததால் அதை பற்றி

கண்டு கொள்ளவில்லை.

54. In the evidence, the 1st defendant as D.W.1 has stated as follows:-

பிரமாண பத்திரிக்கையிலும் சொல்லியுள்ளேன். என் கணவருக்கு

பாத்தியப்பட்ட சொத்து என்ற எண்ணத்தில் தான் தாவா சொத்தை என்

கணவர் எனக்கு கிரையம் செய்து வைத்தார்.

55. D.W.2, the 2nd defendant would also deposed that he is the owner of the property by stating that he has paid the entire sale consideration under Ex.B.1 to the vendors. He would in his cross-



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examination submit as follows:-

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தாவா சொத்து வாதி பெயருக்கு பட்டா மாறுதலுக்கு அனைத்து நடவடிக்கையும் நான்தான் எடுத்தேன். ஏன் என்றால் என்னுடைய சொத்து பெயரளவில் பத்திரம்.

பொது அதிகார பத்திரம் பட்டா மாறுதலுக்கு மின் இணைப்பிற்கும் மேற்பார்வை செய்யவும் நான் வாதியிடம் இருந்து எழுதி வாங்கி கொண்டீர்கள் என்றால் அதை நான் மறுக்கிறேன். ஏன் என்றால் தாவா சொத்தை நானே பணம் கொடுத்து வாங்கியதால் வாதியே என் பெயருக்கு நீங்களே அனுபவித்து கொள்ளுங்கள் என பொது அதிகார பத்திரம் எழுதி கொடுத்தார் என சாட்சியே கூறுகிறார்.

56. Therefore, the defendants have taken a stand that the suit property belonged to them since it was purchased by the 2nd defendant. However, regarding the validity of the sale in favour of the 1st defendant, the 2nd defendant would plead that the sale has been effected on the basis of a valid power of attorney that has been issued by the plaintiff in favour of the 2nd defendant. The extract of which



has been stated supra.

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57. Therefore, the defendants would take the plea of being the owner of the property as well as the 2nd defendant being the power agent of the plaintiff thereby admitting the title of the plaintiff. The Hon'ble Supreme Court in the judgement reported in **(2005) 7 SCC 653 - Devasahayam Vs. P.Savithramma** has held that a defendant can take inconsistent pleas but cannot take a mutually destructive plea. Like in the instant case where on one hand the defendants would submit that they are the owners of the property and in the other breath state that they have a valid power of attorney from the owner of the property. The Hon'ble Supreme Court has observed as follows:-

"a party to a lis cannot raise pleas which are mutually destructive but ordinarily inconsistent defences can be raised"



58. Once a mutually destructive plea has been taken, the defendants ought to elect to advance one plea at the time of evidence.

In the instant case, the defendants have not retracted any one of the pleas. Therefore, on this score also the defendant has to fail and the (viii) point for consideration is also answered against the defendants.

59. It is a well-settled principle that the power of attorney does not confer title on the agent as it only creates an agency whereunder the principal authorizes the agent to do specific acts for and on his behalf. No consideration has passed under the power of attorney, Ex.A.2 in the instant case and therefore it is revocable and terminable. The Hon'ble Supreme Court in the judgement reported in **(2012) 1 SCC 656 -Suraj Lamp & Industries Pvt. Ltd. Vs. State of Haryana** makes it clear that a power of attorney does not confer title. The learned judge has held as follows:-

"A power of attorney is not an instrument of



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transfer in regard to any right, title or interest in an immovable property. The power of attorney is creation of an agency whereby the grantor authorises the grantee to do the acts specified therein, on behalf of grantor, which when executed will be binding on the grantor as if done by him (see Section 1-A and Section 2 of the Powers of Attorney Act, 1882). It is revocable or terminable at any time unless it is made irrevocable in a manner known to law. Even an irrevocable attorney does not have the effect of transferring title to the grantee"

