IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 27.01.2015

CORAM

THE HONOURABLE MR.JUSTICE R. MAHADEVAN

A.S.No.1077 of 2007
and
C.M.P.Nos.1 & 2 of 2007, 1 of 2008 and 1 of 2010

1.R.V.E. Venkatachalam (Died)

2.Udhayarani
3.Muthu Kumaralingam
4.Mangala Gowri
[Appellants 2 to 4 brought on records as LRS of Deceased sole appellant as per the order of this court dated 23.09.2014 made in M.P.Nos.1 to 3 of 2013 in A.S.No. 1077 of 2007] ...Appellants/LRS of Plaintiffs

Versus

1.B.A.Devaneson
2.Theodore Devaneson
3.Ashok Andrews ...Respondents/Defendants

Prayer: This appeal is filed under Section 96 of C.P.C. against the judgment and decree dated 17.8.2007 made in O.S.No.115 of 1994 on the file of the learned District Judge, Nilgiris at Udagamandalam.

For Appellants : Mr.R. Subramanian

For Respondents : Mr.C.A.Diwakar for R1
R2 & R3 given up

JUDGMENT RESERVED ON : 01.12.2014

J U D G M E N T

This regular appeal is directed against the judgment and decree dated 17.8.2007 made in O.S.No.115 of 1994 on the file of the learned District Judge, Nilgiris at Udagamandalam.

2. Having been dissatisfied with the dismissal of the suit, the plaintiff has knocked at the doors of this court by way of this appeal.

3. For easy reference and also for the sake of convenience, the parties to the appeal may hereinafter be referred to as the plaintiff and the defendant respectively wherever the context so require.

4. Background facts leading to the filing of the suit are as follows:-

(i) The suit property commonly known as " Allendale" situated at Figure of Eight Road, Coonoor Town, measuring 0.79.5 acres of land together with the building thereon in R.S.No.1181/2 belongs to the defendants by virtue of their purchase under a registered sale deed, dated 14.5.1980.

(ii) The defendants 1 to 3 are sisters and brother. The first defendant was appointed as the Power Agent of the second and third defendants under the valid Power-of-Attorney, dated 7.8.1980 empowering to deal with the suit property.

(iii) The fourth defendant was inducted into possession of the suit property as a tenant on 1.1.1992 by the first defendant as a co-owner and as the Power-of-Attorney of the defendants 2 and 3 in pursuant to the rental agreement, dated 27.12.1991.

(iv) On an assurance given by the defendants 1 to 3 and having satisfied that as per the Power-of-Attorney the first defendant was authorised to sell the suit property on behalf of the defendants 2 and 3, the fourth defendant had negotiated for the purchase of the suit property.

(v) The first defendant for herself and in her capacity as the Power Agent of the defendants 2 and 3 had executed the agreement of sale, dated 22.2.1992 in favour of the fourth defendant for the valuable consideration of Rs.5,00,000/- and received a sum of Rs.61,000/- as advance and also agreed to receive the balance price of Rs.4,39,000/- at the time of registration of the sale deed within a period of one year.

(vi) It was also agreed that the fourth defendant is fully empowered by the defendants to transfer this sale agreement and to deliver vacant possession to any third party and the fourth defendant is at liberty to advertise the property for sale and to negotiate with any person or persons for the purpose of transferring the sale agreement.

(vii) After the agreement of sale, dated 22.2.1992, the fourth defendant had developed the suit property at his own costs with the knowledge of the defendants 1 to 3.

(viii) As per the conditions stipulated in the sale agreement, dated 22.2.1992, the fourth defendant had assigned his rights under an assignment deed, dated 4.5.1992 to the plaintiff for the consideration of Rs.7,00,000/- and on the same date, the fourth defendant received a sum of Rs.2,61,000/- and the balance of Rs.4,39,000/- to be paid to the defendants 1 to 3 at the time of execution of the sale deed in favour of the plaintiff by the defendants.

(ix) As per the assignment deed, the fourth defendant had delivered actual and vacant possession of the suit property to the plaintiff in part performance of the said assignment deed and the plaintiff has been in possession and enjoyment of the suit property. The fourth defendant had also handed over the original documents to the plaintiff.

(x) The plaintiff is always ready and willing to perform his part of contract. Though the plaintiff requested the defendants to execute the sale deed, they are evading and neglecting to execute the sale deed under one pretext or the other.

(xi) While so, to the surprise of the plaintiff, the defendants 1 to 3 through their counsel had sent a notice, dated 25.5.1992 making false allegations against the plaintiff and denied the execution of the sale agreement, dated 22.2.1992 and their liability to execute the sale deed. Moreover, the defendants had threatened to launch criminal proceedings both civil and criminal against the plaintiff and the fourth defendant. The plaintiff gave a reply, dated 24.7.1992 denying the allegations.

(xii) On 26.7.1993, the plaintiff had called upon the defendants to act upon the terms of the agreement by way of advocate's notice. Though the defendants had received such notice, they refused to perform their part of contract.

(xiii) Therefore, the plaintiff is entitled to the relief of specific performance of the suit agreement, dated 22.2.1992 as against the defendants. Hence, the present suit.

5. During the pendency of the suit, on 1.10.1994, the first defendant died leaving behind the defendants 2 and 3 as her heirs and legal representatives.

6. Subsequent to the death of the first defendant, her 1/3 rd undivided share in the suit property devolved on the defendants 2 and 3 equally and thereby the defendants 2 and 3 are entitled to half share each.

7. While so, the third defendant, who had earlier resisted the suit had voluntarily chosen to withdraw his defence plea in the suit and had acknowledged the binding nature of the suit agreement of sale and sold his half share in the suit property to the plaintiff for a consideration of Rs.2,50,000/- and received a sum of Rs.2,19,500/- after deducting and adjusting half of the advance amount of Rs.61,000/-, which was paid by the fourth defendant under a registered sale deed, dated 10.11.1997.

