IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 06.02.2017

PRONOUNCED ON: 07.04.2017

CORAM:

THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

CS.No.1170 of 2009

Elizabeth John ... Plaintiff

Vs

Dr.M.J.John ... Defendant

Prayer:- This Civil Suit is filed under Order IV Rule 1 of the Original Side Rules read with Order VII Rule 1 of CPC for the reliefs as stated therein.

For Plaintiff : Mr.A.K.Sriram

For Defendant : Mr.V.Ramesh

JUDGEMENT

This civil suit had been filed, to pass a judgement and decree, against the Defendant:-

(a) for declaration that the Plaintiff is the sole and absolute owner of Flat No.11A, Golden Altius, AK-3/4, 4th Avenue, Anna Nagar, Chennai 600040, more fully described in the Schedule, after declaring that the sale deed, bearing Doc.No.4822 of 2006, dated 26.12.2006, SRO, Anna Nagar, as null and void, inoperative and non-est in law.

(b) for consequential relief of recovery of possession of the schedule mentioned property.

(c) for recovery of a sum of Rs.42,86,347/- along with interest at 18% per annum from the date of plaint till the date of realisation.

(d) for a sum of Rs.30,000/- per month towards damages for use and occupation for the schedule mentioned property from the date of the plaint till the date of handing over possession.

(e) directing the Defendant to pay the costs of the suit.

2. **Plaint:-** The plaintiff is the wife of the defendant. They got married on 21.07.1983. They have two grown up children, who were aged 23 years and 20 years on the date of filing of the suit. The plaintiff was the only child of her parents. Her mother Mary Joseph was the absolute owner of the premises bearing Door No.I-37, Anna Nagar East, Chennai 600 102. After the death of her father, the mother of the plaintiff had offered the property for development to Golden Homes Private Limited. The plaintiff was present when the Joint Development Agreement was entered into on 23.09.2004. She also assisted her mother. She then left for Toronto, Canada where she was working from February 2003. After that period, her mother was looked after by the defendant herein. The mother of the plaintiff was aged and was unable to manage her own affairs. The defendant gave an assurance that he would take care of the mother of the plaintiff and also her affairs. The plaintiff had also signed the Joint Development Agreement dated 23.09.2004. According to the Joint Development Agreement, the promoter was to build 8 flats, out of which 4 flats and a sum of Rs.31,00,000/- were to be given to the plaintiff's mother. In December 2004, the defendant took control of the entire transaction and persuaded the plaintiff's mother to forego 2 flats and instead, take 2 flats in

another project called “Golden Altius” at No.AK-3/4, 4th Avenue, Anna Nagar, Chennai 600 040. The plaintiff's mother had entered into two agreements of sale and two builders agreements dated 10.12.2004. The defendant had persuaded the plaintiff's mother to include him as a party to the above 4 agreements. It had been stated in the agreement that the sale consideration of Rs.16,31,300/- and Rs.15,77,000/- for the two flats at Golden Altius amounting to Rs.28,51,700/- was to be adjusted against the amounts payable to the plaintiff's mother under the original Joint Development Agreement, dated 23.09.2004.

3. It had been stated in the plaint that the fact that the defendant influenced the plaintiff's mother is evidenced by E-Mails sent by the defendant to the plaintiff. The plaintiff had further stated that she had left India on 12.11.2004 and returned to Canada. She had a joint savings bank account with her mother in Canara Bank, Anna Nagar East, Chennai – 600 102, bearing Account No.22817. When she left for Canada, she left several blank signed cheque leaves of the said account with the defendant. The balance in the said account was Rs.93,737.99/- at the time when she left for Canada and the signed cheques were given to pay income taxe and corporation taxes. However, the defendant did not pay the corporation tax and income tax. The Property Developer had deposited a sum of Rs.30,00,000/- into the said account between 25.09.2004 and 19.08.2005. This amount of Rs.30,00,000/- was withdrawn by the defendant using the blank signed cheques given by the plaintiff and transferred to another account in his and in the plaintiff's name, bearing Account

No.7193. The plaintiff had stated that this transfer was unlawful and fraudulent and that the defendant systematically persuaded her mother to agree to be admitted in Chacko Homes, an Old Age Home at Aluva in Kerala. She was admitted on 02.11.2004.

4. It had been stated in the plaint that the defendant went to Kerala in September 2006 and obtained a Power of Attorney from the mother of the plaintiff, on 21.09.2006 with respect to the 2 flats at I-37, Anna Nagar East, Chennai. Based on the Power of Attorney, the defendant had rented out Flat No.A-1, Golden Cove, I-37, Anna Nagar East, Chennai to Hindustan Unilever Limited on 22.09.2006 by way of a lease agreement. The defendant received the entire monthly rents of Rs.18,000/- every month from Hindustan Unilever Limited. The plaintiff had further stated that the defendant leased out the other flat, bearing No.A-4, to Ambattur Clothing Company Limited by a lease agreement dated 27.11.2006 for a monthly rent of Rs.18,000/-, which was also collected every month by the defendant. The plaintiff had sought for accounts from the defendant in respect of the advance and rents collected. The defendant deposited the monthly rents and the advance in the saving sank account No.7193 and withdrew the same.

5. The mother of the plaintiff had died on 28.01.2007 at the Old Age Home. Even thereafter, the defendant continued to collect the monthly rents and suppressed the fact of death of the plaintiff's mother to the tenants. The plaintiff had stated that after the death of her mother, the defendant had lost right

to collect the monthly rents from the tenants and when they came to know about the death of the mother of the plaintiff, they demanded return of the advance amounts paid. The defendant did not return the amount and consequently, the plaintiff had to return the advance to one of the tenants, Hindustan Unilever Limited. She thereafter took possession of the flat. The plaintiff has claimed the rents, which had been collected by the defendant with respect to the said flat.

6. It had been further stated in the plaint that the defendant along with their son, Dennie John went to Kerala in December 2006 and obtained two General Powers of Attorney from her mother and one General Power of Attorney in the name of Dennie John. They were executed just one month before the death of the plaintiff's mother. In the said Power of Attorney, power was given to sell the property to the defendant himself. The mother of the plaintiff, who was very old, had signed the Power of Attorney without realizing the consequences. Subsequently, using the Power of Attorney, the defendant had executed a sale deed dated 23.12.2006 in favour of himself, which was registered as Document No.4822/2006 and another sale deed dated 26.12.2006 in the name of Dennie John, with respect to the 2 flats at Golden Altius. After the death of the mother, the plaintiff came back to India and realized that her mother had died in poverty and without any money. The defendant did not give any proper replies for the enquires made by the plaintiff. The plaintiff went back Canada on 12.02.2007 and came back on 30.08.2007.

7. It had been further stated in the plaint that the defendant had

asserted that the 2 flats at Golden Altius belonged to him and their son, Dennie John. It was only then that the defendant showed the sale deeds. The plaintiff had further stated that she had marital problems with the defendant and had to leave the house since she was beaten and humiliated. She had to undergo treatment at Sundaram Medical Foundation. She had issued a notice on 02.01.2008 and in his reply dated 18.01.2008, the defendant had claimed that he purchased the flats from and out of his own money. The plaintiff had stated that this was false and not probable in view of the requests made by the defendant through emails, seeking money.

