

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 29.01.2015

Delivered on : 05.02.2015

CORAM

THE HONOURABLE MR. JUSTICE P.R.SHIVAKUMAR
S.A.No.429 of 2007

K.Sundararaj

.. Appellant/ Plaintiff

-Vs-

1.R.Chellamuthu
2.R.Subramaniam
3.P.Sellamuthu
4.R.Palaniamy

.. Respondents/ Defendants

Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree passed by the learned Subordinate Judge, Dharapuram made in A.S.No.32 of 2006 dated 25.01.2007 in reversing the judgment and decree of the learned District Munsif, Kangeyam made in O.S.No.218 of 2004 dated 15.06.2006.

For Appellant : Mr.S.Parthasarathy
Senior Counsel
for Mr.J.Ramakrishnan

For Respondent : Mr.N.Manokaran for R1
Mr.C.Prabakaran for R3 and R4

R2 : NA

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JUDGMENT

The plaintiff in the original suit is the appellant in the second appeal. The first defendant in the suit is the second respondent and the second defendant in the suit is the first respondent in the appeal. Defendants 3 and 4 in the original suit are the respondents 3 and 4 in the second appeal.

2. The plaintiff filed the suit O.S.No.218 of 2004 in the Court of District Munsif, Kangeyam against the respondents herein for a declaration that the deed of general power of attorney dated 26.02.2001 allegedly executed by him in favour of the first

respondent herein/second defendant and registered as Document No.37/Book 4 in the office of Sub-Registrar, Vellakoil is forged, void and invalid, for a declaration that anything done by the first respondent/second defendant pursuant to the said deed of power of attorney dated 26.02.2001 shall be void and not binding on the appellant/plaintiff and for a permanent injunction restraining the respondents herein/defendants from entering into the suit property and disturbing the plaintiff's peaceful possession and enjoyment of the same. The learned trial Judge, by judgment and decree dated 15.06.2006, decreed the suit as prayed for, against which the second defendant (first respondent in the second appeal) alone filed an appeal in A.S.No.32 of 2006 on the file of Sub-Court, Dharapuram. The learned lower appellate Judge, by judgment and decree dated 25.01.2007, reversed the judgment of the trial Court and set aside the decree passed by the trial Court with the result that the original suit came to be dismissed. As against the reversing judgment and decree of the lower appellate Court, the appellant herein/plaintiff has brought forth the present second appeal on various grounds set out in the memorandum of grounds of second appeal.

3. Since the ranks of the respondents are not in line with the ranks of the defendants in the original suit, for sake of convenience and clarity, the parties are referred to in accordance with their ranks in the original suit and in appropriate places, when necessity arises, their ranks in the second appeal also shall be indicated.

4. The plaintiff (appellant in the second appeal) filed the original suit based on the allegations found in the plaint as well as the reply statement that are, in brief, as follows:

The plaintiff's father purchased the first item of the suit properties in two parts - one from C.Palanisamy Chettiar under a sale deed dated 19.02.1971 and the other from Palanisamy and another under a sale deed dated 07.11.1974. After the said purchases, the father of the plaintiff clubbed both the portions into a single plot and the same is shown as Item 1 of the plaint schedule properties. In a portion of Item 1, the father of the plaintiff put up a mill and in the other portion he put up a house and was in enjoyment of the same. On the death of the father of the plaintiff on 04.11.1990, Item 1 of the suit properties became the property of the joint family consisting of plaintiff, his brothers and their mother. Item 2 of the suit properties was purchased by the plaintiff under a sale deed dated 06.02.1985 as the self-acquisition and he was in exclusive possession and enjoyment of the same.

5. The plaintiff had borrowed some amount for his business from the first defendant R.Subramaniam, who was doing finance business in the name and style of "Sri Manikumar Finance" at Vellakoil. While repaying the said amount borrowed from him, there arose a difference of opinion between the plaintiff and the first defendant and consequently, the first defendant made attempts to recover a huge amount, by using coercive methods with the help of his close

associates. Hence, on a complaint made by the plaintiff, a criminal case was instituted against the first defendant and his close associates in C.C.No.129 of 1999 on the file of the Judicial Magistrate, Kangeyam. The institution of the criminal case enraged the first defendant and he along with his henchmen abducted the plaintiff on 01.06.2011 and obtained signatures of the plaintiff in a number of blank papers, blank concur papers and some books and registers. In this regard, the then Sub-Registrar, Vellakoil also assisted the first defendant and his men for getting the signatures of the plaintiff in those blank papers, books and registers. Hence, the plaintiff lodged a complaint and the Vellakoil police registered a criminal case in FIR No.257 of 2001 for offences under Sections 147, 263, 323 & 506(i) IPC.