8. The suit has been amended for the following reliefs:-

a. Directing the second defendant to execute the sale deed and if found necessary, jointly with the fourth defendant, in respect of the suit property described in the Schedule after receiving the balance sale consideration of Rs.2,19,500/- in favour of the plaintiff in specific performance of the Agreement, dated 22.2.1992 and the Assignment deed, dated 4.5.1992 within the specified time be fixed by the Court, failing which, the court may be pleased to execute the same on behalf of the defendants in favour of the plaintiff.

b. Confirming the possession of the suit property by the plaintiff and to do all acts necessary for the enjoyment of the suit property without any obstruction.

9. The brief averments In the written statement filed by the defendants 2 and 3 are as follows:-

(i) The legal representatives of Late Miss.L.V.P.Devaneson, who died after the filing of the suit, have not been brought on record and any claim against the first defendant would be abated.

(ii) The alleged Power of attorney, dated 7.8.1980 executed by these defendants in favour of the first defendant late Miss.L.V.P.Devaneson does not empower the first defendant to deal with the property in an omnibus manner as alleged by the plaintiff.

(iii) It is true that the suit property was rented out to the fourth defendant on 1.1.1992 by the first defendant as co-owner and in the capacity of the power agent of the defendants 2 and 3.

(iv) The power of attorney does not empower the first defendant to sell the property or enter into any agreement for sale.

(v) The first defendant did not sign in any sale agreement in favour of the fourth defendant either by herself, nor as the power of attorney of the defendants 2 and 3 and the sale agreement is a forged one. No sale consideration nor any part thereof had ever passed to the defendants 2 and 3 nor to late Miss. L.V.P. Devaneson as alleged. The action of the fourth defendant was noticed only later by the unsuspecting defendants 1 to 3, and after they had complained to the authorities.

(vi) The so-called consideration quoted in the sale agreement is highly unconscionable and far below the value of the property as advertised by the fourth defendant himself.

(vii) The so-called assignment deed, dated 4.5.1992 executed by the fourth defendant in favour of the plaintiff is false and fictitious. The plaintiff is a willing party to the forgery and fraud committed by the fourth defendant and the alleged assignment deed is a collusive exercise only to grab the suit property illegally.

(viii) These defendants had come to know about the activities of the plaintiff and the fourth defendant only after the plaintiff had been illegally inducted into the suit property by the fourth defendant in May 1992 and on 18.5.1992 the defendants have lodged a complaint to the Superintendent of Police.

(ix) The defendants 2 and 3 and the first defendant had seen the copy of the agreement from the plaintiff and on enquiry, they came to know from the plaintiff that Rs.12.00 lakhs was collected by the fourth defendant from the plaintiff under the guise of the alleged assignment deed and the plaintiff had been inducted into the suit property.

(x) The plaintiff never investigated the title of the suit property by meeting these defendants or the first defendant and asking for original documents of title nor making any enquiries with the first defendant.

(xi) The allegation that the fourth defendant handed over all the original documents in his possession to the plaintiff is false since the suit has been filed only on the strength of the xerox copy of the agreement. The original title deeds are with the defendants and they have not handed over the same to the fourth defendant.

(xii) The willingness and readiness on the part of the plaintiff does not arise as the very sale agreement is a forged one.

(xiii) The sale agreement is illegal and cannot be acted upon and consequently, the assignment deed is also non-est in the eye of law and illegal.

(xiv) The plaintiff is obviously attempting to grab the suit property by hook or crook and it is unbelievable and outrageous that the assignment deed for a property worth about Rs.50.00 lakhs would be made out of an agreement for only Rs.5.00 lakhs.

(xv) The second defendant has also filed his additional written statement stating that the legal heirs of late Miss.L.V.P.Devaneson, the first defendant, have not been made parties to the suit. It is incorrect to say that after the first defendant's death, her share devolved on the second and third defendants. Without making the legal heirs of the first defendant as parties to the suit, the suit is bad for non-joinder of necessary parties.

10. The fourth defendant in his written statement has stated that in the complaint given by the second defendant to the Coonoor Police, she had stated that the signature of the first defendant was forged by this defendant and the first defendant never entered into any agreement with this defendant for the sale of the suit property and requested to take necessary action against this defendant. Since the investigation revealed that the signatures found in the sale agreement were proved to be of Miss.L.V.P. Devenesan, both

technically and orally, the case was referred to as "Mistake of Fact" and the referred charge sheet was served on the second defendant. The fourth defendant is always ready and willing to perform his part of the contract.

11. A memo was filed by the third defendant stating that the suit claim has been satisfied and executed the sale deed, dated 10.11.1997 in favour of the plaintiff in respect of his share in the suit property and therefore, the third defendant was withdrawing from the suit and requested the court to record the same.

12. Based on the pleadings of the plaintiff as well as the defendants, the trial court has formulated the following eight issues:-

a. Whether the suit agreement for sale, dated 22.2.1992 executed by the defendants 1 to 3 in favour of the 4th defendant is true, valid and binding on them?

b. Whether the defendants 1 to 3 had delivered possession of the suit property to the 4th defendant in pursuance of the suit agreement?

c. Whether the Assignment Deed, dated 4.5.1992 executed by the 4th defendant in favour of the plaintiff is true and valid and in accordance with the agreement dated 22.2.1992?

d. Whether the plaintiff is in possession of the suit property?

e. Whether the plaintiff has been ever ready and willing to perform his part of the obligation in respect of the agreement, dated 22.2.1992 and 4.5.1992 in favour of the defendants 1 to 3 ?

f. Whether the plaintiff is entitled to endorse the agreement for sale, dated 22.2.1992 and of the assignment deed, dated 4.5.1992 against the defendant?

g. Is the plaintiff entitled to confirmation of possession of the suit property?

h. To what relief, if any, is the plaintiff entitled?