60. Further by selling the property to the 1st defendant his wife without the knowledge of the plaintiff is clearly a case of breach of fiduciary capacity and duty as an agent. In the judgment of the Hon'ble Supreme Court reported in **(2005) 12 SCC 77-. State of**



Rajasthan Vs. Basant Nahata, the learned Judges has observed as follows:-

"52. Execution of a power of attorney in terms of the provisions of the Contract Act as also the Powers-of-Attorney Act is valid. A power of attorney, we have noticed hereinbefore, is executed by the donor so as to enable the donee to act on his behalf. Except in cases where power of attorney is coupled with interest, it is revocable. The donee in exercise of his power under such power of attorney only acts in place of the donor subject of course to the powers granted to him by reason thereof. He cannot use the power of attorney for his own benefit. He acts in a fiduciary capacity. Any act of infidelity or breach of trust is a matter between the donor and the donee."



61. In the case on hand, the defendants have justified the execution of Ex.A.20 stating that he is the owner of the property and that he has a power of attorney from the plaintiff and therefore the sale in favour of the 1st defendant is a valid sale. As already held the plaintiff is the owner of the property having parted with the sale consideration for the same. Therefore, the 2nd defendant's action in selling the property is clearly a breach of his fiduciary capacity as an agent. Once this Court has come to the conclusion that the plaintiff is the owner of the property then the 2nd defendant as power agent is accountable to the plaintiff for the sale consideration if any received under Ex.A.20. Ex.A.20 sale deed would read that the 1st defendant had purchased the property for a sum of Rs.15,50,000/-. D.W.1 in her cross-examination would submit that this sum of Rs.15,50,000/- was the money that she had saved over a period of time and this amount along with the sale consideration that she had received from the sale of her property had been utilized for purchasing the suit property



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under Ex.A.20. However, there is no prove regarding the sale of any property. D.W.1 evidence in this regard is as follows:-

வீட்டில் இருந்த 15,50,000/-த்தான் கொடுத்தேன். பல வருட காலமாக கொடுக்கப்பட்ட பணம் மற்றும் நிலம் விற்க பணம் தான் ரூ.15,50,000/-
ரூ.15,50,000/- பணம் பல வருட காலமாக என்னிடம் வீட்டில் தான் இருந்தது.
ரூ.15,50,000/-த்தையும் என் கணவரிடம் கொடுத்துதான் கையெழுத்து வாங்கினேன்.

That this amount has not been given to the plaintiff is evident from the very admission of D.W.1. In her cross examination, she would state as follows:-

என்னிடமிருந்து பெற்ற ரூ.15,50,000/-த்தை என் மகனுக்கு என் கணவர் கொடுத்ததாக சொன்னார். எப்போது கொடுத்தார் என்ற விவரம் எனக்கு தெரியாது. மகனிடம் கொடுத்த விவரத்தை சிறிது நாட்கள் கழித்து என்னிடம் சொன்னார். என் மகன் பணம் கொடுத்த காலத்தில் பெங்களூரில் இருந்தார். என் மகனுக்கு எங்கு வைத்து என் கணவர் பணம் கொடுத்தார் என்ற விவரம் தெரியாது. ரொக்கமாக கொடுத்தாரா அல்லது வங்கி மூலம் பணத்தை அனுப்பினாரா என்று தெரியாது.



62. Therefore, this would clearly prove that the said sum of Rs.15,50,000/- has not been paid to the plaintiff. The sale itself has been effected by the 2nd defendant in favour of the 1st defendant on the premise that he is the owner of the property which is clear not only from his pleadings but also from his evidence and that he has used the power of attorney only to effect the sale.

63. The learned counsel for the defendants has submitted that the non-payment of the entire sale consideration is not a ground to set aside the sale deed in support of which he has relied upon the judgment reported in *2020 (7) SCC 366 - Dahiben Vs. Arvindbhai Kalyanji Bhanusali (Gajra) (Dead) & Ors* that was a case where the plaintiffs who were the vendors had been cheated into signing the sale deeds without receiving the entire sale consideration and the Hon'ble Supreme Court had held that even if the entire sale consideration had not been paid it would not be a ground for cancelling the sale deed.