6. Besides lodging such a complaint, apprehending that the signatures obtained by the first defendant might be used in creating documents, the plaintiff caused publication of a notice in the Tamil Daily "Dinamalar" dated 11.06.2001 cautioning the public that any document that might be created with those stamp papers would not be binding upon him. Subsequent enquiry in the office of the Sub-Registrar, Vellakoil created shock and surprise as the plaintiff found that a general Power of Attorney had been registered on 26.02.2001 as if it had been executed by the plaintiff in favour of the second defendant authorizing him to manage, encumber and alienate the suit properties. No power of attorney in respect of the plaintiff schedule properties was ever executed by the plaintiff either in favour of the second defendant or in favour of any other defendants. The plaintiff believes the deed of power of attorney dated 26.02.2001 to be a forged one and the registration of the document had been secured by impersonation. Based on such a deed of power of attorney, the second defendant appears to have executed sham and nominal sale deeds in favour of the 3rd and 4th defendants in respect of the suit properties.

7. The plaintiff, who obtained a copy of the forged power of attorney dated 26.02.2001, submitted objections dated 05.07.2001 in Objection Petition No.1 of 2001 and again another Objection Petition No.2 of 2001 to the Sub-Registrar, Vellakoil respectively not to register any document executed on his behalf and not to deliver the alleged sale deeds executed by the second defendant in favour of Defendants 3 and 4. The plaintiff lodged a further complaint with Vellakoil Police and he sent a written complaint to the higher police officials on 12.07.2001 as the Station House officer of Vellakoil Police Station refused to receive the complaint. Thereafter, the defendants threatened and made an attempt to trespass into the property, but some how or other the plaintiff was able to thwart their attempts. The defendants went away with the proclamation that they would again come and take possession and out of necessity he filed the suit for the above said reliefs.

8. The case of the defendants (respondents in the appeal) as culled out from their written statements can be briefly stated thus:

The plaintiff borrowed huge amounts from the first defendant but

he had not come forward to pay any amount either towards principal or interest till the filing of the suit. The plaintiff had cultivated a practice of borrowing amounts from various persons and lodging police complaints against such creditors when the creditors pressed for repayment of the loan on his default to do so. The complaint against the first defendant leading to the institution of C.C.No.129 of 1999 in the Court of Judicial Magistrate, Kangeyam was one such false complaint. The said criminal case also subsequently resulted in the acquittal of the persons accused therein. Subsequent to the judgment of acquittal in the above said criminal case, the plaintiff attacked the first defendant when he approached him to demand repayment of the loan, enacted a drama, lodged a complaint with the police in order to wreck vengeance. The first defendant, who sustained injuries, got admitted in the Government Head Quarters Hospital, Erode and a case came to be registered based on his complaint in Vellakoil Police Station as FIR No.257 of 2001.

9. The story of abduction on 01.06.2001 and forcible extraction of his signatures and left thumb impression was highly imaginary and there is no truth in it. The fact that there was a time gap between 26.02.2001, the date on which power of attorney was executed and 01.06.2001, the date of lodging of complaint will make it clear that the plaint averments are not tenable. The first defendant is not a necessary party and hence the suit is liable to be dismissed as against the first defendant as it is bad for misjoinder of parties. The plaintiff duly appointed the second defendant as his power agent for the purpose of selling the suit properties. The original deed of power of attorney and all other documents were also handed over to the second defendant and by virtue of the power granted to him under the deed of power of attorney, he executed sale deeds on 05.03.2001 in favour of defendants 3 and 4 and also put them in possession of the suit properties. The sale proceeds realized were also paid to the plaintiff who himself collected the amount. The second defendant did not have any interest in respect of the suit property prior to the execution of the power of attorney in his favour and subsequent to the execution of the sale deeds in favour of defendants 3 and 4 on the strength of the power of attorney.