8. The plaintiff had further stated that she had sent Rs.9.50 lakhs from Canada. There was also Fixed Deposits/NSC's to a sum of Rs.2.10 lakhs and these amounts have to be accounted for by the defendant. She was thrown out of the house on 24.11.2007. The defendant also withdrew the final balance of Rs.2.5 lakhs from the Canara Bank. The plaintiff had further stated that her son, Dennie John realised that the defendant had played a fraud on the plaintiff and also on her mother. He had, therefore, executed a settlement deed in favour of the plaintiff dated 03.03.2008 registered as Document No.766/2008. The present suit is filed with respect to the flat in the name of the defendant bearing No.11-A, Golden Altius, 11th Floor, AK-3/4, 4th Avenue, Anna Nagar, Chennai. The plaintiff had claimed that the defendant also has to pay a sum of Rs.5,33,755/- to the builder.

9. The plaintiff had further stated that apprehending harm at the

hands of the defendant, she had filed OP.No.282 of 2008 under Section 9(B) of the Domestic Violence Act before the Family Court at Chennai. The defendant had filed a counter raising false contentions. Her two sons had appeared before the Court and confirmed that the plaintiff was physically assaulted by the defendant. In such circumstances, this suit had been filed for the reliefs as stated above.

10. **Written Statement:-** In the written statement, the defendant had denied each and every allegations in the plaint. He had stated that it was the intention of the plaintiff's mother that one flat should go to Dennie John and another flat should go to him. It was only with such intention that the mother of the plaintiff had executed Powers of Attorney. The defendant denied that the plaintiff had left blank signed cheque leaves before leaving to Canada. He stated that the entire operation of Account No.22817 was done only by the plaintiff and her mother. He denied that he had withdrawn a sum of Rs.30,00,000/- from the said account. He stated that he took care of the plaintiff's parents. He stated that the plaintiff never bothered about them. He further stated that he paid Rs.2,00,000/- for the electrical and plumbing fittings and fixtures for each of the flat Nos.A1 and A4 in I-37 and he had also paid money for completion of construction of flat Nos.11A and 11B in Golden Altius.

11. The defendant further stated that it was the intention of the plaintiff to send her mother to the Old Age Home in Aluva, Kerala. The defendant took care of her mother, while the plaintiff was happy and enjoying at

Canada. The defendant was toiling by taking care of his mother-in-law and father-in-law, his children and his business. He had to undergo spinal surgery on 02.02.2005. The plaintiff was aware about the Powers of Attorney executed by her mother in favour of the defendant and Dennie John. The defendant further stated that the plaintiff admitted her mother in the Old Age Home at Kerala. The defendant further stated that the rental income was used for payment of corporation taxes, property taxes, water taxes and electricity charges, besides taking care of mother-in-law and sending Dennie John to Canada and for educational and other expenses. He had also spent money for the funeral expenses of the mother of the plaintiff. He denied that the plaintiff repaid the advance amount to the tenant. He stated that he brought the body of the mother of the plaintiff from Kerala and buried her at Kilpauk Cemetery. He further stated that the plaintiff humiliated the defendant by sending offending emails to his clients, friends and family members. The defendant had filed a complaint charging defamation in CMP.No.2101 of 2008 before the Judicial First Class Magistrate Court, Thiruvalla, Alleppey District, Kerala.

12. It had been stated in the written statement that the plaintiff had humiliated the defendant. His staff Ms.Daisy Lydia filed CC.No.14139 of 2008 against the plaintiff in the V Metropolitan Magistrate Court, Egmore, Chennai. The defendant stated that the undivided share of land was registered in his name by agreement dated 10.12.2004. He had borrowed a sum of Rs.24,00,000/- from his brother and sister-in-law for building the flat. The

plaintiff had received articles and cash worth Rs.20,00,000/- from the defendant's brother. He stated that the plaintiff had filed OP.No.282 of 2008 to harass the defendant and that the plaintiff forced her son to settle one flat in her name. The defendant had to give a complaint against his son for hacking the email of the defendant. The defendant further stated that the plaintiff also filed OP.No.133 of 2009 before the First Additional Family Court, Chennai for divorce on the ground of adultery.

13. The defendant denied that Rs.5,33,755/- was payable to the builder. He also denied the receipt of Fixed Deposit or NSCs. He had stated that he withdrew a sum of Rs.2.50 lakhs from Canara Bank and deposited the same in the State Bank of India, Arumbakkam Branch, for which, the plaintiff also took a cheque from the defendant. The defendant, therefore, had stated that the plaintiff was aware of the transactions, including the builders agreement, dated 10.12.2004. He stated that he was not in possession of either property or Fixed Deposit Receipts or NSC forms or blank cheques. The defendant stated that the amount of Rs.30,00,000/- paid by the builder was deposited in Account No.22817. The defendant therefore stated that the purchase of the flat and the undivided share of land are supported by consideration and that the vendors have not challenged the sale deed and consequently, the plaintiff cannot challenge the sale deed. The defendant prayed that the suit may be dismissed.

14. On the basis of the above pleadings, by order dated 14.10.2010, this Court had framed the following issues:-

1. Was not the Flat No.A-1, Golden Cove, 1/37, Anna Nagar East Chennai leased out to Hindustan Unilever Limited and to Ambattur Clothing Factory Limited, from 22.09.2006 and 27.11.2006 respectively by the defendant based on a Power of Attorney executed by the plaintiff's mother?

2. Is not the defendant liable to account for the rental advance received from the Hindustan Unilever Limited and from the Ambattur Clothing Factory Limited, from 22.09.2006 and 27.11.2006 respectively?

3. Is not the plaintiff entitled to the relief of declaration of title in respect of the schedule mentioned property, after declaring the Sale Deed dated 26.12.2006 – Doc No.4822/2006; S.R.O., Anna Nagar as null and void, inoperative and non-est in law?

4. Is the defendant liable to pay Rs.42,86,347/- or any other sum to the plaintiff?

5. Is the plaintiff entitled to damages at Rs.30,000/- per month from the date of plaint?

6. Is not the claim for recovery of possession of suit property barred by limitation?

7. Is not the defendant liable to account for all the monies that have been received by him from the plaintiff and from the account of plaintiff's mother?

8. Did the defendant persuade the mother of the plaintiff to forego two flats in “Golden Cove”and opt for two flats in “Golden Altius”or persuade her to include the defendant as a party to the four agreements entered into by her with M/s Golden Homes Pvt. Ltd.?

9. To what other reliefs, the parties are entitled to?

15. The plaintiff had examined herself as PW.1 and also examined her son Dennie John as PW.2 and marked Ex.P1 to P26. The defendant had

examined himself as DW.1 and marked Ex.D1 to D17.

16. Ex.P1 is the construction agreement, dated 23.09.2004. Ex.P2 and P3 are two builders agreement dated 10.12.2004 and Ex.P4 is the agreement of sale, dated 10.12.2004. Ex.P5 is the copy of Power of Attorney, dated 21.09.2006. Ex.P7 and P8 are the Powers of Attorney in favour of the defendant dated 23.12.2006 and Ex.P9 is the Power of Attorney dated 23.12.2006 in favour of Dennie John. Ex.P10 is the sale deed in favour of the defendant, dated 26.12.2006 and Ex.P11 is the sale deed in favour of Dennie John, dated 26.12.2006. The emails exchanged between the plaintiff and the defendant were marked as Ex.P18. The plaintiff had also marked a statement of accounts as Ex.P19. The death certificate of the mother of the plaintiff was marked as Ex.P21 and the statement of the defendant in OP.No.282 of 2008 was marked as Ex.P26.