13. In order to substantiate their respective cases both the plaintiff and the defendants were directed to face the trial.

14. The plaintiff had examined herself as PW 1. Besides one more witness was examined on her side. During the course of their examination Exs.A1 to A19 were marked. On the other hand, on the side of the defendants two witnesses were examined. During the course of their examination Exs.B1 to B13 were marked.

15. On evaluating the evidences, both oral and documentary, the learned trial Judge had proceeded to dismiss the suit.

16. Challenging the correctness of the judgment and decree of the trial court dated 17.8.2007, the plaintiff stands before this court with this appeal.

17. Heard Mr.R. Subramanian, learned counsel appearing for the appellants and Mr.C.A.Diwakar, learned counsel appearing for the respondents.

18. The arguments of the learned counsel appearing for the appellant are as under:-

a. Regarding the genuineness of the agreement of sale, dated 22.2.1992, the trial Court has found that the defendants have denied the execution of the sale agreement and the document has been sent to the hand writing expert, who in his report has stated that the admitted signatures and the disputed signatures are one and the same. However, the trial court held that the report of the hand writing expert is not sufficient and since the execution of the agreement of sale has not been proved by examining the independent witnesses or the persons, who had signed in the document, and the trial court has come to the conclusion that the sale agreement Ex.A2 has not been proved.

b. Since the allegation of forgery is raised, the admitted and the disputed signatures were sent to the hand writing expert and his opinion was obtained saying that there was no dissimilarity between the admitted and the disputed signatures of D1. Though the trial Court has not rejected the opinion of the hand writing expert, it has held that it is not sufficient to prove the case of the plaintiff.

c. There is no justification for condemning the expert's opinion and insisting for corroboration. This is the principle laid down by the Hon'ble Apex Court in the decision reported in AIR 1980 SC 531.

d. Further, though D3 had filed the written statement along with D2 questioning the genuineness of the sale agreement, he has accepted the sale agreement and the assignment deed as well as executed the sale deed Ex.A14, dated 10.11.1997 in respect of his half share and therefore, the execution of the documents has been admitted by D3 and the Power of Attorney, sale agreement and the assignment deed have been referred to in Ex.A.14 and D3 had also stated that he was withdrawing his defence acknowledging the binding nature of the agreement of sale and therefore, when D3, who is one of the owners of the suit property, had accepted the agreement of sale and in pursuant to that he has executed the sale deed Ex.A14, the question of genuineness of Ex.A2 does not arise.

e. The trial Court has found that the non-examination of the witnesses in the agreement of sale is fatal to the case of the plaintiff. The sale agreement is not a document requiring attestation under Section 3 of the Transfer of Property Act and only in respect of the documents which require attestation, the same should be proved by examining the attesting witnesses as per Section 68 of the Evidence Act.

f. As far as the other documents are concerned, the relevant provision is under section 67 of the Evidence Act and therefore, as per Section 67 of the Evidence Act, the opinion of the handwriting expert is sufficient and therefore, there is no need for the examination of the witnesses signed in the agreement of sale.

g. In so far as the Power-of-Attorney executed by the defendants 2 and 3 in favour of D1 is concerned, the trial Court has found that the Power of Attorney has not authorised D1 to sell the property. In the Power of Attorney, it is clearly stated that the power has been given to execute and register all deeds of lease, mortgage and release deeds and other deeds of agreement in respect of the properties. It is a general power of attorney and therefore, other deeds of agreement in respect of the property would include the power to sell the property also. In this regard, in the decision reported in (1997) 3 SCC 474, the Hon'ble Supreme Court has held that the document had to be read as a whole. In that case also, there was no specific clause in the Power of Attorney for sale. But the Apex Court has held that the document has to be understood in the manner in which parties themselves understood the purpose of the document. The attended circumstances have also to be taken into consideration.

h. In the case on hand, the power to execute the sale agreement has been accepted and upheld in Ex.A14, which shows that D3 having accepted the authority of D1 to enter into the sale agreement, executed the sale deed on the basis of the power of attorney, sale agreement and the assignment deed.

i. However, the trial court had taken a contrary view based on one of the circumstances that as per Ex.A2 a sum of Rs.25,000/- was shown to be paid by means of a cheque in favour of D1, but there is no evidence to show that the cheque was encahsed by D1. In fact, D2 in her evidence admitted that D2 and D1 had a joint account in the State Bank of Tranvancore and the advance of Rs.25,000/- was paid under the cheque bearing No.345008, dated 22.2.1992 and the cheque number tallied with the cheque referred to in the sale agreement and therefore, the finding of the trial court, in this regard, is perverse.

j. The trial court has rejected the contention of the defendants that Ex.A14 is not valid and accepted Ex.A14 in respect of his share only. When the sale deed has been held to be valid, the sale agreement and the assignment deed cannot be said to be invalid.

k. The plaintiff is always ready and willing to perform his part of contract and in fact, initially, when the suit was decreed ex parte, the plaintiff has deposited the balance sale consideration and therefore, the suit may be decreed as prayed for setting aside the judgment and decree of the court below.

19. In support of his arguments, the learned counsel for the appellants has relied on the following decisions:-

i. Nimala Anand vs. Advent Corporation (P) Ltd., and others (2002 (4) CTC 424). In this case, the Hon'ble Apex Court dealt with the exercise of discretion to impose any reasonable condition, directing one party to pay additional amount to other party while granting or refusing the relief of Specific Performance.

ii. Bijendra Nath Srivastava (Dead) through L.Rs. vs. Mayank Srivastava (1994 AIR (SC) 2562). This is the case relating to misconduct of arbitrator and non-speaking award.

iii. To substantiate his claim that the respondent failed to prove their claim of fraud and misrepresentation, the learned counsel relied on AIR 1994 MAD. 247 (K.Kanakarathnam .v. A.Perumal). The relevant portion is as follows:-

"7. ....