10. When the title of the plaintiff in respect of the suit properties has been disputed, he ought to have sought for declaration of his title. He should have prayed for recovery of possession of the properties, since the purchasers, namely defendants 3 and 4 are in possession of the suit properties. The plaintiff himself voluntarily executed the deed of power of attorney dated 26.02.2001 in favour of the second defendant in the presence of witnesses and he himself presented the said document before the registering authority for registration. The defendants 3 and 4 are bonafide purchasers and they have purchased the suit properties in good faith without notice of any defect in the power given to the second defendant. After purchase, the defendants 3 and 4 are in possession and enjoyment of the suit properties and mutation of their names has also been made in the revenue and other records. Fourth defendant has purchased the first item of the suit properties. He also obtained a loan on the

security of the property and also leased out the property purchased by him. The third defendant has purchased the second item of suit property. Hence, the suit filed by the plaintiff should be dismissed with costs.

11. As many as four issues and four additional issues were framed by the trial Court. In the trial that was conducted on the basis of the issues and additional issues framed by the trial Court, two witnesses were examined as Pws 1 and 2 and 27 documents were marked as Exs.A1 to A27 on the side of the plaintiff. Two witnesses were examined as Dws 1 and 2 and two documents were marked as Exs.B1 and B2 on the side of the defendants. In addition, five documents produced by the witness were marked as Exs.X1 to X5 and three documents were marked as Court documents, namely Exs.C1 to C3.

12. At the conclusion of trial, the learned trial Judge, on an appreciation of evidence, accepted the case of the plaintiff and decreed the suit as prayed for by judgment and decree dated 15.06.2006. As against the decree of the trial Court neither the first defendant, nor the defendants 3 and 4, who claimed to have purchased suit properties and claimed to be in possession and enjoyment of the same, chose to prefer any appeal. On the other hand, the second defendant R.Chellamuthu alone preferred an appeal on the file of Sub-Court, Dharapuram in A.S.No.32 of 2006. The learned lower appellate Judge by his judgment and decree dated 25.01.2007 allowed the appeal, set aside the decree passed by the trial Court and dismissed the suit filed by the plaintiff. The said reversing judgment and decree of the lower appellate Court is challenged by the plaintiff in the present second appeal.

13. As per Section 100 of the Code of Civil Procedure, a further appeal (second appeal) from the appellate decree of a Court subordinate to the High Court shall lie to the High Court provided such second appeal involves a substantial question of law. It also provides that the party preferring the second appeal should precisely formulate the substantial question of law involved in the second appeal and incorporate the same in the grounds of second appeal with a distinctive head. If the High Court is satisfied that a substantial question of law is involved in the second appeal, it shall formulate the same and then hear the appeal on such substantial question of law. During such hearing, it shall be open to the opposite party to contend that no substantial question of law is involved in the second appeal and the substantial question of law formulated by the High Court at the time of admission is, in fact, not a substantial question of law involved in the second appeal. In compliance with the mandate provided under Section 100 CPC, the following questions were formulated at the time of admission of the second appeal as substantial questions of law involved in the second appeal:

1. Are not the judgment and decree of the 1st Appellate Court vitiated on account of non-consideration of the alteration in Ex. A25 endorsement which conclusively establishes the fact that

all is not well with the execution of the alleged power of attorney?

2. Whether under Section 114 of the Indian Evidence Act, the first appellate Court is right in law in not drawing adverse inference against the defendants for concealing the alleged original power of attorney in spite of order passed under Ex.A21 directing them to produce the original.
3. Whether the non-examination of concerned Sub-Registrar who took active part in registering the subject matter of alleged power of attorney deed by the defendant's side is fatal to the defendant's case?
4. Are not the judgment and decree of the first appellate Court vitiated for its failure to comply with the provisions under Order 41 Rule 31 CPC r/w. Section 96 of CPC?

14. The arguments advanced by Mr.S.Prathasarathy, learned senior counsel appearing on behalf of learned counsel on record for the plaintiff (appellant), by Mr.N.Manokaran learned counsel appearing for the second defendant (first respondent) and by Mr.C.Prabakaran, learned counsel appearing for defendants 3 and 4 (respondents 3 and 4) were heard. The materials available on record were also perused.

15. Order XLI Rule 31 of the Code of Civil Procedure deals with the contents of the judgment of an appellate Court. It says that the judgment of the appellate Court shall be in writing and shall state the points for determination; decision thereon, the reasons for the decision and where the decree appealed from is reversed or varied, the relief to which the appellant is entitled. As amended by Madras High Court, Rule 31 of Order XLI CPC reads as follows:

"The judgment of the Appellate Court shall be in writing and shall state—

- (a) the points for determination;
- (b) the decision thereon;
- (c) the reasons for the decision; and -
- (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled, and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein."