17. Among the documents of the defendant, Ex.D1 is the settlement deed executed by Dennie John in favour of the plaintiff dated 03.03.2008. The letter of the mother of the plaintiff to the defendant dated 10.12.2004 was marked as D10. The passbook of the defendant with the State Bank of India was marked as D15 and the certificate dated 15.02.2009 given by MJA.Mathew was marked as D17.

18. This court heard the arguments advanced by the learned Counsel on either side and also perused the materials on record.

19. The plaintiff is the wife of the defendant. The plaintiff's mother,

Mary Joseph was the absolute owner of the premises bearing Door No.I-37, Anna Nagar East, Chennai 600 102. The plaintiff was the only daughter of her parents. When the plaintiff left for Canada on employment, her mother was looked after by the defendant. The mother was suffering from old age infirmities and also had very poor eyesight and when the plaintiff was in Canada, the mother was under the total influence of the defendant. The property belonging to the mother was offered for joint development agreement and the builder had offered to give 4 flats and Rs.31,00,000/- to the mother for development of the property. Subsequently, instead of 4 flats, the builder had assured to give 2 flats at another project called Golden Altius. It is the case of the plaintiff that she had sent money to the defendant towards the construction of the flats. But, the defendant, by using his influence, persuaded the mother to sign Powers of Attorney in his name and using one of the Powers of Attorney, had purchased a flat in his own name. The plaintiff seeks declaration of title, after declaring that such sale deed is null and void. The defendant had also leased out 2 flats to tenants. The plaintiff also seeks accounts and damages for the use and occupation of the suit property. In the above background of the above facts, the issues framed as stated above for consideration will have to be examined.

20. **Issues (1) and (2):-** In the plaint, it had been stated that the mother of the plaintiff was the owner of the premises bearing No.I-37, Anna Nagar East, Chennai - 600 102. The mother of the plaintiff along with the Developer, Golden Homes Private Company, had entered into a joint

development agreement, dated 23.09.2004 for construction of 8 flats in the said property. The said agreement dated 23.09.2004 was marked as Ex.P1. It was tripartite agreement signed by Marry Joseph, the mother of the plaintiff, Elizabeth John, the plaintiff and M/s.Golden Constructions. In the said agreement, the terms were as follows:-

> “WHEREAS the PROMOTER has offered to pay a sum of Rs.31,00,000/- (Rupees Thirty One Lakhs only) by cash/cheque besides providing the OWNERS 4 flats with a total Super Plinth Area of 5530 sq.ft. with specifications mentioned in Schedule 'C' hereunder in the following form:
>
> (a) One flat measuring 1490 sq.ft with three bedrooms and 2 toilets, on the 11th floor eastern side along with space to park one car in the proposed building called “Golden Altius”at door No.AK3/4, 4th Avenue, Anna Nagar, Chennai – 40.
>
> (b) One flat measuring 1540 sq.ft with three bedrooms and 3 toilets, on the 11th floor western side along with space to park one car in the proposed building called “Golden Altius”at door No.AK3/4, 4th Avenue, Anna Nagar, Chennai – 40.
>
> (c) One flat measuring around 1250 sq.ft with three bedrooms and 2 toilets, on the 1st floor southern side along with space to park one car in the stilts floor area in the proposed building at Plot No.353, Door No.I - 37, Anna Nagar East, Chennai – 102 (Schedule A mentioned property).
>
> (d) One flat measuring around 1250 sq.ft. with three bedrooms and 2 toilets, on the 4th floor southern side along with space to park one car in the stilts floor area in the proposed building at Plot No.353, Door No.I-37, Anna Nagar East, Chennai 102 (Schedule A mentioned property) along with reserved open car park space measuring 29 feet east to west on the southern side set back (marked green in the plan annexed) of the proposed building at Plot No.353, Door No.I-37, Anna Nagar East, Chennai - 102 (Schedule A mentioned property)
>
> on the OWNERS agreeing to sell 3/4th undivided share of the

> Schedule A mentioned property to the PROMOTER or its nominees."

A perusal of the above terms reveals that the mother of the plaintiff was to be given a sum of Rs.31,00,000/- and also 4 flats. In this regard, the defendant had also agreed, during his cross examination that 4 flats were to be given to the mother of the plaintiff and that a sum of Rs.31,00,000/- was also to be given. In the plaint, it had been mentioned that the defendant had, on the basis of a Power of Attorney, leased out the said flats to Hindustan Unilever Limited and Ambattur Clothing Limited. The Power of Attorney obtained by the defendant from the mother of the plaintiff was marked as Ex.P5. A perusal of the Ex.P5 reveals that the stamp paper was purchased in Arumbakkam at Chennai on 22.09.2006. However, the Power of Attorney is dated 21.09.2006. The defendant had not come forward with any explanation as to how an agreement can be executed on a stamp paper, which was purchased on the next day.

21. Be that as it may, among the terms in the Power of Attorney, the defendant was given power to open a bank account and operate the same in the name of the Principal. There is a further clause granting power to let out the scheduled property to any third party on such terms, as the defendant deems fit. There is a further clause that the defendant shall render true and proper accounts. The schedule mentioned properties in the Power of Attorney are 2 flats each, measuring 1250 and 1255 sq.ft respectively at Door No.5-37 Anna Nagar East. It is on the basis of this Power of Attorney document that the

defendant had let out the property to two companies, namely, Hindustan Unilever Limited and Ambattur Clothing Company.

22. Ex.P6 letter was written by the Hindustan Unilever Limited on 25.09.2006 addressed to the defendant enclosing a cheque for Rs.1,80,000/- towards advance rent of Rs.16,500/- for 10 months and maintenance charges of Rs.1,500/- for 10 months. As stated, one peculiar fact is that the Stamp Paper, on which the Power of Attorney was written, had been purchased on 22.09.2006, but the document is dated 21.09.2006. Consequently, the fact that a tenant inducted on 25.09.2006 within four days from the date of the Power of Attorney indicates that the defendant must have entered into negotiations with the tenant, Hindustan Unilever Limited, even before he was given necessary power under Ex.P5. It further implies that the defendant had acted independently and it is a mute question whether he had actually obtained instructions from the owner of the property, namely, the mother of the plaintiff. With respect to the Power of Attorney, the defendant during his cross examination had stated:-

> " It is correct to state that Ex.P5 is a power executed by the plaintiff's mother in my favour. One of my office staff by name Daisy Samuel has signed as witness in Ex.P5. At the time of execution of Ex.P5, the plaintiff was not in India. Ex.P5 was executed at Chennai. My mother-in-law came to Chennai to execute Ex.P5. The date on the stamp paper in Ex.P5 says 22.09.2006. The power is dated 21.09.2006."

He had further admitted during cross examination:-

> "At the time of Ex.P5 though my mother-in-law was ailing and restricted in so far as her movement is concerned,

whenever my son and me went to Kerala we used to take her out and she was able to move with assistance. I have not mentioned in my written statement or in my proof affidavit that my mother in law came to Chennai even once after being admitted in the old age home in Kerala."

23. It is further seen that the defendant had also admitted that it was based on the Power of Attorney that he had leased out the 2 flats to the tenants. Relevant portion of his evidence reads as follows:-

"It is correct to state that it was only based on Ex.P5 that I leased out two flats in I-37, Anna Nagar East to Hindustan Unilever Ltd. and Ambattur Clothing Factory Ltd. It is true to state that in my capacity as power agent the lease agreement of the above two tenants were in my name and I was collecting the rents by cheques in my name. Rs.1.80 lakhs was the rental advance I received from each of the above two tenants. In respect of Hindustan Unilever I collected rents approximately one year and in respect of Ambattur Clothing Factory I collected rents slightly lesser than a year. I have accounted for the rents and the rental advance collected from the two tenants as per Ex.P5."