Order 6 Rule 4, C.P.C. says.

"In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence and in all other cases in which particulars may be necessary beyond such as arc exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading".

'It is settled law that as per this rule, necessary and material facts should be pleaded in support of the case set up and that in the absence of pleadings, evidence if any produced cannot be considered. The object of the rule is that in order to have a fair trial it is imperative that the party should stale the essential material facts so that the other party may not be taken by surprise. No doubt, the learned counsel for the defendant argued that the pleadings should receive liberal construction and that if the parties knew the case and proceeded to trial on a certain issue by producing evidence, it would note be open to the other party to raise a question of absence of pleadings in appeal, But we do not think such a liberal construction is warranted in this case."

20. Countering the submissions of the learned counsel for the appellant, the learned counsel appearing for the respondents has advanced his submissions as under:-

a. The so-called sale agreement is a forged one as if it was executed by the first defendant and that the suit has been filed only based on the certified true copy of the agreement of sale and no reason has been stated for the non-filing of the original sale agreement and the whereabouts of the original sale agreement has also not been stated and also the Notary has not been examined to prove that he had seen the original agreement of sale before certifying the copy of the sale agreement. The above facts assume more significance when the defendants 1 to 3 had specifically denied the execution of the very sale agreement.

b. When the defendants 1 to 3 had specifically denied the execution of the sale agreement, it is the burden of the plaintiff to prove that the sale agreement is a genuine one by examining the witnesses singed in the sale agreement and its executant. Since the burden of proof has not been discharged by the plaintiff in the manner known to law, the so-called sale agreement cannot stand in the eye of law.

c. Further, even assuming for the sake of argument that the sale agreement Ex.A2 was executed by the first defendant, it is not valid as no power was vested with the first defendant. The power to sell or enter into an agreement to sell is conspicuously absent in the Power of Attorney Ex.A6 executed by the defendants 2 and 3 in favour of the first defendant. Unless there is specific provision or clause in the power of attorney, the power agent cannot sell or encumber the property. A plain reading of Ex.A6 does not confer any power on the first defendant to sell the suit property. Otherwise, D1 would not have given the complaint Ex.B4 to the Superintendent of Police.

d. As far as the so-called letter given by the first defendant to the fourth defendant, which has been marked as Ex.A7, dated 22.2.1992 conferring the rights and privileges on the fourth defendant over the suit property is concerned, a perusal of that letter clearly shows it is a concocted one to support the forged sale agreement. Ex.A7 was addressed to the fourth defendant as if by the first defendant using her letter head.

e. Further, on the very date of execution of the sale agreement, Ex.A7 was prepared since the fourth defendant and the plaintiff have known that the Power of Attorney had not conferred any power on the fourth defendant to sell the suit property and hence, Ex.A7 was prepared.

f. The alleged execution of the sale deed Ex.A14, dated 10.11.1997 has not been proved by examining the third defendant. P.W.1 has stated in his cross examination that he is not aware of the contents of Ex.A.14, but his son is aware of the contents of Ex.A.14 and as such, P.W.1 is not competent to prove the contents of Ex.A.14. The transaction between P.W.1 and D3 under Ex.A14 would hit by the doctrine of Lis Pendens. Section 52 of the Transfer of Property Act provides that the suit property cannot be transferred or otherwise it would affect the rights of other party.

g. The third defendant as a joint owner is entitled for 1/3rd share and following the death of the first defendant her 1/3rd share would devolve on her legal heirs and as such the execution of the sale deed Ex.A.14 for 1/2 share of the property is not valid.

h. The possession of the plaintiff is illegal as he is claiming possession based on the forged agreement of sale. Considering all these aspects, the trial court has dismissed the suit and therefore, nothing warrants to interfere with the same.

21. In support of his contention, the learned counsel for the respondents has relied on the following decisions:-

a. Church of Christ Charitable Trust and Educational Charitable Society represented by its Chairman ((2012) 8 SCC 706).

b. Anantha Pillai vs. Rathnasabapathy Mudaliar and others (1968 (82) L.W.5).

c. Ravjappa .v. Nilkanta Rao and others (AIR 1962 Mysore 53)

d. Thakur Dongar Singh .vs. Dr.Ladli Prasad Bhargava (1973 (2) SCC 263

e) Thiruvengadam Pillai .vs. Navaneethammal and another (2008 4 SCC 530)

f) S.Gopal Reddy .vs. State of A.P (1996 (4) SCC 596)

g) Unreported judgment of this Court in CRP(PD) No.1566 of 2006 between (R.V.S.Venkatachalam and Jeel Devanesan and 15 others)

h) Timblo Irmaos Ltd., Margo .v. Jorge Anibal Matos sequeira and another (1977 (3) SCC 474)

22. The aforesaid submissions of either side would invite this Court to decide the following points:-

a. Whether the Power of Attorney Ex.A.6 confers powers on D1 to sell the suit property or not?

b. Whether the first defendant had executed the agreement of sale under Ex.A2, dated 22.2.1992 in favour of the fourth defendant or not?

Point No.1:-

23. The suit property is commonly known as "Allendale" situated at Figure of Eight Road, Coonoor Town consisting of 0.79.5 acre of land together with the building thereon in R.S.No.1181/2 and the same is belonged to the defendants 1 to 3 by virtue of their purchase from the previous owner for a sum of Rs.1,50,000/- under a registered sale deed, dated 14.5.1980.

24. The defendants 1 to 3 are sisters and brother. The first defendant is the duly authorised Power Agent of the second and third defendants under the Power of Attorney, dated 7.8.1990

empowering her to deal with the suit property.

25. The fourth defendant was inducted into the possession of the suit property as a tenant on 1.1.1992 by the first defendant as a co-owner and the power agent of the defendants 2 and 3 by virtue of the rental agreement, dated 27.12.1991. These are the admitted facts.

