IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 11.10.2018

Coram

The Hon'ble Mr.Justice N.Seshasayee

A.S.No.818 of 2010

1. Hajira Ummal
2. Mohamed Ashib
3. Mohamed Imran ...Appellants/ Defendants 1 to 3

3rd appellant declared as major. Consequently, R4 discharged from guardianship Vide order dated 09.10.2017 made in C.M.P.No. 17073 and 17074 of 2017 of this Appeal.

Vs.

1. Raja Mohamed
Rep. by Power of Attorney Mr.Jahaber Ali
(R-1 causetitle amended as per order dated 12.12.2017 in CMPNo.21418/2017 of this Appeal. .. 1st Respondent / Plaintiff

2. Abdul Kadar
3. Iqubal
4. Jagabar Sadhick

5. The Sub-Resistrar Karaikal
Sub Registrar Office, Karaikal. ..Respondents 2 to 5/ Defendants 4 to 7.

Appeal filed under Section 96 read with Order 41, Rule 1 of C.P.C, against the judgment and decree dated 18.08.2009 in O.S.No. 9 of 2006 passed by the Additional District Judge, Puducherry, Karaikal.

For Appellant : Mr.K.M. Aasim Shehad for M/s. BFS Legal

For Respondent-1 : Mr.R.Thirugnanam

Respondents 2 to R5 : No appearance

JUDGEMENT

The defendants 1 to 3 in O.S.No.9 of 2006, on the file of the Additional District Judge, Puducherry, are the appellants herein.

2. The first respondent/plaintiff filed the suit seeking cancellation of a settlement deed dated 11.12.2003 executed by the first appellant in favour of the appellants 2 and 3 (both of whom are sons born through her husband, the first respondent herein) with a consequential prayer to direct the Sub-Registrar, Karaikal, to carryout certain mutations in regard to such cancellation of settlement deed; and for declaration that he is entitled to receive rent from the fourth defendant/second respondent. The Trial Court decreed the suit as prayed for. Aggrieved by the same, the defendants 1 to 3 have appealed to this Court. Parties would be referred to by their rank before the trial court.

3. The material allegations on the foundation of which the plaintiff has instituted the suit are:

- The suit property, a residential house, originally belonged to the mother of the first respondent, Rabiathu Bairia. On 26.03.1998, she gifted the said property to her son, the plaintiff herein, under a registered gift deed. Since the date of the gift, the plaintiff has been in peaceful possession and enjoyment of the suit property.

- The plaintiff had been working in Saudi Arabia and he used to visit India twice or thrice every year. Hence, to protect, preserve and to maintain his property, the plaintiff had executed a power of attorney in favour of his wife/first defendant on 24.04.2002. It is pertinent to mention here that the plaintiff did not have any intention to transfer the suit property to anyone else, including his sons.

- In 2003, plaintiff returned to India. During such visit, he did not visit his family, but opted to stay with his sister. The first defendant, though his wife, cared little for him, as she chose not even to visit him once. In February, 2004, the plaintiff again left India for Saudi Arabia. Despite the fact his relationship with his wife (the first defendant) had strained, he did not cancel the power of attorney which he had executed in her favour, as he expected her to mend her ways. But opposite to his expectation, to his shock and surprise, he came to know that during his visit to India in October, 2003, i.e., at the very point of time, when the plaintiff was available in

India, the first defendant/first appellant, without his knowledge, had settled the property in favour of her sons (appellants 2 and 3/defendants 2 and 3) on the strength of the power of attorney referred to above. This came to be challenged by the plaintiff, and he laid the present suit for the said purpose.

4. The defendants 1 and 2 contested the suit and in their written statement, wherein they alleged:

- The suit was not properly instituted as the minor defendants, viz., defendants 2 and 3, were not properly represented, nor the plaintiff has filed any application seeking appointment of a proper person to be the guardian of the minors, as such, the suit suffers from legal infirmity. Secondly, the suit is not maintainable on the ground that the power agent of the plaintiff has no authority to file the suit. Though the plaintiff claims that he has cancelled the power of attorney granted in favour of the first defendant and executed the deed of revocation of settlement on 27.12.2005 by appointing one Mr.M.Naina Mohamed, as his power agent, vide power deed dated 03.01.2006, nothing has been stated about such revocation of the settlement deed, dated 11.12.2003, in the power deed dated 03.01.2006, and hence, the said Naina Mohamed is not entitled to file the suit on the strength of the alleged power deed dated 03.01.2006.

