

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: **24.10.2016**

CORAM:

THE HONOURABLE MR.**JUSTICE K.K.SASIDHARAN**

C.R.P.(P.D.) Nos.1738,2672 of 2016,
CMP.Nos.9222 and 13846 of 2016

CRP (Pd)No.1738 of 2016

T.S.Balasubramanian

...Petitioner

versus

1.T.D.Saravanan

2.S.Pushpavalli

3.P.Kabali

4.Pallavaram Mutual Benefit Fund Limited,
Rep. by its Secretary,
75, Shanmugam Road, West Tambaram,
Chennai - 600 045.

...Respondents

(Respondents 3 and 4 are given up)

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India, against the fair and decreetal order made in I.A.No.185 of 2016 in O.S.No.276 of 2015 dated 27.04.2016 on the file of Subordinate Court, Tambaram.

For Petitioner : Mr.R.Thiagarajan

For Respondents : Mr.T.Easwaradhas for R1 and R2

CRP (Pd)No.2672 of 2016

1.T.D.Saravanan
2.S.Pushpavalli

...Petitioners

versus

1.T.S.Balasubramanian
2.P.Kabali
3.Pallavaram Mutual Benefit Fund Limited,
Rep. by its Secretary,
75, Shanmugam Road, West Tambaram,
Chennai - 600 045.

...Respondents

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India, against the order and decretal order of the Hon'ble Sub-court, Tambaram made in I.A.No.66 of 2016 in O.S.No.276 of 2015 dated 29.03.2016.

For Petitioners : Mr.T.Easwaradhas
For Respondents : Mr.R.Thiagarajan for R1

COMMON ORDER

When there is a suit virtually challenging the Power of Attorney and the registered document executed on the strength of the said Power of Attorney and a connected suit for declaration on the basis of the Power of Attorney and the Sale Deed, who has to lead evidence at the first instance as provided under Order XVIII Rule 1 of the Code of Civil Procedure is the core issue in the revision petition in CRP (Pd) No.2672 of 2016.

2. The direction given by the Trial Court to the plaintiff to produce the copy of the proceedings in O.P.No.840 of 2012 is under challenge in the connected revision petition in CRP(Pd) No.1738 of 2016.

3. The petitioner in CRP (Pd) No.1738 of 2016 filed a suit in O.S.No.276 of 2015 before the Sub-Court at Tambaram praying for a decree of permanent injunction. The respondents in CRP (Pd) No.1738 of 2016 filed a civil suit in O.S.No.411 of 2007, before the Principal District Court at Chengalpet, praying for a decree of declaration and consequential injunction, which was subsequently transferred to the Sub-Court at Tambaram and re-numbered as O.S.No.156 of 2010.

4. The petitioner in CRP (Pd) No.1738 of 2016, who is the plaintiff in O.S.No.276 of 2015, contended that from the Encumbrance Certificate in relation to the suit property, it was found that the third respondent fabricated a General Power of Attorney dated 06.01.1999 and sold the suit property to respondents 1 and 2. The Sale Deed was registered as Document No.4691 of 1999. The petitioner, without challenging the execution of Power of Attorney and the related sale deed filed the suit for injunction alone.

5. The respondents 1 and 2 in CRP (Pd) No.1738 of 2016, who are the petitioners in CRP (Pd) No.2672 of 2016 filed an independent suit in O.S.No.411 of 2007. It was a suit for declaration and injunction.

6. The suits are now pending on the file of Sub-Court at Tambaram. The Trial Court passed an order directing joint trial of both the suits.

7. Before the Trial Court, the first respondent in CRP (Pd) No.2672 of 2016 filed an application in I.A.No.66 of 2016 to direct the petitioners, who are respondents 1 and 2 in CRP (Pd) No.1738 of 2016 to lead common evidence at the first instance. The Trial Court allowed the said application following the judgment in **Bajaj Auto Limited, rep. by S.Ravikumar v. TVS Motor Company Limited [2010 (6) CTC 225]**. The order is challenged in CRP (Pd) No.2672 of 2016.