26. Now, it is the case of the plaintiff that the sale agreement Ex.A2 was executed by the first defendant being the power agent of the defendants 2 and 3 in favour of the fourth defendant and that the fourth defendant assigned the sale agreement in favour of the plaintiff under the deed of assignment of sale agreement, dated 4.5.1992.

27. On the other hand, it is the case of the defendants 1 to 3 that no power was given to the first defendant to sell or encumber the suit property under the Power of Attorney Ex.A6, but power was given only to execute and register all deeds of leases, mortgage deeds and Release Deeds and other deeds of agreement on their behalf in respect of the properties, for which they hold joint rights along with the power agent and therefore, the alleged sale agreement is a forged and concocted one to grab the suit property.

28. A perusal of Ex.A6 Power of Attorney, dated 7.8.1980 reveals as under:-

> "To execute and register all deeds of lease, mortgage deeds and Release deeds and other deeds of agreement on our behalf in respect of properties for which we hold joint rights along with our agent.
>
> To clear all Mortgage loans and redeem the mortgage.
>
> To appear in any court of law for us and on our behalf and to sign any papers like Vakalath, plaints, petition etc., in our name and on our behalf in respect of our joint property at Coonoor."

29. Likewise, the contents of the power of attorney are going on. However, this Court does not find anywhere in the power of attorney, the words, "to sell or purchase or to execute the sale deed or to encumber the suit property, are mentioned.

30. A plain and whole reading of Ex.A6 does not disclose the intention of the defendants 2 and 3 that they had given power to the first defendant to sell the suit property, but they gave power with an intention to execute lease, mortgage and release deeds and other deeds of agreement in respect thereof.

31. However, the contention of the learned counsel for the plaintiff is that in the Power of Attorney, it is clearly stated that the power has been given to execute and register all deeds of lease, mortgage and release deeds and other deeds of agreement in respect of the properties. It is a general power of attorney and therefore, other deeds of agreement in respect of the property would include the power to sell the property also.

32. This Court is of considered view that unless there is specific terms in respect of the powers conferred in the power of attorney, it cannot be construed that the power agent was vested with all general powers.

33. Anyhow, at this juncture, it is pertinent to see the decisions relied on by the learned counsel for the defendants / respondents as to what are the principles laid down by the Hon'ble Apex Court and this Court.

34. The learned counsel for the respondents relied on the following judgments referring fraud, authenticity of thumb impression and comparison of signatures with admitted/proved signatures.

(i) The decision in Ravjappa .v. Nilkanta Rao and others (AIR 1962 Mysore 53) is related to the presumption drawn under Section 90 of the Evidence Act. In this case, the Mysore Court held that it is for the party who asks the Court to draw the necessary presumptions under Section 90 to prove by satisfactory evidence that the document was produced from proper custody. The above judgment is not relevant to the facts of the case.

ii) In the decision in Thakur Dongar Singh .vs. Dr.Ladli Prasad Bhargava (1973 (2) SCC 263, the Hon'ble Apex Court has held as follows:-

> "This is a case where the circumstances speak more eloquently than the witnesses and the tell-tale recitals in Ex.P2 are enough to stamp it as a fruadulent document. In the circumstances, we do not consider it necessary to discuss any points of law."

iii) The decision in Thiruvengadam Pillai .vs. Navaneethammal and another (2008 4 SCC 530), related to authenticity of thumb impression on sale deed.

iv) The decision in S.Gopal Reddy .vs. State of A.P (1996 (4) SCC 596) deals with Section 73 of the Evidence Act. Section 73 of the Evidence Act reads as under:-

> "73. Comparison of signature, writing or seal with others admitted or proved.—In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing, or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing, or seal has not been produced or proved for any other purpose. The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person. "

35. The learned counsel for the respondents also relied on the judgment of this Court dated 05.06.2007 in CRP(PD) No.1566 of 2006 is the order passed in the Civil Revision Petition, which is filed against the order dated 14.09.2006 made in I.A.No.87 of 2005 in O.S.No.115 of 1994 (i.e., the present case on hand) on the file of the learned District Munsif, Nilgiris, directing the trial Court to dispose of the suit within a period of five months from the date of receipt of a copy of that order.

36. The learned counsel for the respondents further relied on the judgment reported in Church of Christ Charitable Trust and Educational Charitable Society represented by its Chairman (2012) 8 SCC 706), in support of his contention regarding the power of attorney. In the said decision, the Hon'ble Apex Court has observed as under:-

"19) ....It is settled that a power of attorney has to be strictly construed. In order to agree to sell or effect a sale by a power of attorney, the power should also expressly authorize the power to agent to execute the sale agreement/sale deed i.e., (a) to present the document before the Registrar; and (b) to admit execution of the document before the Registrar. A perusal of the power of attorney, in the present case, only authorizes certain specified acts but not any act authorizing entering into an agreement of sale or to execute sale deed or admit execution before the Registrar. In a recent decision of this Court in Suraj Lamp and Industries Pvt. Ltd. vs. State of Haryana and Another (2012) 1 SCC 656, the scope of power of attorney has been explained in the following words:

"20. A power of attorney is not an instrument of 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.

21. In State of Rajasthan v. Basant Nahata, (2005) 12 SCC 77. this Court held: (SCC pp. 90 & 101, paras 13 & 52)

"13. A grant of power of attorney is essentially governed by Chapter X of the Contract Act. By reason of a deed of power of attorney, an agent is formally appointed to act for the principal in one transaction or a series of transactions or to manage the affairs of the principal generally conferring necessary authority upon another person. A deed of power of attorney is executed by

37. In the decision above cited supra, the following principles have been derived, namely, 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).

38. The agent derives a right to use his name and all acts, deeds and things done by him and subject to the limitations contained in the said deed and the same shall be read as if done by the donor.