- The suit is bad for non-joinder of necessary parties. Admittedly, the plaintiff has sought for a direction against the Sub-Registrar, Karaikal, to carryout certain mutations in regard to such cancellation of the settlement deed, but, the Sub-Registrar, Karaikal, has not been added as party defendant to the suit. That apart, the plaintiff has not properly valued the suit. The relief sought by the plaintiff seeking direction to the Sub-Registrar, Karaikal to make certain mutation in the register maintained tantamounts to a relief of mandatory injunction, and to seek such relief, the suit has to be necessarily valued under Section 27 of the Pondicherry Court Fees and Suits Valuation Act, 1972.

- It is no doubt true that the plaintiff was the absolute owner of the suit property. But, later on, the plaintiff has executed a power of attorney in favour of his wife/first defendant. Thus, she has been specifically empowered to act on behalf of the plaintiff. By virtue of the said Power of Attorney, she has executed a gift deed in favour of defendants 2 and 3, who are none other than the children born to her through the plaintiff. The allegation in the plaint that the relationship between the plaintiff and first defendant was not cordial is not true. Till the beginning of 2004, the plaintiff was staying with the defendants 1 to 3. Thereafter, due to the instigation of his sister, the relationship between her and the plaintiff got strained and gradually the plaintiff avoided living with the defendants 1 to 3. But, at the very point of time when the settlement deed was executed, the plaintiff was living with the defendants 1 to 3. Therefore, it is false to say that the settlement deed was executed in the absence of the plaintiff in India, and that he was not aware of the same. If the first defendant has settled the property on her children without the knowledge of the plaintiff and against his wishes, he could have revoked the power granted to her or challenged the settlement deed before he left India, in February, 2004. Therefore, the settlement deed is valid and genuine and the interpolations made therein are also true and no fraud has been played. Thus, by virtue of the settlement deed, possession and enjoyment of the suit property was handed over to the first defendant and in pursuance thereof, she is acting as guardian of the minors and receiving the rent paid by the tenants, who are in occupation of the property and the plaintiff neither has right over the suit property, nor is he entitled to receive the rent which the property fetches. The suit is liable to be dismissed.

5. On the basis of the above pleadings, the Trial Court framed the following issues

1.Whether the plaintiff is the owner of the suit property?
2.Whether the plaintiff is entitled to receive the rent of the suit property?
3.Whether the settlement deed dated 11.12.2003 is true and valid?
4.Whether the plaintiff is entitled to the relief of cancellation of settlement deed dated 11.02.2007?
5.To what relief, the plaintiff is entitled to?

The power of attorney was marked before the trial Court as Ext.A4. It was not the original power of attorney executed by first respondent, but, a photostat-certified copy obtained from the Sub-Registry. This document is a manuscript, wherein, interpolations are seen in the form of an interlineation, granting power to the power-holder to sell the property. The learned trial Judge suspected the genuineness of Ex.A-4 and relied on the testimony of the first appellant, who examined herself as D.W.1. before the trial Court, and decreed the suit.

6. In the context of the argument advanced, the only point for consideration is Whether Ext.A-4 grants the first defendant, the appellant to execute a settlement deed?

7. Ext.A-4 is dated 24.04.2002. In the operating portion of this document, there is an interlineation which seems to grant the first defendant the power to sell the property. The plaintiff denies this interlineation as fradulently made. Under Ext.A-4 no express power seems to emanate in favour of the first defendant to execute a settlement deed. Further, Ext.A-4 is a certified photo-copy of the original, and the first defendant has not chosen to produce the original. The moot point is, has the first defendant been authorised by Ext.A-4 to settle the suit property in favour of her sons.