24. The defendant has stated during cross examination that

"all the rents and the rental advance received as cheques were deposited by me in the saving banks account No.7193 maintained in the Canara Bank between me and the plaintiff jointly."

He further stated that

"Ex.D15 is the original pass book. All the rental incomes are reflected in Ex.D15. Ex.D15 contains deposited rental amount of Rs.15,219/- on 07.08.2007, 09.08.2007, 06.09.2007, 08.10.2007, 10.10.2007, 09.02.2008 alone and there is no credit reflecting deposit of the advance amount of Rs.1,80,000/- paid by Hindustan Unilever Limited and given in Ex.P6."

In this connection, Ex.P12 is the letter dated 10.09.2007 addressed by the defendant to the Hindustan Unilever Limited, stating that the lease period was further extended for 11 months from 01.09.2007. Therefore, it is very clear that the defendant had not properly accounted for the amounts received by him towards the rental income.

25. Ex.P23 is the copy of the Saving Bank Account in the name of the plaintiff, bearing account No.22817 in the Canara Bank. In this, it is seen that there had been a deposit of Rs.7,50,000/- on 25.09.2004 and corresponding withdrawal of Rs.6,50,000/-. There is no evidence to show the deposit of rental income by the defendant. On the other hand, there is evidence to show deposit of amounts by the plaintiff and withdrawal by the defendant. Ex.P14 is the letter by HDFC Bank to the defendant, reflecting a rental income of Rs.15,219/- vide cheque No.041694, dated 03.01.2008 which was deposited in the account. It is seen that the defendant, exercising the power received by him in Ex.P5, had let out the property to the tenants and had not deposited the cheques in the account of the plaintiff or her mother. This is evident from Ex.P23 and Ex.P14. In Ex.D15, there is deposit of rental amount at irregular intervals. The defendant is liable to account for the rental income every month. In these circumstances, with respect to the issues (1) and (2), I hold that the defendant had leased out the flats at A1 Golden Cove I-37, Anna Nagar East to the two firms, namely, Hindustan Unilever Limited and Ambattur Clothing Factory

Limited from 25.09.2006 and 27.11.2006 based on the Power of Attorney executed by the plaintiff's mother and consequently, the defendant is liable to account for the rental advance and the rents received from the said two tenants respectively. This is all the more necessary, because, the defendant had used the Power of Attorney to lease out the property and he has a corresponding duty to render accounts for the rental income received by him. The issues (1) and (2) are answered in favour of the plaintiff and against the defendant.

26. **Issue (7):-** This issue relates to liability of the defendant to account for all the moneys that had been received by him from the plaintiff and from the account of the plaintiff's mother. In this connection, it is to be noted that the defendant during his cross examination had stated as follows:-

> "In respect of Hindustan Unilever I collected rents approximately one year and in respect of Ambattur Clothing Factory I collected rents slightly lesser than a year.

He had further stated as follows:-

> "It is correct to state that it was only based on Ex.P5 that I leased out two flats in I-37, Anna Nagar East to Hindustan Unilever Limited and Ambattur Clothing Factory Limited. "

> " All the rents and rental advance received as cheques were deposited by me in Saving Bank A/c No.7193 maintained in Canara Bank between me and the plaintiff jointly. I have not produced the statement of accounts for SB A/c.No.7193 as such. It is correct to state that I was receiving a sum of Rs.36,000/- per month inclusive of TDS for a period of approximately one year. It is correct to state that approximately the entire amount of Rs.36,000/- per month is being used for the family. "

He had further stated as follows:-

> "It is true to state that 12 months after my mother in law died I still collected rents as per Ex.P14 but the same was based

on the fact that the lease was extended as per their request contended in Ex.P12."

Moreover, he had also stated during cross examination as follows:-

"It is correct to state that in paras 15 and 23(1) of my proof affidavit as well as in para 25(k) of my written statement I have called upon the plaintiff to produce the accounts of Canara Bank A/c.22817. It is correct to state that this statement of account has been produced by the plaintiff as stated in Ex.P23. In Ex.P23 there is a transfer of Rs.2.50 lakhs in my name. Similarly, in Ex.P23 there is a transfer of Rs.7 lakhs and Rs.8 lakhs in my name in June 2005 and June 2006 respectively. It is correct to state that during the time of these transfers referred above the plaintiff was not in India. It is also correct to state that during the above transfers the plaintiff's mother was not in Chennai.

I have not given any accounts in the form of written statement for the amount of Rs.17.50 lakhs transferred in my name as per Ex.P23 though I have given my explanation as to the details of the expenses made by me from out of the said amounts."

He had further stated that during cross examination as follows:-

" I do no accept any of the entries made by the plaintiff in Ex.P19 series. However the amount of Rs.6,38,061/- mentioned in Ex.P19 has having been remitted by me to the plaintiff when she was in Canada is admitted by me. It is correct to state that even if the entries found in Ex.P19 are shown to be bank transfers as evidenced by Ex.P23. I would still deny the genuineness of the entries in Ex.P19. It is correct to state that in Ex.P23 there is an entry dated 26.09.2004 for Rs.6.50 lakhs has been transferred to my joint account. It is incorrect to state that the entry dated 02.03.2005 in Ex.P23 showing transfer of Rs.2.50 lakhs from the plaintiff's mother's joint account to me. Witness adds: This amount of Rs.2.50 lakhs is not from the plaintiff's mother's joint account but it is from my account. It is correct to state that on 28.06.2005 Ex.P23 shows transfer of Rs.7 lakhs to my joint account with the plaintiff. It is also correct to state that further sum of Rs.8 lakhs has been transferred as per Ex.P23 to my joint account with the plaintiff on 21.06.2006. Ex.P23 also shows the cash withdrawal of

Rs.3.50 lakhs on 26.12.2006."

27. The above evidence of the defendant clearly shows that he had admitted receipt of extensive money from the plaintiff, when she was in Canada and also receipt of rental income from the two tenants. He has to account for the same. I, therefore, answer issue (7) in favour of the plaintiff and consequently, I hold that the the defendant has to render accounts for the money received from the plaintiff and from the account of the plaintiff and her mother.

28. **Issue (4):-** This issue is with respect to the claim of the Plaintiff for a sum of Rs.42,86,347/- from the Defendant. The Plaintiff has relied on Ex.P19, while stressing the fact that she is eligible for this claim. Ex.P19 is the statement of accounts prepared by the Plaintiff. In this connection, it has been clearly admitted that the said statement has entries, which are contentious and which are admitted by both the Plaintiff and the Defendant. It contains both the funds received and collected by the Defendant and also the expenditure incurred out of the said funds received by the Defendant. There are both cash and cheque transactions. The learned counsel for the Defendant had strenuously disputed the entries in Ex.P19 and contended that it is a self prepared statement of the Plaintiff and in fact, there are three entries which reflect deposit in SB A/c. No.7193. He had further stated that there are no oral evidence to substantiate a few entries.

29. In order to balance the arguments advanced by both sides, each entry will have to be analysed. There is an entry on 13.10.20004 with respect to the cash received by the Defendant from Golden Homes as part payment towards the property development. This amount is for a sum of Rs.5 lakhs. However, there is no direct evidence on this fact. It is a statement of presumption by the Plaintiff and I reject that the Defendant is liable to the Plaintiff for this sum.