8. The respondents 1 and 2 in CRP (Pd) No.1738 of 2016 filed an application in I.A.No.185 of 2016 to direct the petitioner to produce a copy of the Probate proceedings in O.P.No.840 of 2012. The application was allowed by the Trial Court even without giving time to the

petitioner to file counter affidavit. The said order is under challenge in CRP (Pd) No.1738 of 2016.

CRP (Pd) No.2672 of 2016

9. The first respondent filed an application in I.A.No.66 of 2015 to direct the petitioners to lead evidence at the first instance. The Trial Court found that the petitioners filed the suit for declaration and injunction. The first respondent filed the suit for injunction. Since comprehensive relief was prayed for in the connected suit in O.S.No.411 of 2007, the learned Trial Judge was of the view that the burden is on the petitioners to lead evidence. The learned Judge relied on the decision of a Division Bench of this Court in **Bajaj Auto Limited case** (cited supra).

10. The suit before the Division Bench in **Bajaj Auto** case was not one for injunction. It was a comprehensive suit for declaration and that too for a decree of non-infringement. The other suit was a suit for permanent injunction and rendition of accounts. The Division Bench found that being the plaintiff in a comprehensive suit for declaration and that too for a decree of non-infringement, the plaintiff in the said suit has to begin the evidence.

11. In the subject case, the question is as to whom the burden of proof lies. The first respondent was well aware of the execution of registered Power of Attorney and the Sale Deed executed in favour of the petitioners. The plaint filed by the first respondent in O.S.No.276 of 2015 contained a clear statement with regard to the fabrication of Power of Attorney and the Sale Deed executed on the basis of the said Power of Attorney in favour of the petitioners. Even then, the first respondent has not filed the suit for declaration. It was only the petitioners, who filed the suit for declaration and consequential injunction.

12. The question is as to who would fail in case no evidence is let in. The first respondent seeks a decree of injunction, notwithstanding the execution of the Sale Deed in favour of the petitioners. The first respondent has taken up a contention that the Power of Attorney was fabricated and as such, the consequential Sale Deed has no legal sanctity. It is therefore the responsibility of the first respondent to begin the evidence at the first instance. The petitioners are armed with two documents. The validity of those documents were not challenged before the Trial Court. Therefore, it cannot be said that the responsibility is on the side of the petitioners to lead evidence at the

first instance. The learned Judge followed the judgment in **Bajaj Auto Limited case** (cited supra) without ascertaining the true factual position. I am therefore of the view that the Trial Court was not correct in directing the petitioners to lead evidence at the first instance. The impugned order is therefore, liable to be set aside.

CRP (Pd) No.1738 of 2016

13. The respondents 1 and 2 filed an application in I.A.No.185 of 2016 to direct the petitioner to produce the copy of the petition in O.P.No.840 of 2012. The order passed by the Trial Court does not contain any indication that notice was given to the petitioner to produce the copy of the documents. Similarly, there is nothing on record to show as to whether reasonable opportunity was given to the petitioner to file counter affidavit and arguments were heard before passing the order. The application in I.A.No.185 of 2016 is silent as to whether the respondents have taken earnest efforts to obtain a certified copy of the document. The learned Judge without ascertaining the background facts directed the petitioner to produce the document. Since sufficient opportunity was not given to the petitioner to oppose the application, the impugned order is liable to be set aside.

K.K.SASIDHARAN, J.

(svki)

14. In the result, the impugned orders dated 29.03.2016 and 27.04.2016 are set aside. The first respondent in CRP (Pd) No.2672 of 2016 is directed to lead evidence at the first instance.

15. The application in I.A.No.185 of 2016 in O.S.No.276 of 2015 is restored to file. The petitioner is given two weeks time from the date of receipt of a copy of this order to file counter in the said application. The learned Trial Judge is directed to consider the application afresh and pass appropriate order on merits and as per law.

16. The Civil Revision Petitions are allowed as indicated above. No costs. Consequently, connected miscellaneous petitions are closed.

24.10.2016

Index:Yes/No
svki

To
The Sub-Court, Tambaram

C.R.P.(P.D.) Nos.1738 and 2672 of 2016