Provided that where the presiding Judge is specially empowered by the High Court to pronounce his judgment by dictation to a shorthand writer in Open Court, the transcription of the judgment so pronounced, shall after such revision as may be deemed necessary, be signed by the Judge. "

Pointing out the above said provision of law, learned senior counsel for the plaintiff (appellant) argued that the lower appellate Court did not follow the mandatory provision in delivering the judgment in the appeal before the lower appellate Court. According to the

submissions made by the learned senior counsel for the plaintiff (appellant), technical compliance of the requirements of the said rule is not one contemplated therein and on the other hand, it mandates substantial compliance with all the requirements stipulated in Rule 31 of Order XLI of the Code of Civil Procedure. Learned senior counsel for the plaintiff (appellant) took this Court through the Judgment of the lower appellate Court and pointed out the fact that the lower appellate Court, without framing necessary points for determination, simply framed a single point as the point for determination and decided the entire appeal. The said single point framed by the lower appellate Court also, according to the learned counsel for the appellant/plaintiff, shall not show compliance with the requirements of Order 41 Rule 31 CPC to the slightest effect as the exact point framed for determination was "Whether the appeal could be allowed?"

16. Per contra, it is the contention of the learned counsel for the defendants (respondents) that though necessary points for determination in detail were not formulated and stated in the judgment of the lower appellate Court, the requirement of Order XLI Rule 31 CPC was substantially complied with insofar as the lower appellate Court discussed all necessary issues with reference to the pleadings and evidence, provided answers for the possible issues to have been framed in the appeal and based on such finding alone, the ultimate result of the appeal was provided in the last paragraph of the judgment of the lower appellate Court.

17. This Court is not in a position to accept the above said submission of the learned counsel for the defendants (respondents). The learned counsel for the plaintiff (appellant) has rightly contended that the lower appellate Court failed in its duty to state the necessary points for determination and provide the decision for those points with reasons thereon. Simply framing an issue as "whether the appeal is liable to be allowed?" shall not amount to substantial compliance and even a technical compliance of the requirements of Order XLI Rule 31 CPC. Time and again this Court has come heavily upon the lower appellate Courts in adopting a short cut method of framing a single issue as to whether the appeal has to be allowed? and this Court also deprecated such a practice. Despite there being such a clear mandate in Order XLI Rule 31 C.P.C, which has also been interpreted by a catena of decisions of this Court as well as the Apex Court that substantial compliance of such requirements is needed, the learned lower appellate Judge chose to commit the very same blunder unmindful of the various directions issued by this Court, various other High Courts and the Supreme Court. Suppose, the lower appellate Court has divided the judgment in such a way to show that necessary points for determination were discussed in separate paragraphs and decisions thereon with reasons for such decisions were also provided thereon, it may be possible for this Court to take the omission to state the points for determination in specific terms to be a technical flaw, supplement those points, and consider whether the decisions rendered by the lower

appellate Court were correct. To the utter disappointment and dismay of this Court, the learned lower appellate Judge has omitted to follow the mandates provided in Clause (a) to (c) in Order XLI Rule 31 CPC.

18. Clause (d) of the above said rule makes it clear that in case the appellate Court confirms the decree of the trial Court, nothing more need be stated than stating that the appeal is dismissed with or without costs. In the event of reversal of or variation / modification of the decree of the trial Court, the appellate Court is duty bound to state what are the reliefs to which the appellant is entitled. While setting aside the decree of the trial Court, the appellate Court must precisely state in what respect the decree of the trial Court is set aside and in what respect and to what extent it is varied / modified and it should also state what shall be the scope of the modified decree in case of variation / modification. In case of reversal of the decree, the appellate Court should also make it clear whether the reversal gives a complete disposal to the suit and if so, in what manner. If it is a case of appeal filed by the plaintiff, it must clearly state the reliefs to which the plaintiff (appellant) is entitled. If it is an appeal by the defendant, it must state what shall be the ultimate result of the suit. It shall not be proper to simply state that the trial Court's decree is set aside without stating what shall be the ultimate result of the suit. If the above yardsticks are applied to the judgment of the lower appellate Court, which is the subject matter of challenge in the second appeal, this Court can, without any hesitation, hold that the judgment of the lower appellate is not in conformity with the requirements of Clause (d) of Rule 31 of Order XLI of CPC. For all the reasons stated above, the fourth substantial question of law is answered accordingly holding that the judgment of lower appellate Court is not a judgment in the eye of law as it does not comply with the mandatory requirements of Rule 31 of Order XLI of the Code of Civil Procedure.