However, the instant case is a clear case of fraud being played on the actual owner of the property. The 2nd defendant without paying the sale consideration for purchasing the suit property claims to be the owner of the property and on the basis of being the owner of the property has sold the same to the 1st defendant using the power of attorney that has been executed by the plaintiff in his favour. Therefore, the judgement cited on the side of the defendants with reference to the above proposition will not apply to a case where fraud has been played. Therefore, considering the fact that this Court has come to the conclusion that the sale consideration for the purchase of the suit property having emanated from the plaintiff, the property belongs to the plaintiff and even assuming without admitting that the 2nd defendant has used the power of attorney to sale the property to the 1st defendant, the defendants have to prove that the sale consideration has been paid to the plaintiff. Therefore points for consideration nos.(vi) and (vii) are answered against the defendants.



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64. That apart the 2nd defendant, the power agent has sold the property to his wife. The Hon'ble Supreme Court has in the case of ***Bhatori Vs. Ram Piari – 1996 (11) SCC 655***, answered the question “*Whether the sale of the appellant's land to the wife of a power agent of the appellant is valid in law*” as a case of fraud being played on the appellant.

65. In another case of the Hon'ble Supreme Court reported as ***Kewal Krishnan vs. Rajesh Kumar and others – 2021 SCC Online SC 1097***, the learned Judges had observed that where the power agent had sold the property to his wife / minor sons who had no earning capacity and where passing of consideration has not been proved such a transaction would be a sham transaction. In such a case the Principal need not seek to declare the sale deed as null and void. These facts would apply squarely to the case on hand. Therefore, point



for consideration (ix) is answered in favour of the plaintiff.

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66. The Trial Court has simply proceeded on the footing that the plaintiff had executed a power of attorney, Ex.A.2 in favour of the 2nd defendant and on the basis of this power of attorney the 2nd defendant had sold the property to the 1st defendant. However, from the narration supra, the defence is not on the lines as stated by the learned Trial Judge. Therefore, the reasoning of the Trial Court in dismissing the suit cannot be countenanced and the same has to be set aside.

67. The appeal, in a nutshell, is therefore allowed for the following reasons:

(a)The suit property was purchased under Ex.A.1 by the plaintiff from out of his income as evidenced by Ex.A.9 and Ex.A.19.

(b)The defendants have not proved that they have paid the sale consideration.



(c)The defendant who claims to have paid Rs.12,50,000/- for purchasing an extent of 3.80 acres have not questioned the sale of 1.90 acres by the plaintiff's wife as owner of that extent.

(d)The defense set up by the defendants that the property was purchased by the 2nd defendant in the name of the plaintiff is barred by the provisions of Section 4 (2) of the Benami Transactions (Prohibition) Act, 1988.

(e)The defendants have taken mutually destructive pleas.

(f)The 2nd defendant as power agent has sold the property to his wife and there is no proof that the sale consideration reflected in Ex.A.20 sale deed has been paid by the 1st defendant.

(g)The 1st defendant as D.W.1 had stated that the sum which was paid by her to the 2nd defendant was given by him to his sons. Therefore, the sale consideration has not been paid to the plaintiff and it is also not the case of the defendants that the amount was paid to the plaintiff as they claim that the 2nd defendant is the owner of the property. Hence, the said sale deed



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Ex.A.20 is a sham and nominal one.

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68. Therefore, in the light of the aforesaid discussion, the First Appeal is allowed with costs and the Judgement and Decree of the Trial Court, namely, the Principal District Judge, Dharmapuri is set aside.

08.03.2024

Index: Yes/No
Speaking order/non-speaking order
Neutral Citation: Yes/No
shr

To,

1. The Principal District Judge, Dharmapuri.
2. The Section Officer,
V.R.Section,
High Court, Madras.



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P.T.ASHA, J.,

shr

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