8. The learned counsel appearing for the appellants submitted that the sole intention of the plaintiff, which gets manifested in his pleadings, in executing the Power of attorney in favour of his wife was that he wanted to secure the interest of his family, and hence the said Power of Attorney must be contextually understood. It is in pursuance to this intention of the plaintiff, the first defendant had executed the settlement deed in favour of the very sons who were born to her through the plaintiff. He also submitted that the plaintiff has neither resorted to the procedure contemplated under Order XI Rule 14, or Order XII Rule 10 CPC, requiring the first defendant to make available the original Power of Attorney document to prove his case that the intelineation was fraudulently made, and therefore, it is not appropriate on the part of the trial court to draw adverse inference about the conduct of the first defendant. Reliance was placed on the authorities in Naren Chandra Naskar Vs. Arun Bhattacharya and others [2008) 13 S.C.C. 406] Phool Kumari Vs. Office of the Superintendent, Tihar, New Delhi and another [(2012) 8 S.C.C. 183].

9. In response, the learned counsel for the first respondent argued that under the Indian Evidence Act, primary evidence is the best evidence and the burden is cast on the party who relies on the secondary evidence to explain as to why the primary evidence could not be produced. Reliance was placed on R.V.E. Venkatachalam (Died) and others Vs. B.A. Devaneson and others [(2015 2) MLJ 530]. Therefore, the burden is cast only on the first defendant, who has opted to produce the secondary evidence to explain as to what had happened to the primary evidence. Secondly, it is not her case that she had lost the original Power of Attorney document irretrievably that its secondary evidence could be accepted. Thirdly, even if the interlineations in the Power of Attorney is to be presumed true, still, it goes to show that power has been granted only to sell the property, and not to settle the property. Fourthly, going by

the quality of interlineation, it is not attested at the places where interlineations are made as contemplated under Rules 22 and 23 of the Registration Rules.

10. To the last mentioned point, the learned counsel appearing for the defendants1 to 3/appellants would submit that Rules 22 and 23 of the Registration Rules should not be read in isolation but read in conjunction with Rule 114, and if at all any, the plaintiff ought to have summoned the Sub-Registrar to produce the original Register books in terms of Rule 147.

11. Impressive may be the submission of the learned counsel for the appellants but this Court reads an element of desperation in it. Turning to the point on whom the burden of proof is cast, this Court must hold that the plaintiff has pushed the defendants to the back foot straightaway, as under the Evidence Act, the burden is cast on the party who possesses the primary evidence, the best evidence as per the Evidence Act, to produce it. The point is whether the original Power of Attorney deed had the interlienation such as the one which Ext.A-4 has. Here, the first defendant, speaks in different terms and goes to the extent of deposing that that her husband might have stealthily removed the Power of Attorney from her custody. When the plaintiff has denied that the original Power of attorney did not contain the interlienation, then to prove its opposite, the positive aspect of the factum of existence of interlineation in the original, she ought to have invoked Rule 147, since the burden is on her to vindicate her claim that interlineation in the power of attorney was genuine.

12. This apart, as rightly pointed out by the learned counsel for the plaintiff, even if the interlineation is considered to be there when the original Power of Attorney was executed, still the only power granted by the plaintiff to the first defendant was only to sell the suit property but not to gift or settle the same. A sale involves conversion of an immovable property into money, an asset in liquid form. But settlement fetches nothing for the executant of the Power of Attorney. Therefore, the settlement, obviously, cannot be equated or placed alongside a power of alienation. This would mean, even if the interleniation were to be presumed to be genuine, yet it must have to be held that the first defendant as the Power of Attorney of the plaintiff had acted in excess of authority granted under it, and consequently, the settlee, namely the defendants 2 and 3/appellants 2 and 3, cannot obtain any title under the same.

13. In conclusion, this Court does not find merit in the Appeal. The same is dismissed but without costs. It may be stated that during the course of hearing, some efforts were taken by this Court to bring about an amicable settlement between the parties, but, for varieties of reasons, even a meeting could not be organized. This Court only wishes that since the litigation appears to have germinated out of spousal differences, the family become wiser and resolve their differences. May sanity and peace prevail in the lives of the parties.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

sd

To:

1. The Additional District Judge, Puducherry, Karaikal.

2. The Section Officer, VR Section, High Court, Madras.

+1 cc to M/s.BFS Legal, Advocate, S.R.No.70728

+1 cc to Mr.R.Thirugnanam, Advocate, S.R.No.70447

A.S.No.818 of 2010

MP(CO)
SSM(14/03/2019)