19. The case of the plaintiff (appellant) is that the deed of Power of Attorney dated 26.02.2001 based on which the second defendant (first respondent) executed sale deeds in favour of the defendants 3 and 4 (respondents 3 and 4) is a forged and fabricated document and the registration of the same was secured by impersonation. Section 89 of the Indian Evidence Act, 1872 contemplates a presumption that every document called for and not produced after notice to produce was attested, stamped and executed in the manner required by law. Relying on the said provision and also Section 114 of the Evidence Act, it is contended on behalf of the appellant/plaintiff that since the second defendant, failed to produce the original deed of power of attorney dated 26.02.2001, an adverse inference should have been drawn against him and that it is a fit case in which it shall be presumed that the document has not been produced because the same is forged as claimed by the plaintiff. It is true that when a party to the suit is directed by the Court or served with a notice to produce a document in his custody or under

his control and such party fails to produce the same, adverse inference to the effect that the production of the same would adversely effect his case can be drawn. But, such an adverse inference cannot be drawn without there being a clear proof that the document directed to be produced is in fact in his custody or power. In the case on hand, the plaintiff did not serve a notice on the second defendant to produce the original deed of power of attorney. He also did not file any application under Order XI Rule 16 CPC to serve notice on the second defendant to produce the original deed of power of attorney dated 26.02.2001. No interrogatories came to be served specifically inviting a plea as to whether the original deed of power of attorney dated 26.02.2001 was with the second defendant as contended by the plaintiff. No application for a direction to produce the said document also came to be filed by the plaintiff in the suit.

20. On the other hand, the plaintiff has chosen to produce a certified copy of an order of the learned Judicial Magistrate, Kangeyam dated 15.11.2003 made in CrI.M.P.No.2149 of 2002 in C.C.No.179 of 2002 as Ex.A21 in the suit. The said Criminal Miscellaneous Petition came to be filed under Section 91 Cr.P.C by the plaintiff in the above said criminal case, which was instituted on his complaint. Even in the said petition, a clear stand was taken by the second defendant (first respondent herein) that the original deed of power of attorney dated 26.02.2001 was not available either with him or with other co-accused since the original deed of power of attorney had been taken back by the appellant herein/plaintiff after the purpose for which the same was executed had been accomplished by execution of the sale deeds. It was also contended therein that when the original was with the plaintiff (the complainant in the criminal case) either by producing the same or by summoning the copy of the document and the relevant registers from the concerned Sub-Registrar Office, the genuineness or otherwise of the document could be tested. However, the learned Judicial Magistrate holding that since the execution of sale deeds in favour of defendants 3 and 4 had been admitted, the same would be enough to negative the contention of the second defendant and other co-accused that the document was not in the custody of either of them. Accordingly, the learned Judicial Magistrate, Kangeyam seems to have allowed the criminal miscellaneous petition and directed the second defendant (first respondent) to produce the deed of power of attorney dated 26.02.2001 registered as Document No.37/BK4 of 2001 in the office of the Sub-Registrar, Vellakoil.

21. A reading of the said order will make it clear that the learned Judicial Magistrate had not rendered a concrete finding that the said document was in the custody of the second defendant. It will be quite obvious from the penultimate paragraph of the order. It was stated therein that in case the documents were in the custody of Accused Nos.6 and 7, who are the defendants 3 and 4, they should produce the same into Court. Apart from the ambiguity in the finding, it is an admitted fact that the above said criminal case in

C.C.No.179 of 2002 ultimately resulted in the acquittal of the accused therein. The same would indicate that no adverse inference was drawn in the proceedings in which direction to produce the document came to be issued. Hence, the said order shall not be in anyway helpful to support the case of the plaintiff (appellant) that an adverse inference based on the non-production of the original deed of Power of Attorney dated 26.02.2001 should be drawn against the second defendant.

22. However an attempt was made on behalf of the plaintiff to show that there was an admission on the part of the second defendant that he was having in his possession the original deed of power of attorney at the time of filing of the written statement. In such an attempt, the copy of the written statement of the second defendant served on the counsel for the plaintiff has been produced as Ex.A20. Pointing out the fact that something more has been added in Paragraph 17 of the written statement available in the case bundle, an attempt was made to contend that the second defendant committed an act of tampering with the records by substituting the written statement originally filed into the Court with a new one containing more averments in Paragraph 17 of the written statement. In Ex.A20, paragraph 17 reads as follows:

"17.This defendant begs to submit if really if there is any enmity even at the execution of the power deed, the plaintiff can express his unwillingness and other circumstances prevailing at the time of execution before the Registrar Office. But nothing is happened in this case. But, the plaintiff himself executed the power deed in favour of this defendant with the presence of witnesses and presented the said document before the Registrar Office and the original power also handed over to this defendant and even without lapse of time, this defendant acted in a legitimate manner and duly sold the suit properties."