39. In order to agree to sell or effect a sale by a power of attorney, the power should also expressly authorize the power to agent to execute the sale agreement/sale deed i.e., (a) to present the document before the Registrar; and (b) to admit execution of the document before the Registrar.

40. A perusal of the power of attorney, in the present case, the defendants have only authorized the aforesaid specified acts but not any act authorizing to enter into an agreement of sale or to execute sale deed or admit execution before the Registrar.

41. The learned Single Judge of this Court, in another decision in Anantha Pillai vs. Rathnasabapathy Mudaliar and others (1968 (82) L.W.5) has observed as under:-

> "The general principles regarding the construction of a power-of-attorney are well-settled. Powers -of-attorney must be strictly construed as giving only such authority as they confer expressly or by necessary implication. Where an act purporting to be done under the power-of-attorney is challenged as being in excess of the power, it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument either by express terms or by necessary implication. Some of the principles governing the construction of a power-of-attorney are : (1) the operative part of the deed is controlled by the recitals; (2) where an authority is given to do particular acts, followed by general words, the general

words are restricted to what is necessary for the performance of the particular acts; (3) the general words do not confer general powers but are limited to the purpose for which the authority is given and are construed as enlarging the special powers only when necessary for that purpose; (4) a power-of-attorney is construed so as to include all medium powers necessary for its effective execution. Bearing these general principles in mind the question for consideration is whether the power-of-attorney in this case authorised the first defendant to enter into an agreement to sell or authorised him to execute a sale deed. In my opinion the power granted to the first defendant to execute every type of document on behalf of Janaki Ammal will have to be understood with reference to particular acts specified in the documents itself, for which the power was granted. It must be remembered that the power was granted by a wife to a husband for managing her properties and not for liquidating the same. The apparent necessity for executing such a power was that being a woman she was not able to attend to the day-to-day requirements involved in the management of the properties and it is not as if she was not in a position to negotiate the terms of a sale or to execute a sale deed, which is not an every day occurrence. Mr. Rajagopala Iyer relied on the decision of this Court in Venkataramana Iyer v. Narasinga Rao 24 M.L.J. 180 : I.L.R. (1915) 38 Mad. 134, and contended that the power-of-attorney in this particular case was a general power-of-attorney. For the same purpose the learned Counsel relied on the decision of this Court in Krishna Phoopathi Deo v. Raja of Vizianagaram I.L.R. (1915)38 Mad. 832 : 26 M.L.J. 185. I must point out that there is no magic in the nomenclature of a power-of-attorney being a general power-of-attorney. The scope of the power has to be gathered from the language of the document. As was pointed out by this Court in the latter case relied on by the learned Counsel himself " Every document must be construed with reference to its particular terms, and differently worded documents afford but little assistance for correctly construing the document concerned in this case ". Therefore, even on the basis that the power-of-attorney executed by Janaki Ammal on 30th June, 1937, is a general power-of-attorney, still the question remains whether it authorised the first defendant to execute a document like Exhibit A-l. Learned Counsel relied on a decision of the Calcutta High Court in Narendra Nath v. Bimala Sundari (1938) 42 C.W.N. 718, for the position that the agent's power is not limited to the physical act of signing documents relating to transactions entered into by the principals but he has also the power to enter into contracts himself on behalf of the principals and to make the necessary documents. In my opinion the question is whether any such power can be gathered from the terms of the document in question. I am clearly of the view that no such power can be gathered from the document in question. One feature I have already indicated is that the document does not confer expressly on the first defendant any power to alienate the properties either by way of sale, mortgage or otherwise. Secondly, the document is a detailed one referring to several acts to be done by the first defendant. Therefore, in the context of the detailed enumeration of the powers conferred on the first defendant to perform acts, the general words will have to be understood as enabling him to do such things as are necessary for the purpose of effectively performing those functions enumerated and conferred on the first defendant. Thirdly, the occasion for executing the power-of-attorney was that Janaki Ammal being a woman was not in a position to look after the management of her properties and affairs personally, and certainly that does not indicate any inability or disability on her part to negotiate a sale or enter into an agreement for that purpose. In this context a decision of the Patna High Court in Loknath Prosad v. Sah Wahib Hussain is instructive. In that case a pardanashin lady executed a power-of-attorney in favour of her husband for the purpose of looking after her affairs and managing her properties. The power-of-attorney in that case began by reciting that the executant being a pardanashin lady it was difficult and impossible for her to look after and take care of the whole and entire village and Court affairs and cases and to execute every kind of deed personally. It went on to appoint the husband as the general power-of-attorney with full powers and then specified in detail the powers in relation to village and Court affairs and to instruments affecting moveable and immovable properties. As to the latter powers, the language used after enumerating different kinds of deeds such as deeds of sale, mortgage and lease, etc. was "the said general attorney shall either as (or through) attorney on his own behalf or personally on my behalf by his pen sign and acknowledge and get attested (these instruments) and present them before the Registrar and admit execution and get them registered." That is to say, the attorney had power to sign and consent to a deed of sale and get it attested and registered. Notwithstanding this language, the Patna High Court pointed out that the husband had no power to enter into an agreement for sale in respect of the wife's property. The learned Judges pointed out (at page 186):

If the lady had intended that her attorney Should have power to sell, mortgage and lease, nothing would have been simpler than to say so; but this is not said.

The learned Judges further pointed out: If there had been a power to sell, then by necessary implication there would have been the power to settle the terms of sale. But there is no power to sell.

If that was the decision of the Patna High Court in relation to a power-of-attorney where expressly the power was conferred on the husband to execute deeds of sale, mortgage, lease, etc. on behalf of the grantor of the power the position is a fortiori here, where there is no enumeration of any power to execute all types of documents on her behalf, which necessarily has to be understood in the context of the specified and enumerated powers conferred on the first defendant by Janaki Ammal. For these reasons, I am of the view that the power-of-attorney executed by Janaki Ammal in favour of the first defendant on 30th June, 1937 did not authorise the first defendant to execute Exhibit A-1 on behalf of Janaki Ammal and therefore the said document is not binding either on Janaki Ammal or the 2nd defendant.”

