

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 18.06.2018
Judgment pronounced on: 02.07.2018

CORAM

THE HONOURABLE MR.JUSTICE P. RAJAMANICKAM
S.A.No.173 of 2000

A. Duraikannu Padayachi

... Appellant/plaintiff

Vs.

Mani Padayachi

...Respondent/Defendant

Prayer : Second Appeal is filed under Section 100 of the Civil Procedure Code, against the Judgment and Decree dated 17.11.1998 in A.S.No.6 of 1998 on the file of the Sub-Court Cuddalore preferred against the Judgment and Decree dated 15.10.1997 in O.S.No.429 of 1992 on the file of the Principal District Munsif, Cuddalore.

For Appellant : M/s.R.Meenal

For Respondent : Set exparte

JUDGMENT

This second appeal has been filed by the plaintiff against the Judgment and decree passed by the Sub-Judge, Cuddalore, in A.S.No.6 of 1998 dated 17.11.1998 confirming the Judgment and decree passed by the District Munsif, Cuddalore, in O.S.No.429 of 1992 dated 15.10.1997.

2. The appellant herein has originally filed a suit in O.S.No.429 of 1992 on the file of the District Munsif, Cuddalore, to declare his title to the suit 'A' and 'B' schedule properties and to restrain the defendant, his men, etc., by means of permanent injunction from interfering with his peaceful possession of the suit properties. Subsequently, he amended the plaint to deliver vacant possession of the suit properties and for future mesne profits. The learned District Munsif by the Judgment dated 15.10.1997, had dismissed the said suit. Aggrieved by the same, the plaintiff has filed an appeal in A.S.No.6 of 1998 on the file of the Sub-Judge, Cuddalore. The learned Special Judge, Cuddalore, has dismissed the said appeal confirming the Judgment and decree passed by the Trial Court. As

against the same, the plaintiff has filed the present second appeal. For the sake of convenience, the parties are referred to as described before the trial court.

3. The averments made in the amended plaint are, in brief, as follows:

a) The suit 'A' schedule property originally belonged to one Ayyakannu Chettiar. On 18.11.1953, the said Ayyakannu Chettiar had executed a settlement deed in favour of his wife and daughters. The settlees wherein had executed a General power of attorney in favour of one Sambandam authorising him to sell suit 'A' schedule property. The said Sambandam had executed an agreement of sale in favour of the plaintiff on 17.01.1991 for Rs.12,750/- and received Rs.5000/- as advance. On 20.12.1991, the said Sambandam had sold the suit 'A' schedule property to the plaintiff for a valuable consideration of Rs.12,750/- through a registered sale deed. The plaintiff was put in possession of the suit 'A' schedule property.

b) The suit 'B' schedule property was purchased by the plaintiff's father and his brother Krishna Padayachi under two sale deeds dated 05.11.1933. Subsequently, Krishna Padayachi died without any male issues and his wife also died many years ago. Hence, the 'B' schedule property devolved upon the plaintiff and his brothers. In an oral partition, about 20 years back, the 'B' schedule property was allotted to the share of the plaintiff. Thus, the plaintiff has become the absolute owner of both the 'A' and 'B' schedule properties. Further the plaintiff and his pre-decessors-in-title have been in open, hostile and continuous possession of the suit properties for more than statutory period and has thus prescribed title to the suit properties by adverse possession also. While so, the defendant claimed that he has purchased the property from the plaintiff's brothers and tried to trespass into the suit properties. Hence the plaintiff has filed the above suit for declaration and permanent injunction. During pendency of the suit, in the first week of July, 1994, the defendant has trespassed into the suit properties and he is in unlawful possession. Hence, the plaintiff has amended the plaint for delivery of possession and for future mesne profits.

4. The averments made in the written statement and in the additional written statement are, in brief, as follows:

a) It is true that the suit 'A' schedule property and other properties belonged to one Ayyakannu Chettiar and that he settled the same in favour of his wife Apoorvam Ammal and daughters through a registered settlement deed dated 18.11.1953. Some of the settlees seemed to have executed a registered General power of attorney dated 08.09.1986 in favour of one

Sambandam. But, it was later revoked by the principals through the revocation deeds dated 26.04.1991 and 29.04.1991 on due notice to the said power agent. Thereafter they have executed deeds of general power of attorney dated 26.04.1991 and 29.04.1991 respectively appointing one Gnanasekaran as their power agent to deal with the aforesaid properties.