30. With respect to further entries, in Ex.P19, namely, dated 26.9.2004 for the amount transferred to the joint saving bank account no.7193, the same is reflected in the statement of accounts. This is to an extent of Rs.6,50,000/-. Similarly, with respect to the amount withdrawn from SB Account No.22817 on 27.1.2005 for Rs.50,000/- and yet another amount again withdrawn on 8.3.2005 to a sum of Rs.2,50,000/-, the same are substantiated in the statement of accounts. In his evidence, DW.1 had stated:-

> "It is correct to state that in paragraphs 15 and 23(1) of my proof affidavit as well as in paragraph 25(k) of my written statement I have called upon the Plaintiff to produce the accounts of Canara Bank a/c.No.22817. It is correct to state that this statement of account has been produced by the Plaintiff as stated in Ex.P23. In Ex.P23 there is a transfer of Rs.2.50 lakhs in my name. Similarly, in Ex.P23, there is a transfer of Rs.7 lakhs and Rs.8 lakhs in my name in June 2005 and June 2006 respectively. It is correct to state that during the time of these transfers referred to above the Plaintiff was not in India. It is also correct to state that during the above transfers the Plaintiff's mother was not in Chennai.
>
> Witness adds: However, these cheques were issued by the Plaintiff and her mother for specific expenses of the family. Though sum of Rs.17.50 lakhs is covered by above said

> transfers, since I was taking care of my mother in law and had to pay the educational expenses of my two sons, the said amount was warranted. Further, my second son was sent to Canada for studies for which his flight fare and his accommodation apart from educational expenses were met out of this amount. Further my first son was also sent to Canada for three months holiday and the entire expenditures were met out of these funds."

Again DW.1 had stated in his cross examination:-

> "I have not given any accounts in the form of written statement for the amount of Rs.17.50 lakhs transferred in my name as per Ex.P23 though I have given my explanation as to the details of the expenses made by me from out of the said amounts.

DW.1 had further admitted in his cross examination:-

> " The statement of income mentioned in Ex.P26 with reference to a sum of Rs.37,25,256/- was given due to the repeated assumption that I had received a sum of Rs.30 lakhs from the builder which in reality I had not. So according to me the entire expenditure of Rs.48 lakhs approximately has found in Ex.P26 has been paid by me and not from out of the money received from the builder.

DW.1 had further stated in his cross examination:-

> "I do not remember whether payment was received by me into my account in State Bank of India as shown in Ex.P22. The amount of Rs.9,56,500/- shown as credit on 18.08.2007 in Ex.D15 could be the amount that was sent under Ex.P22. I do not remember what were the exact details of the property transaction but the joint development agreement will speak for itself."

31. Moreover, Ex.P22 is the payment advice from CIBC, Chennai dated 16.8.2007, which reflects transfer of Canadian Dollars 25000 to the State Bank of India, Chennai account in the name of the Defendant. In this connection DW.1 had stated in his cross examination:-

> "I do not accept any of the entries made by the Plaintiff in Ex.P19 Series. However, the amount of Rs.6,38,061/- mentioned in Ex.P19 has having been remitted by me to the Plaintiff when she was in Canada is admitted by me. It is correct to state that even if the entries found in Ex.P19 are

> shown to be bank transfers as evidenced by Ex.P23. I would still deny the genuineness of the entries in Ex.P19. It is correct to state that in Ex.P23 there is an entry dated 26.9.2004 for Rs.6.50 lakhs has been transferred to my joint account. It is incorrect to state that the entry dated 2.3.2005 in Ex.P23 showing transfer of Rs.2.50 lakhs from the Plaintiff's mother's joint account to me. Witness adds: This amount of Rs.2.50 lakhs is not from the Plaintiff's mother's joint account but it is from my account. It is correct to state that on 28.6.2005 Ex.P23 shows transfer of Rs.7 lakhs to my joint account with the Plaintiff."

32. With respect to the other entries, it is the contention of the learned counsel for the Defendant that the expenditure incurred by the Defendant had been admitted by the Plaintiff. However, with respect to the amounts transferred by cheques, namely, Rs.7 lakhs on 28.6.2005 to SB Account 7193 and Rs.8 lakhs on 21.6.2006, I hold that the Defendant is liable to account for the same.

33. Similarly, even with respect to the interest deposited and the cash withdrawn by him, the Defendant is liable to the Plaintiff. These include a deposit of rental advance of Rs.1,80,000/- on 27.9.2006, another advance of Rs.1,80,000/- on 29.11.2006 and also cash withdrawal of Rs.3,50,000/- from SB A/c No.22817 on 26.12.2006 and the amount refunded by the Chacko Old Age Home on 7.3.2001 to a sum of Rs.2,80,000/- and another sum of Rs.50,000/- on the same day and the entry shown in Ex.D15 dated 16.8.2007 being amount remitted by the Plaintiff from Canada to a sum of Rs.9,50,000/-. I hold that the Defendant is liable to the above amounts to the Plaintiff.

34. The other amounts shown as collected by him in Ex.P19, namely, rental collection to a sum of Rs.3,45,753/- and the maturity proceeds of

national savings certificates to a sum of Rs.1,20,000/- and Rs.90,000/- and the amount paid to the builder for flat no.11B to a sum of Rs.5,33,755/- are cash payments, for which there are no oral evidence available and consequently, I am not inclined to give the benefit with respect to these amounts to the Plaintiff.

35. Ex.D15 is the pass book of the Defendant with the State Bank of India and a perusal of the same shows that there are deposits of rental account to a sum of Rs.15,219/-. However, they are sporadic in nature. I would give the benefit to the Defendant with respect to the same.

36. There is yet another entry at Ex.P26, which was marked through DW.1 during his cross examination with respect to expenses towards surgery and treatment for a sum of Rs.1 lakh. This has to be contrasted with the statement of the Defendant that he did not have any amount even for his surgery. However, I would grant the defendant the benefit of this expenses also.

37. The learned counsel for the Plaintiff had also relied on the emails sent by the Defendant, in which he had claimed that he has no money, in particular to the email, dated 2.6.2004, wherein he has stated that “Dennie's fees is paid only for half year due to financial strain. Anyway let us pray for each other. Write a reply as soon as you get this.” In yet another email dated 9.6.2004, the son of the Plaintiff had stated that, “I am just planning to buy a bike, but we are short of that thing called cash”. In yet another email dated 3.7.2004, the Defendant had again moaned about the difficulties he is facing at Chennai and he had further stated that “We bought only TV and not any combo

as you mentioned because our finances are at all time low"

38. Pointing out all these documents, the learned counsel for the Plaintiff was very emphatic in his assertion that the Defendant had actually taken away the money due and payable to the plaintiff. As pointed out in Ex.P19, if the contentious entries are subtracted, I hold that the Defendant would be liable to the Plaintiff a sum of Rs.26,96,839/- (Rupees twenty six lakhs ninety six thousand eight hundred and thirty nine only) with interest 6% p.a. from the date of the plaint till the date of realization. Issue (4) is accordingly answered.