(The exact passage with all mistakes without correction has been reproduced)

It is true that in the written statement of the second defendant available in the case bundle the following averments have also been added in Paragraph 17:

"After completion of the execution, the plaintiff received the entire sale consideration amount and received back the original power deed due to the vendors are more than one person, and assured to issue the certified copies of the power deed to the defendant's 3 and 4. But he failed to do so. And he lodged a false and vexatious private complaint in C.C.No.179 of 2001 before the judicial Magistrate of Kangeyam, against this defendant and others with an ill-design in his mind after laps of long time. Originally the plaintiff received the entire sale consideration and the original power deed and now filed the present suit and the private complaint with a ulterior motive to cheat and defraud the right of the defendants."

23. The necessary inference from the above said portion in Paragraph 17 and other corrections found in the written statement available in the case bundle, which are not reflected in the copy served on the counsel for the plaintiff produced as Ex.20, will indicate that before the filing of the written statement, copy was served on the counsel and after serving the copy, certain corrections and additions in Paragraph 17 came to be made. Further, even in Ex.A20 (copy of the written statement) served on the plaintiff, there is no unequivocal admission that the deed of power of attorney was available with the second defendant. It had been provided therein that after the registration of the document it was handed over to the second defendant and he acted on the basis of the power given to him under the said document by executing the sale deeds in favour of defendants 3 and 4. That cannot be stretched further to interpret that even after the execution of the sale deeds in favour of defendants 3 and 4, the second defendant continued to keep the power of attorney with him and he was in possession of the same as on the date of filing of the written statement. The later part of Paragraph 17 would make it clear that the first respondent/second defendant took a plea that the original Power of Attorney was taken back by the plaintiff besides receiving the sale consideration. Under the said circumstances, it shall not be conducive for the interest of justice to draw an adverse inference against the second defendant under Section 114 of the Indian Evidence Act on the premise that he had concealed the alleged original deed of power of attorney. The second substantial question of law is answered accordingly against the appellant holding that the appellate Court has not committed any error in law in not drawing adverse inference against the respondents for not producing the original deed of power of attorney dated 26.01.2001 even after the passing of the order in Ex.A21 by the Criminal Court in the criminal proceedings.

24. It is the case of the appellant/plaintiff that the deed of Power of Attorney dated 26.02.2001 registered as Document No.37/BK4 of 2001 in the office of the Sub-Registrar, Vellakoil, is a forged one and that the registration of the said document was secured by impersonation. In addition to the above said plea, the appellant/plaintiff has also taken a plea that after about three months and a week from the date of registration of the deed of power of attorney, he was abducted and his signatures and thumb impressions were obtained in several stamp papers, concur papers, books and registers. It is also his contention that the then Sub-Registrar helped the first defendant in obtaining his signatures and thumb impressions. It is not clear as to what is the attempt made by the plaintiff (appellant) by making such an averment. He has not made it clear whether the thumb impression found in the thumb impression register maintained in the office of the Sub-Registrar is not that of the plaintiff (appellant). At one place, he took a stand that both the signature and thumb impression found in the documents relating to the registration were not his signature and thumb impression and that they were created by forgery by impersonation. However, at a later point of time, he has taken a stand that the thumb impression found

in the thumb impression register alone is that of him and the signature found therein is forged.

25. In this regard, it is the further case of the plaintiff that the Sub-Registrar, who registered the Power of Attorney was proceeded with Departmentally and was demoted and transferred to another place. The attempt made by the plaintiff to prove such a punishment to the Sub-Registrar by examining his Successor as PW2 proved to be a failure. PW2 made a clear assertion that his predecessor was not punished with reduction in rank and on the other hand, he was simply transferred. PW2 was examined to speak about the certified xerox copies of the documents relating to the registration of the deed of power of attorney dated 26.02.2001, which have been marked as Exs.X1 to X5. Ex.X1 is the certified extract (xerox) of the book containing daily accounts of the registrations in the office of the Sub-Registrar, Vellakoil relating to 26.02.2001. The 5th document registered on the said date is the Deed of Power of Attorney concerned in this case. The certified Xerox copy of the receipt issued to the plaintiff (appellant) is Ex.X2. In Ex.X2, it is noted that the appellant/plaintiff authorized S.Rajakrishnan, the first attester of the deed of Power of Attorney, to receive the registered document from the office of the Sub-Registrar. The signature of the first attester, which has been attested by the plaintiff, has been marked as Ex.X4. Certified xerox copy of concerned page of the thumb impression register dated 26.02.2001 has been marked as Ex.X3. Another certified xerox copy of the same sent to the Inspector of Police, Vellakoil Police Station with a covering letter of the District Registrar, Erode has been produced as Ex.A25. Certified xerox copy of the document filed with the Sub-Registrar containing the signature of the executent of the document has been marked as Ex.X5.