b) Subsequently, the said Gnanasekaran, as power agent, sold the suit 'A' schedule property to the defendant through a registered sale deed dated 05.08.1991 for a valid consideration of Rs.30,000/-. The defendant has also been inducted into possession of the said property on the said date itself. Thus, the defendant has become the absolute owner of the suit 'A' schedule property. Since the power deed which was executed in favour of the said Sambandam was revoked by the principals on 26.04.1991 and 29.04.1991 respectively, the said Sambandam has no right to execute the sale deed dated 20.12.1991 in favour of the plaintiff. Therefore, the plaintiff has neither title nor possession of the suit 'A' schedule property.

c) It is true that the plaintiff's father Appavu Padayachi and his younger brother Krishna Padayachi had purchased some properties including suit 'B' schedule property under two registered sale deeds dated 05.11.1933. The further averments that the said Krishna Padayachi died without any male issue and hence the suit 'B' schedule property was devolved upon the plaintiff and his brothers are all false. The said Appavu Padayachi and Krishna Padayachi had divided their properties orally in or about 1944. Ever since then, Appavu Padayachi was dealing with the divided extent of 65½ cents out of acres 1.29 in his own right as the divided member. So also the said Krishna Padayachi and his minor son Arumugham had dealt with other half share in their own right.

d) Appavu Padayachi branch owned only 65 ½ cents of land in item Nos.2 to 4 on north; 6½ cents in Item No.1 in suit 'B' schedule property and nothing more and hence, the plaintiff and his two younger brothers viz., Vairakuannu and Jayaraman had divided the same in a oral partition in the year 1972 and in pursuance of which Koorchit (partition list) was drawn in triplicate on 22.07.1972 in a village panchayat. In the said koorchit, all the parties had signed and each of the said brothers were provided with the copy of the said koorchit. Ever since then, the plaintiff and his two brothers were in separate possession and enjoyment of each of their respective shares as absolute owners. The plaintiff is not in a possession of the property as alleged by him in the plaint. The question of adverse possession also does not arise. The plaintiff is not entitled to the said 'B' schedule property as alleged by him. He was allotted northern 22 ½ cents out of 65 ½ cents and is in

enjoyment by metes and bounds within the stated boundaries as detailed in the said koorchit and nothing more. The plan appended with the written statement may be read as part and parcel of the written statement.

e) The plaintiff's youngest brother Jayaraman sold his property to the defendant through a registered sale deed dated 02.05.1988. So also, the other brother Vairakannu sold his property to the defendant through a registered sale deed dated 30.03.1991. Ever since the said sale deeds, the defendant has been in possession and enjoyment of the properties mentioned in the said sale deeds in his own right as absolute owner. Though the patta has been in the name of the plaintiff and his brothers jointly, the defendant's vendors were in separate possession and enjoyment of their respective shares in pursuance of the oral partition. Thus, the plaintiff has neither title nor in possession of suit 'A' and 'B' schedule properties as alleged by him. The alleged agreement purported to have been executed on 17.01.1991 by one Sambandam in favour of the plaintiff is a fabricated document and the said document will not bind upon the defendant. The suit is bad for non-joinder of necessary parties viz., Vairakannu, Jayaraman and Ayyadurai. The plaintiff knowing fully well that he had neither title nor in possession of the suit properties, has filed a suit for declaration and injunction. The allegation that during pendency of the suit that the defendant had trespassed into the suit property and he is in unlawful possession is false. So, the plaintiff is not entitled for the relief of declaration and recovery of possession. Therefore, the defendant prayed to dismiss the above suit.

5. The averments made in the reply statement filed by the plaintiff are, in brief, as follows:

In a oral partition which took place between the plaintiff and his brothers, Vairakannu and Jayaraman, the suit 'B' schedule properties were allotted to the share of the plaintiff. Vairakannu and Jayaraman were allotted in Vazhuthalampattu village. They had in turn sold the property to others. Therefore, the plaintiff prayed to decree the suit as prayed for.

6. Based on the aforesaid pleadings, the learned District Munsif has framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff examined himself as PW1 and examined two more witnesses as PW2 and PW3. He has marked Exs.A1 to A23 as exhibits. On the side of the defendant, the defendant examined himself as DW1 and examined three more witnesses as DW2 to DW4. He has marked Ex.B1 to Ex.B27 as exhibits.

7. The learned District Munsif after considering the

materials placed before her, has dismissed the suit. Aggrieved by the same, the plaintiff has filed an appeal in A.S.No.6 of 1998 on the file of the Sub-Judge, Cuddalore. The learned Sub-Judge, Cuddalore, has dismissed the said appeal confirming the decree passed by the trial court. Feeling aggrieved, the plaintiff has preferred the present second appeal.

8. At the time of admitting this second appeal, this court has formulated the following substantial questions of law:

(i) Whether in law the courts below have not overlooked that Exs.B12 and B13 are not valid in law and that there cannot be any legally valid revocation as prescribed under Section 204 of the Contract Act?