42. In the decision cited supra, the following principles have been culled out:-

> “The general principles regarding the construction of a power-of-attorney are well-settled. Powers -of-attorney must be strictly construed as giving only such authority as they confer expressly or by necessary implication. Where an act purporting to be done under the power-of-attorney is challenged as being in excess of the power, it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument either by express terms or by necessary implication. Some of the principles governing the construction of a power-of-attorney are : (1) the operative part of the deed is controlled by the recitals; (2) where an authority is given to do particular acts, followed by general words, the general words are restricted to what is necessary for the performance of the particular acts; (3) the general words do not confer general powers but are limited to the purpose for which the authority is given and are construed as enlarging the special powers only when necessary for that purpose; (4) a power-of-attorney is construed so as to include all medium powers necessary for its effective execution”

43. In the decision in Timblo Irmaos Ltd., Margo .v. Jorge Anibal Matos sequeira and another (1977 (3) SCC 474), the Hon'ble Apex Court has held that power of attorney to be read as a whole keeping in mind its purpose.

44. If the above said principles are applied to the power of attorney, the only inevitable conclusion is that D1 was not empowered to execute the sale agreement or to sell the suit property and therefore, as rightly contended by the the learned counsel for the defendants that in the Power of Attorney the first defendant was not conferred any authority to execute the sale agreement or to negotiate for selling the suit property and therefore, this Court finds that the first defendant has no authority to execute the sale agreement, even assuming for the sake of argument, it becomes invalid

and non-est.

Point No.2:-

45. It is the case of the plaintiff that the first defendant being the power agent of the defendants 2 and 3 had executed the agreement of sale in respect of the suit property in favour of the fourth defendant and that the fourth defendant has assigned the sale agreement in favour of the plaintiff.

46. On the other hand, it is the case of the defendants that the so-called agreement of sale is a forged and concocted one to swallow their suit property.

47. The alleged sale agreement Ex.A2 was said to be executed on 22.2.1992. A perusal of Ex.A2 reveals that it is an unregistered document and seems that it was executed by the first defendant in favour of the fourth defendant. The suit property was sold for a sum of Rs.5,00,000/-.

48. On the very day of execution of the sale agreement, it seems that a letter was addressed to the fourth defendant by the first defendant under Ex.A7.

49. A perusal of Ex.A7 shows that it is the letter head of the fourth defendant and there is no sender's address. Since it is the letter head of the fourth defendant, at the left top of the letter head, simply the word "To" has been typed. To ascertain that whether Ex.A7 is the letter head of the fourth defendant, the letter addressed by the fourth defendant to "The Hindu" under Ex.B2 is verified. On verification of Ex.B2, it is clear that Ex.A7 is the letter head of the fourth defendant and he simply added the word "To" at the left top of his letter head to show that the letter has been addressed by the first defendant conferring the rights and privileges over the suit property on the fourth defendant. From the above, it is clear that Ex.A7 is purely a forged and concocted one to take away the property of the defendants.

50. On 25.5.1992, the defendants have sent a lawyer's notice to the fourth defendant as well as the plaintiff denying the agreement of sale. It reads as under:-

> "2. Our clients 2 and 3 had given a power of attorney to our client No.1 with specific powers only ; to lease or mortgage or release the

property since our clients 2 and 3 were at that time residents of Madras. On 27.12.1991 our client leased out the said building and appurtenant land to you No.(1) under an agreement of lease for a rent Rs.3000/- per annum to be increased in a phased manner at Rs.4000/- per annum for the next four years.

3. While so, you No.1 have inducted the second addressee illegally into the said property on 22.2.1992. You No.1 have forged a "sale agreement" allegedly written by our client No.1 as power of attorney of our clients Nos.2 and 3 and under the guise of the forged agreement you have entered into another sale agreement with the second addressee, thereby inducting the second addressee into illegal possession of the property. Our clients learnt of these disconcerting facts, when they questioned the second addressee and obtained xerox copies of the forged, fraudulent agreement from him. Our clients have sent complaints to the police and other authorities against you No.1."

51. From the above, it is clear that when the defendants had approached the plaintiff, they came to know that the forged sale agreement was created by the fourth defendant and immediately, they have given complaints to the police.

52. A perusal of Ex.A.18 Advocate's notice, dated 12.8.1993, issued by the third defendant to the advocate of the plaintiff, which divulge the entire fabricated case of the fourth defendant and the plaintiff as under:-

"At the outset, our client wants to bring to your notice that the said Power of Attorney, dated 7.8.1980, which is not a registered document has given no authority nor there is any clause in the Power of Attorney authorising Miss.L.V.P. Devaneson to sell the 'Allendale' property.

Our client states that it appears on 22.3.1992 the said Ashok Andrews has given an advertisement in "The Hindu" in the real estate columns proposing the sale of their "Allendale" property giving a Box No.1168 in favour of the

"The Hindu", Madras -2. Our clients states that neither he nor his sisters Miss.L.V.P. Devaneson or Miss. B.A. Devaneson were aware of the advertisement about the sale of their property since they never had any intention or even the remote idea of selling their property. During the second week of May 1992, my client states that he was informed by his sisters that some cars are coming and people are inspecting their property.

Our client states that he immediately grew suspicious and rushed to Coonoor and found the fraud, forgery and cheating committed by the said Ashok Andrews in trying to sell their property. Our client on 12.5.1992 went and saw your client at Tiruppur and he was informed about the fact that their property is not for sale and that the Ashok Andrews has been playing fraud. Our client states that your client apparently showed his anger towards the said Ashok Andrews and gave xerox copies of documents and letters given to him by the said Ashok Andrews.