39. **Issues (3) and (8):-** These issues relate to declaration of title in respect of the suit property, after declaring the sale deed dated 2.6.2012, which is registered as Document No.4822 of 2006 in the Sub Registrar Office, Anna Nagar, as null and void and whether the Defendant persuaded the mother of the Plaintiff to forgo two flats in Golden Cove and opt for two flats in Golden Altius and whether he persuaded the mother of the Plaintiff to include him as a party to the four agreements entered into by her with the Golden Home Private Limited. In this connection, the Plaintiff had stated in the plaint as follows:-

> "The Plaintiff states that she left for Toronto, Canada where she had been working from February 2003 onwards and thereafter, the affairs of her mother was being managed by the Defendant, since the mother of the Plaintiff was aged and therefore unable to manage her own affairs. The Plaintiff went back to Canada on the assurance given by the Defendant that he is happy to look after the affairs of her mother in the Plaintiff's absence and therefore, she though that the interests of her aged mother would be looked after properly by the Defendant. The Plaintiff states that she was also a party and signatory to the Joint Development agreement dated 23.9.2004"

It is significant to note that there is no specific denial about the said averment.

Again, the Plaintiff had stated in the plaint in paragraph 11 as follows:-

> "11. The Plaintiff states that the Defendant along with their son, Dennie John, then seem to have gone to Kerala in December 2006 and obtained 2 deeds of General Power of Attorney in his name and one General Power of Attorney in the name of Dennie John. The Plaintiff states that the said Powers were executed barely only month before the death of the Plaintiff' mother and is in respect of Construction agreement dated 23.09.2004. The Plaintiff states that said Power was obtained by the Defendant and Dennie John to do acts on behalf of the Plaintiff's mother. The Plaintiff states that surprisingly, 2 deeds of Power of Attorney dated 23.12.2006 registered as Document No.634/2006 and 635 of 2006 contains a clause that entitles the attorney to obtain a sale deed in the name of the attorney and the other Power of Attorney will show the true intention of the Plaintiff's mother. "

For this averment there is no specific denial in the written statement. Again, the Plaintiff had stated as follows in paragraph 12:--

> "12. The Plaintiff states that the fact that this has been done in a rushed manner by the Defendant with the intention of covering the actual intention and inducing the Plaintiff's mother to sign papers is evidenced by the fact that a sale deed dated 26.12.2006 has been executed in favour of the Defendant - Doc.No.4822 of 2006; SRO, Anna Nagar in respect of Flat No.11A, Golden Altius, 4th Avenue, Shanthi Colony, Anna Nagar, Chennai-40, measuring 1490 sq.ft. The Plaintiff states that consequently another sale deed dated 26.12.2006 has been obtained in the name of Dennie John in respect of Flat No.11B, Golden Altius, Door No.AK.3/4, 4th Avenue, Anna Nagar, Chennai-40."

40. In this connection, in Ex.P10, which is the sale deed in Document No.4822 of 2006 and in Ex.P11, which is the sale deed dated 26.12.2006 in Document No.4823 of 2006, it had been mentioned has follows:-

> "Whereas the PURCHASER have approached the vendors for purchase of 1490/47000th undivided share of land in the

property mentioned in Schedule D hereunder, more particularly described in Schedule E, here under:-

Whereas the Vendors have agreed to sell the said undivided share of land for a sale consideration of Rs.14,03,000/- (Rupees fourteen lakhs and three thousand only) and the Purchaser have agreed to purchase the same for the said sale consideration.

NOW THIS DEED WITNESSETH AS FOLLOWS:-

1. In consideration of the payment of the said sum of Rs.14,03,000/- (Rupees Fourteen Lakhs and Three Thousand Only) paid by the PURCHASER to the Vendors, the receipt of which sum the Vendors hereby acknowledge, the Vendors hereby grant, convey, assign, sell and transfer to the PURCHASER by way of this absolute sale 1490/47000th undivided share in the property described in the Schedule D, more particularly described in Schedule E, to own and enjoy the same as absolute owners."

41. The fact that the Defendant had actually purchased the flat in his capacity as the Power of Attorney agent of the mother of the Plaintiff had not at all been denied. Similarly, even in Ex.P11, the fact that the son of the Plaintiff Dennie John purchased the undivided share of land as Power of Attorney agent was not mentioned. The Defendant had not given the source of funds for purchasing the said property. In this connection, PW.2, had stated as follows during the cross examination:-

"Q: Do you recollect your grandmother executed a Power of Attorney one in favour of your mother and one in favour of your father?

A: Yes.

Q: These two Power of Attorney were registered before Sub Registrar Office registration on the very same day and the documents are subsequent one and other?

A: Yes.

Q: Do you know contents of the Power of Attorney?

A: I knew the contents of the Power of Attorney and also whatever my father told me I typed in the documents.

Q: Did you at least read to your grandmother?

A: No.

Q: Your grandmother knew English?

A: Yes.

Q: What was she?

A: My grandmother was a M.A. Post Graduate but unable to read because she was nearly blind around the time of her death?

Q: What was she age at that time?

A: I do not know her age.

Q: She came out of her own volition she came to Sub Registrar Office?

A: I took her in the cab and brought her back.

Q: Can I take it that you are honest throughout?

A: Yes.

Q: After returning from Kerala (i.e.) after registration did you inform your mother?

A: I am not sure about it. Generally, I informed her about the general Power of Attorney registration. But I did not inform the contents of the Power of Attorney.

Q: At that point of time your relationship with your mother is very cordial?

A: Yes.

Q: Based on the said Power of Attorney executed in your favour you got the flat registered in your favour?

A: Yes.

Q: As a dutifully son you have informed your son about the registration?

A: I think so.

Q: similarly, based on the Power of Attorney executed your father the sale deed of another flat was taken by him?

A: Yes.

Q: At that point of time you recollect your memory your relationship of your father and mother was very cordial during the 2006?

A: Yes.

Q: Necessary undivided share was given one flat in favour of your father?

A: Yes.

Q: Ex.P11 a similar sale deed has been executed in your favour on the very same day?

A: Yes.

42. It is clear that the Defendant had used PW.2 as a cover to screen his own illegal activities of obtaining a flat in his name. He probably felt that if he included his son in the other sale deed, then it would not be questioned. However, as it transpired later PW.2 had executed settlement deed in favour of the Plaintiff. PW.2 further stated in his cross examination as

follows:-

> "Q: Your mother is aware Ex.P10 and P11?
>
> A: I think so.
>
> Q: Except the old age your grandmother was hale and healthy?
>
> A: She had vision problem otherwise she was fine in my opinion.
>
> Q: Even for getting the Power of Attorney from your grandmother your father sought your mother's permission through your email?
>
> A: I do not recall. The email was sent on 29.8.2006 by my father to my mother through my email.
>
> Q: I put it to you that right from the beginning of developing the property of your grandmother for everything your father consulted with your mother?
>
> A: I am not sure. I cannot say.
>
> Q: When your grandmother passed away?
>
> A: January 2007

43. It is, thus, seen that the mother of the Plaintiff was having problems with her vision. This is also significant because in any document signatures are to be obtained and the sanctity of the signatures will always be questioned by any court. Suspicious circumstances will have to be looked into by this court. Suspicious circumstances surrounding the entire issue in this case are as follows:-

1. The Plaintiff had left to Canada.
2. The mother of the Plaintiff was under the care and control of the Defendant.

3. After the Plaintiff went to Canada, the Defendant thought it fit to admit the mother of the Plaintiff in the Old Age Home at Kerala.

4. When the mother of the Plaintiff was at the old age home, the Defendant went there and also obtained the Power of Attorney in his name. At that point of time, even according to the son of the parties herein, the mother of the Plaintiff had poor vision.

5. In the Power of Attorney which was obtained in his name, the Defendant very peculiarly reserved all rights to sell the property to himself.