26. It transpires, during the course of investigation of the case registered in Crime No.251 of 2001 of Vellakoil Police Station, the Inspector of Police, Finger Print Bureau, Erode compared the admitted left thumb impressions of the appellant/plaintiff and the left thumb impression found in the original of Ex.X3 and on such comparison, submitted an opinion that both the thumb impressions were the left thumb impressions of one and the same person. Only after the said opinion came to be noticed by the plaintiff, he shifted his stand by contending that the thumb impression found in the thumb impression register was obtained subsequently, whereas the signature for registration of the document was forged by impersonation. If at all the appellant/plaintiff was cock sure of his contention, he could have very well taken steps to have his admitted contemporary signatures compared with the signatures found in Exs.X3, X4 and X5. But he has not chosen to do so. It is the plaintiff, who has approached the Court with the suit for a declaration that the deed of power of attorney is a forged one and hence, null and void and also a declaration that anything one or executed on the strength of the deed

of power of attorney shall also be null and void. It is quite doubtful as to whether he has discharged his burden at least to the extent of shifting the burden on the defendants to prove their defence case. It is true that in Ex.X3, a facsimile copy of which is marked as Ex.A25, something has been written and scored out. When the Sub-Registrar who produced the same, was examined as PW2, the same was not brought to his notice and his explanation was not sought for. Whether the said correction will amount to material alteration capable of being projected against the defendants itself is questionable. Who made the correction and how the correction came to be made could have been elicited by the plaintiff through PW2. But he failed to do so. There is also a possibility of such mutilation having been made to project it as a ground for nullifying the document registered. In any event, the same cannot be said to be a material alteration made in the original deed of Power of Attorney making it unreliable. Therefore, the contention of the plaintiff that the said discrepancy found in Ex.X3 and its facsimile Ex.A25 would conclusively establish the fact that all was not well with the execution of the deed of Power of Attorney cannot be countenanced. The first substantial question of law is answered accordingly.

27. However, the fact remains that neither the trial Court nor the lower appellate Court adverted to the said aspect. In the light of the fact that there is some correction in the thumb impression register relating to office attendance for registration of document, copies of which have been marked as Exs.X3 and A25, the Courts below ought to have considered the effect of the same and the failure to do so will amount to an omission to consider a material aspect for rendering a correct and complete finding regarding the issue in controversy. The examination of the person who held the office of the Sub-Registrar, Vellakoil as on 26.02.2001, could have thrown light on the above said aspect of the case. Unfortunately, neither the plaintiff nor the defendants chose to summon him to examine as a witness. The plaintiff (appellant) could have summoned the then Sub-Registrar to bring out the truth. Having failed to do so, he has tried to cause the blame on the defendants (respondents). Therefore, the third substantial question of law has to be answered holding that the non-examination of the Sub-Registrar concerned, who registered the deed of Power of Attorney, shall be a minus point for the respondents/defendants. But, it cannot be stated to be vital to their defence case. The fact remains that the parties to the suit have not chosen to adduce the best evidence for resolving the controversy. The plaintiff, could have taken steps for getting the opinion of a handwriting expert as to whether the signatures found in Exs.X3, X4 and X5 are that of the appellant/plaintiff are not? Similarly, defendants have also showed lethargy and failed to adduce the best evidence available at their disposal. In fact, when it is the case of the plaintiff that the deed of Power of Attorney itself is a forged one, the respondents 3 and 4, who have purchased the property on the strength of the power of attorney, could have evinced interest to sustain their title. They have not chosen to lead any

evidence. The failure on their part to lead evidence can be understood, because in case the deed of power of attorney is held to be null and void, their remedy would lie against the second defendant (first respondent). That is the reason why the second defendant (first respondent) alone chose to file the appeal as against the decree of the trial Court granted in favour of the plaintiff/appellant herein. However, even the second defendant had not chosen to enter the box; nor did he examine any one of the attestors in proof of his defence case. Under the said circumstances, the lower appellate Court is not right in law in dismissing the suit besides setting aside the decree granted by the trial Court in favour of the plaintiff.