Our client states that from the papers made available to him by your client he came to know that by a letter, dated 3.4.1992, the said Ashok Andrews has informed your client to go to Coonoor at any time between 10.00 A.M. To 6 P.M. with prior intimation. My clients states that by another letter he has informed your client that the actual market value is Rs.40 lakhs for 80 cents and the value of the bungalow is Rs.10 lakhs and the total value of the bungalow is Rs.50 lakhs.

Our client states that Ashok Andrews in that letter stated that he was willing to give a quick purchase discount of Rs.10 lakhs to your client and willing to settle for Rs.40 lakhs. Again the said Ashok Andrews has given a note in hand writing that he can sell the property for Rs.25 lakhs and asked to be contacted at Coonoor in telephone No.20961. Our client states that he has also sent photos of their property to your client. Our client states that your client also gave a copy of the forged sale agreement alleged to have been made in favour of Ashok Andrews for Rs.5 lakhs by Miss. L.V.P.Devaneson.

Our client states that after getting knowledge about the fraud played by Ashok Andrews and the forged sale agreement made by the said Ashok Andrews (making use of the payments made by him towards rent and advance and another payment of advance of rent of Rs.25000/- made on 22.2.1992 to his sister), he immediately gave a complaint against the said Ashok Andrews on 18.5.1992 to the S.I. of police, Coonoor and his sister Miss. L.V.P. Devaneson also gave a complaint to the District Superintendent of Police, Ooty on 18.5.1992 that her signature has been forged and with fraudulent sale agreement and forged documents the said Ashok Andrews is trying to sell their property.

Our client states that he and his sisters also published a public notice in "The Hindu" dt. 22.5.1992 through their lawyers, that their property 'Allendale" is not for sale or for lease.

Our client states that even a cursory perusal of the sale agreement and the so-called authorisation letter in the foreign letter head of Ashok Andrews alleged to have been given by his sister, will clearly demonstrate even to a very ordinary lay man that the transaction was fraudulent and the sale agreement is a sham one."

53. Ex.A.18 notice has been filed on the side of the plaintiff, which itself demonstrates that the alleged sale agreement is a forged one to grab the suit property from the defendants 1 to 3. When the plaintiff has miserably failed to rebut the contents of the notice under Ex.A18, which has been filed by him, by examining and adducing the oral and documentary evidence, it could be construed that the plaintiff himself accepts the contents under Ex.A18 as true.

54. Further, on the side of the defendants Ex.B8 was marked to prove the criminal act of the fourth defendant. Ex.B.8 is paper clipping from the pages of Indian Express, dated 27.7.1992, which reads as under:-

> "Cheat absconding with Rs.12. Lakh - Police are on the looking out for a man who is absconding with Rs.12 lakh obtained by fraudulent methods. It is said that one Ashok Andrew of Nagercoil had hired a bungalow in Upper Coonoor belonging to some people living in Bangalore.
>
> He had reportedly forged the title documents to the house and had enticed some people from Tiruppur to "buy" the bungalow from him. There upon an agreement to sell the house for Rs.29 lakh was entered into and Andrew received an advance of Rs.12 lakh. On the Scheduled day of registration when the buyers came to the bungalow they were shocked to learn that they had been cheated."

55. The above clipping clearly brings to light the fraudulent act of the fourth defendant. This Court feels that Ex.A7, Ex.A18 and Ex.B8 are more than enough to prove the case of the defendants that Ex.A2 is a forged one.

56. That apart, to prove the sale agreement, no witness has been examined by the plaintiff. The admitted and the disputed signatures of the first defendant were sent to the handwriting expert for comparison. Though the handwriting expert, in his report, has stated that there is no dissimilarity in the signatures, it is not sufficient to prove the case of the plaintiff when all other evidences are against the plaintiff and the fourth defendant.

57. When the defendants denied the very execution of the sale agreement, it is the bounden duty of the fourth defendant and the plaintiff as well to prove that the sale agreement is not a forged one by examining the independent witnesses or the witnesses signed in Ex.A2 and it is the burden of the fourth defendant and the plaintiff to discharge, but that burden has not been discharged in the manner known to law, which is fatal to the case of the plaintiff.

58. In view of the above, this Court finds that Ex.A2 Agreement of Sale has not been executed by the first defendant as she has no authority to execute the sale agreement and it is proved that Ex.A2 sale agreement was not executed by the first defendant as found in the above discussions and concluded under Point Nos.1 & 2 and that Ex.A2 is a forged and concocted one by the fourth defendant as well as the plaintiff and therefore, Ex.A2 Sale agreement, dated 22.2.1992 is declared as invalid and whatever the documents said to have been arisen from the forged sale agreement are also declared as invalid.

59. In the light of the above discussion, the regular appeal fails and the same is dismissed confirming the judgment and decree of the trial court in respect of the relief sought for in the suit alone and that the suit in O.S.No.115 of 1994 on the file of the learned District Judge, Nilgiris at Udagamandalam, is dismissed. In other respects, i.e., the execution of sale deed under Ex.A14 by the third defendant in favour of the plaintiff and his share in the suit property and in respect of the share of the first defendant and her legal heirs are not considered as relevant as the suit has been filed seeking the relief as against the second defendant alone. Connected C.M.Ps. are also dismissed. However, there will be no order as to costs.

Sd/-
Assistant Registrar(LA)

//True Copy//

Sub Assistant Registrar

Rnb/mra

To

The District Judge
Nilgris at Udagamandalam.

Copy to

The Section Officer,
V.R.Section, High Court,
Madras.

1 CC to Mr.R. Subramanian, Advocate SR.No. 4240

1 CC to Mr.C.A.Diwakar, Advocate SR.No. 3999

A.S.No.1077 of 2007
and
C.M.P.Nos.1 & 2 of 2007, 1 of 2008 and 1 of 2010

KU (CO)
PSI(25.02.2015)