44. Above suspicious circumstances clearly establish that a old lady of infirm health, in particular with poor vision was asked to sign a document and while giving the Power of Attorney to the Defendant, she had in fact authorised him to be the purchaser, which naturally means that if he has to give any consideration towards the purchase, he has to receive it himself. The Defendant cannot expect the court to sit back like an ostrich with neck deep in the sand oblivious to reality. I hold that it is a fraud played by the Defendant on the mother of the Plaintiff. The Defendant had taken advantage of the fact that the Plaintiff was away in Canada. The Defendant had usurped the property for himself. The sale deed is under challenge in this court. This is Ex.P10.

45. The Defendant relies on Ex.D17 to prove source of money. The document has not been proved in accordance with law. It is not even admissible in law. In this connection, Ex.D17, which is relied on heavily by the Defendant, is extracted:-

"TO WHOMSOEVER IT MAY CONCERN

> On 19th November 2006, I returned from Switzerland after visiting my son and relatives there where I worked for more than 30 years. I brought with me Sfr.80,000 (Swiss franc eighty thousand only) which I exchanged on 22nd November 2006 at my Bank (The Federal Bank, Mallappally Branch) Mallappally @ Rs.32 per franc, which brought to me Rs.25,60,000/- (Twenty Five lacs and Sixty Thousand only) Out of the said amount, I gave Rs.24,50,000/- (Twenty Four lacs and Fifty Thousand only) to my brother, Dr.M.J.John, Chennai, for purchasing two flats at Chennai City From the balance of 1.10.00 (One lac and ten thousand only) I paid Ysmen Club, Anicad, Rs.100,000 (One lac only). The Anicad Club was paid on 24th November 2006."

46. Ex.D17 has not been proved in a manner known to law. The executant has not been examined in court and it is also not addressed to any specific individual. It is a mere statement and without additional proof, it cannot be taken either as a proof or as relevant to the facts of the case. I hold that Ex.D17 would only advance the case of the Defendant and it is a very futile attempt on the part of the Defendant to rely on Ex.D17, when he should primarily rely on his own evidence either oral or documentary to dispute the claim of the Plaintiff. Consequently, I hold that Ex.D17 cannot be the basis for grant of any relief in favour of the Defendant. Moreover, the competency of the Defendant to speak about Ex.D17 is also questionable. In this connection, Section 106 of the Indian Evidence Act, is as follows:-

> "106. Burden of proving fact especial within knowledge. When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

During the cross examination, DW.1 had stated as follows:-

> " Ex.D17 is not addressed to me specifically and is addressed to whomsoever it may concern. The amount of Rs.24.50 lakhs mentioned in Ex.D17 was given by my

> brother to me in cash. I do not remember whether I have shown this amount of Rs.24.50 lakhs in my income tax returns as a loan or gift. Witness adds: That it was only a gift. It is correct to state that Ex.D17 was obtained by me after the present suit was filed. I am not going to bring my brother before this Hon'ble Court as a witness unless the court request me. It is correct to state that the money mentioned in Ex.D17 was paid by me to the builder. The amount of Rs.24.50 lakhs mentioned in Ex.D17 has not been shown by me in Ex.P26 series. Witness adds: Since the payment towards the undivided share does not figure in this list. I do not remember exactly how much I have paid to the builder but he same is reflected in the documents executed between me, my son and the builder. I deny the suggestion that I have not paid any money to the builder and that I am giving false evidence."

47. It is, therefore, seen that DW.1 himself had not spoken convincingly with respect to the statement given in Ex.D17. The evidence of DW.1 being unsatisfactory and unconvincing, I reject Ex.D17 as a document either proved or admissible in evidence. A discussion of all the above leads this court to the following inferences:-

i. Payment of consideration towards purchase of the flat has not been proved by the Defendant.

ii. Adverse inference has to be taken against the Defendant for not producing the income tax returns.

48. The learned counsel for the Defendant had stated that the relief seeking declaration of ownership, after declaring the document as null and void, is illegal, cannot be granted by this court. With respect to the said contention, I disagree. A declaration of ownership is being sought since there is a cloud over the ownership of the Plaintiff by the said document, the same is sought to be declared as null and void. Moreover, the Plaintiff is a third party to Ex.P10.

Since the Plaintiff is a third party to Ex.P10, the learned counsel for the Defendant argued that the Plaintiff cannot claim that the sale is a sham and nominal. The learned counsel for the Defendant further pointed out that in the cause of action paragraph, it has only been mentioned as “various dates” and the date of Ex.P10 has not been mentioned. The learned counsel for the Defendant further stated that Ex.P10 had been executed by strangers who were not examined in court. He further pointed out that in both Ex.P2 and Ex.P4, a sum of Rs.15.77 lakhs is mentioned and in Ex.P3, a sum of Rs.16.31 lakhs is mentioned. He also pointed out that in the joint venture agreement, a sum of Rs.7.5 lakhs is mentioned. The learned counsel stated that for the total of two flats and the undivided share of land, a sum of Rs.60 lakhs had been given and a credit of Rs.30 lakhs had been given in the statement of accounts in the account held by the Plaintiff and her mother in Ex.P23. The learned counsel stated that the balance of Rs.30 lakhs has been paid as consideration towards the purchase of the flats. Consequently, he has stated that the Defendant had actually spent money towards the purchase of the flat as stated by him.

49. It has to be mentioned with respect to the contentions raised that Ex.P23 is a joint account in the name of the Plaintiff and her mother and utilizing the signed blank cheques of the Plaintiff, the amounts have been transferred from that account to other account bearing No.7193. It is seen from Ex.19, a sum of Rs.31 lakhs has been transferred to SB A/c No.7193. This has also been admitted by DW.1 in his cross examination. It is also seen that the

sale deed is in the name of the Defendant himself who was the Power of Attorney agent.

50. In **2005-4-CTC-606 (State of Rajasthan and others Vs. Basant Nahata)** in paragraph 5, it had been stated as follows:-

> "54. Execution of a Power of Attorney in terms of the provisions of the Indian Contract Act as also the Power of Attorney Act is valid. A Power of Attorney, we have notified hereinbefore, is executed by the donor so as to enable the donee to act on his behalf. Except in cases where power of attorney is coupled with interest, it is revocable. The donee in exercise of his power under such Power of Attorney only acts in place of the donor subject of course to the powers granted to him by reason thereof. He cannot use the Power of Attorney for his own benefit. He acts in a fiduciary capacity. Any act of infidelity or breach of trust is a matter between the donor and the donee. "

This decision is actually in favour of the Plaintiff. It is clear that the Agent cannot act for his own benefit which was what the Defendant had done in this case. In this case, the Principal, namely, the mother of the Plaintiff died and it is only the Plaintiff who can question the act of the Power of Attorney, namely, the Defendant.

51. In **2012-1-SCC-656 (Suraj Lamp and Industries (P) Limited Vs. State of Haryana)** the scope of the Power of Attorney has been explained in the following manner:-

> " 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 !a and Section 2 of the Power 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 Vs. Basant Nahata (2005-12-SCC-77), this court held:-

'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 the principal in favour of the agent. 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, the same shall be read as if done by the donor. A Power of Attorney is, as is well known, a document of convenience.' ”

The preposition laid down above had also been relied on by the Honourable Supreme Court in **2012-8-SCC-706 (Church of Christ Charitable Trust and Educational Charitable Society Vs. Ponniamman Educational Trust).** It is thus clear that the Power of Attorney cannot act for his own benefit and grab a property from the Principal when he had simultaneously undertaken to act on her behalf for her benefit.