28. In the peculiar facts and circumstances on hand, this Court is of the considered view that it is a case in which both the parties have failed to adduce the best evidence available at their disposal and that hence, the suit itself has to be remitted back to the trial Court for fresh disposal after giving liberty to both the parties to adduce additional evidence.

29. For all the reasons state above, this Court comes to the conclusion that the decree of the lower appellate Court is bound to be set aside. The decree of the trial Court is also liable to be set aside and the original suit is to be remitted back to the trial Court for fresh disposal after giving the parties to the suit an opportunity to adduce additional evidence.

30. In the result, the second appeal is allowed and the judgment and decree of the lower appellate Court dated 25.01.2007 made in A.S.No.32 of 2006 and judgment and decree of the trial Court dated 15.06.2006 made in O.S.No.218 of 2014 are set aside. The original suit is remitted back to the trial Court for fresh disposal after giving an opportunity to the parties to the suit to adduce additional evidence. The trial Court shall make every endeavour to dispose of the suit as early as possible, in any event within a period of six months from the date of receipt of records from this Court. The appellant/plaintiff and the first respondent/second defendant shall be entitled to the refund of the Court fee paid in the second appeal and the appeal suit respectively in accordance with the rules. There shall be no order as to costs.

Sd/-
Deputy Registrar (Judicial)

/true copy/

Sub Asst. Registrar

gpa

To

1) The Subordinate Judge,
Dharapuram

2) The District Munsif
Kangeyam

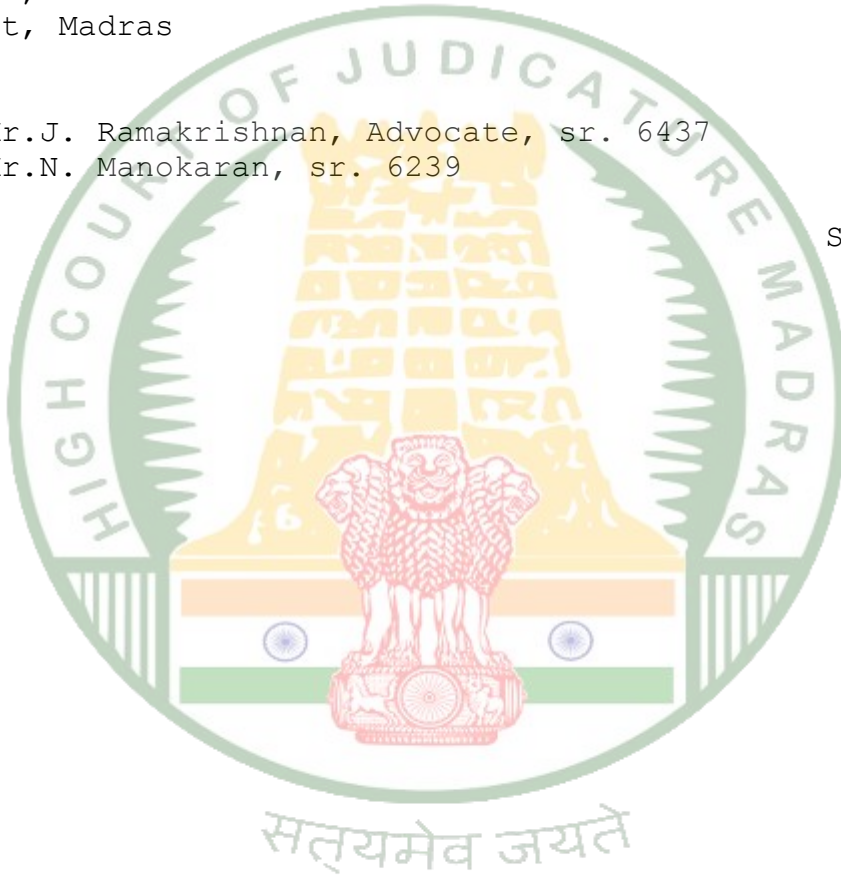
3. The section officer
VR Section,
High court, Madras

1 cc to Mr.J. Ramakrishnan, Advocate, sr. 6437

1 cc to Mr.N. Manokaran, sr. 6239

S.A.No.429 of 2007

TEJ (CO)
kk 17/3



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