52. In **2004-9-SCC-468 (Krishna Mohan Kul Vs. Pratima Maity and others)** which is a case where the executant of a deed was paralytic, practically bedridden and his mental and physical conditions were not in order, the Trial Court had declined to grant the relief that the deed must be declared as void. Before the High Court, a substantial question of law was raised whether the court below was perverse in appreciating the deed executed by such a

person. The High Court had held that the deed was void and invalid. In an appeal to the Honourable Supreme Court, it had been observed as follows:-

> "It has been rightly noticed by the High Court that the courts below have wrongly placed the onus to prove execution of the deed by Dasu charan Kul on the Plaintiffs. There was challenge by the Plaintiffs to the validity of the deed. The onus to prove the validity of the deed of settlement was on Defendant 1. When fraud, misrepresentation or undue influence is alleged by a party in a suit, normally, the burden is on him to prove such fraud, undue influence or misrepresentation. But, when a person is in a fiduciary relationship with another and the latter is in a position of active confidence the burden of proving the absence of fraud, misrepresentation or undue influence is upon the person in the dominating position, and he has to prove that there was fair play in the transaction and that the apparent is the real, in other words, that the transaction is genuine and bona fide. In such a case the burden of proving the good faith of the transaction is thrown upon the dominant party, that is to say, the party who is in a position of active confidence. A person standing in a fiduciary relation to another has a duty to protect the interest given to his care and the court watches with jealousy all transactions between such persons so that the protector may not use his influence or the confidence to his advantage. When the party complaining shows such relation, the law presumes everything against the transaction and the onus is cast upon the person holding the position of confidence or trust to show that the transaction is perfectly fair and reasonable, that no advantage has been taken of his position. This principle has been ingrained in Section 111 of the Indian evidence Act, 1872..........
>
> Where fraud is alleged, the rule has been clearly established in England that in the case of a stranger equity will not set aside a voluntary deed or donation, however improvident it may be, if it be free from the imputation of fraud, surprise, undue influence and spontaneously executed or made by the donor with his eyes open. Where an active, confidential or fiduciary relation exists between the parties, there the burden of proof is on the donee or those claiming through him. It has further been laid down that where a person gains a great advantage over another by a voluntary instrument, the

burden of proof is thrown upon the person receiving the benefit and he is under the necessity of showing that the transaction is fair and honest."

53. In **AIR-2010-SC-2807 (Suhrid Singh Vs. Randhir Singh and others)** the Honourable Supreme Court had held as follows:-

"6. Where the executant of a deed wants it to be annulled, he has to seek cancellation of the deed. But if a non executant seeks annulment of a deed, he has to seek a declaration that the deed is invalid, or non est, or illegal or that it is not binding on him. The difference between a prayer for cancellation and declaration in regard to a deed of transfer/conveyance, can be brought out by the following illustration relating to A and B, two brothers. 'A' executes a sale deed in favour of 'C'. Subsequently, 'A' wants to avoid the sale. 'A' has to sue for cancellation of the deed. On the other hand, if 'B', who is not the executant of the deed, wants to avoid, it, he has to sue for a declaration that the deed executed by 'A' is invalid/void and non-est/illegal and he is not bound by it. In essence, both may be suing to have the deed set aside or declared as non binding. But, the form is different and court fee is also different. If 'A' the executant of the deed, seeks cancellation of the deed, he has to pay ad-valorem court fee on the consideration stated in the sale deed. If 'B' who is a non executant, is in possession and sues for a declaration that the deed is null or void and does not bind him or his share, he has to merely pay a fixed court fee of Rs.19.50 under Article 17(iii) of Second Schedule of the Act. But if 'B' the non -executant, is not in possession, and he seeks not only a declaration that the sale deed is invalid, but also the consequential relief of possession, he has to pay an ad valorem court fee as provided under Section 7(iv)(c) of the Act. Section 7(iv)(c) provides that in suits for a declaratory decree with consequential relief, the court fee shall be computed according to the amount at which the relief sought is valued in the plaint. The proviso thereto makes it clear that where the suit for declaratory decree with consequential relief is with reference to any property, such valuation shall not be less than the value of the property calculated in the manner provided for by clause (v) of Section

7."

54. In this case also, the Plaintiff has come to the court seeking for a declaration that the sale deed in favour of the Defendant is null and void and thereafter, for a consequential declaration that she is the owner of the suit property. I find no infirmity either in the relief sought or in the court fee paid. Consequently, relief (a) for declaration that the Plaintiff is the absolute owner of the Flat No.11A, Golden Altius, ASK-3/4, 4^{th} Avenue, Anna Nagar, Chennai -40, after declaring that the sale deed in Document No.4822 of 2006 dated 26.12.2006 is null and void, is the relief which can be granted by the court of law. In this case, based on the oral and documentary evidence and also on the precedents as stated above, I hold that issues (3) and (8) are to be answered in favour of the Plaintiff and against the Defendant.

55. **Issues (5) and (6):-** The defendant has title deeds in his name. It is only in these proceedings that the said title has been challenged and has been declared as null and void. Even during the evidence, the plaintiff had stated that the builder is in possession of the suit flat. The plaintiff has been granted a substantial relief of declaration of title and to a little extent, some consideration must be shown to the defendant also. The plaintiff has claimed damages at the rate of Rs.30,000/- per month from the date of the plaint. However, there is no substantial evidence let in by the plaintiff with respect to either the quantum or as to the manner in which the such amount has been arrived at by the plaintiff. In these circumstances, since there is no sufficient

evidence, I hold that the plaintiff cannot be granted damages or rather I hold that the defendant cannot be called upon to pay the damages at the rate of Rs.30,000/- from the date of the plaint to the plaintiff. Accordingly, Issue (5) is answered against the plaintiff. With respect to issue (6) relating to limitation, the suit is being one for declaration and the plaintiff having come to the court at earliest point of time, I hold that the suit is within the period of limitation. The plaintiff has a continuous cause of action. Consequently, issue (6) is answered in favour of the plaintiff.

56. **Issue (9):-** Even though the issues are between spouses, the plaintiff being the wife was forced to come to the court by her husband. His acts have been held as illegal. The Plaintiff is therefore also entitled for costs from the Defendant.

57. In the result, this civil suit is partly decreed with costs as follows:-

i. The sale deed dated 26.12.2006 registered as Document No.4822 of 2006 on the file of the Sub Registrar, Anna Nagar is declared as null and void.

ii. The Plaintiff is declared to be the owner of the suit property, viz. Flat No.11-A, Golden Altius, AK-3/4, 4th Avenue, Anna Nagar, Chennai-40.

iii. The Plaintiff is entitled for recovery of possession of the Flat No.11-A, Golden Altius, AK-3/4, 4th Avenue, Anna Nagar, Chennai-40.

iv. The Defendant is liable to pay to the Plaintiff a sum of Rs.26,96,839/- (Rupees twenty six lakhs ninety six thousand eight hundred and thirty nine only) with interest at 6% p.a. from the date of the plaint till the date of realization.

07.04.2017

Index:Yes/No
Web:Yes/No
Speaking/Non Speaking
Srcm

To:

1. The Record Keeper, VR Section, High Court, Madras

C.V.KARTHIKEYAN, J.

Srcm

Pre-Delivery Judgement in
CS.No.1170 of 2009

07.04.2017