(ii) Whether in law the courts below erred in holding that the agreement in Ex.A3 was not executed by the Power Agent overlooking that the test is to see the terms of the agreement in entirety to discover the intention of the parties, the competence of agent to transfer besides the question of satisfaction and right to the principals over the property sought to be transferred?

(iii) Whether in law the courts below erred in overlooking that Ex.B16 and Ex.B17 would not convey any title or right to the defendants as the defendants had not discharged their burden of proving their plea of allotment of 'B' schedule to the appellant's brothers exclusively?

9. Eventhough notice was served on the respondent on 27.03.2017, the respondent neither appeared in person nor through counsel. Hence, respondent was called absent and set exparte. After hearing Ms.R.Meenal, learned counsel appearing for the appellant/plaintiff and perusing the records, the Judgment in this second appeal is being passed.

10. Question Nos: 1 & 2:

Learned counsel for the appellant contended that the courts below failed to consider that before revoking the power of attorney which was executed in favour of one Sambandam, no notice was issued by the principals. She further contended that the courts below failed to consider that the power agent Sambandam by exercising the power conferred on him has entered into a sale agreement with the plaintiff on 17.01.1991 and in pursuance of the said sale agreement, the said power agent has executed the sale deed on 20.12.1991 in favour of the plaintiff for a valid consideration of Rs.12,750/- in respect of the suit 'A' schedule property. She further contended that since the

power agent Sambandam has exercised the authority partly by entering sale agreement with the plaintiff on 17.01.1991, as per Section 204 of the contract Act , the principals have no authority to revoke the power of attorney which was executed in favour of the said Sambandam and therefore, the sale deed in favour of the defendant by the principals, is not valid in law. In support of her contention, she relied upon the decision in M.Masilamani Vs. M. Veeramani and another (2017) 3 MWN (Civil 350).

11. The undisputed facts are as follows:

The suit 'A' schedule property originally belonged to one Ayyakannu Chettiar. The said Ayyakannu Chettiar had executed a settlement deed on 18.11.1953 in favour of his wife Apoorvam Ammal and daughters. The said Apoorvam Ammal and her daughters had executed a registered power of attorney on 08.09.1986 in favour of one Sambandam.

12. According to the plaintiff, the said Sambandam entered a sale agreement with him on 17.01.1991 for selling the suit 'A' schedule property for Rs.12,750/- and on the same day, the said Sambandam has received a sum of Rs.5000/- as advance. His further case is that in pursuance of the said sale agreement, the said Sambandam has executed a registered sale deed on 20.12.1991 and handed over possession of the suit 'A' schedule property to him.

13. The case of the defendant is that the alleged sale agreement dated 17.01.1991 is false and the same was created subsequently by the plaintiff and the said Sambandam. His further case is that the power of attorney which was executed in favour of the said Sambandam dated 08.09.1986 was cancelled by the principals by means of registered deeds of revocation dated 26.04.1991 and 29.04.1991 and thereafter, they executed the deeds of registered power of attorney in favour of one Gnanasekaran and the said Gnanasekaran had executed a registered sale deed in his favour, on 05.08.1991 for valid consideration of Rs.30,000/- and possession was given to him on the same day and hence the said Sambandam could not have convey valid title to the plaintiff by the sale deed dated 20.12.1991.

14. As already pointed out, according to the learned counsel for the appellant, since the power agent, Sambandam has exercised the authority partly by entering the sale agreement dated 17.01.1991, as per Section 204 of the Contract Act, 1872, the principals cannot revoke the power of attorney which was executed in favour of the said Sambandam. For proper appreciation, Section 204 of the Indian Contract Act, 1872, is extracted hereunder:

"204. Revocation where authority has been partly

exercised:-The principal cannot revoke the authority given to his agent after the authority has been partly exercised, so far as regards such acts and obligations as arise from acts already done in the agency.

Illustrations

(a) A authorizes B to buy 1,000 bales of cotton on account of A and to pay for it out of A's moneys remaining in B's hands. B buys 1,000 bales of cotton in his own name, so as to make himself personally liable for the price. A cannot revoke B's authority so far as regards payment for the cotton.

(b) A authorizes B to buy 1,000 bales of cotton on account of A, and to pay for it out of A's moneys remaining in B's hands. B buys 1,000 bales of cotton in A's name, and so as not to render himself personally liable for the price. A can revoke B's authority to pay for the cotton."

15. In this case, the sale agreement said to have been entered by the power agent Sambandam and the plaintiff dated 17.01.1991 has been marked as Ex.A3. The said document has been written in a Rs.3/- stamp paper. In the said stamp paper, the name of the stamp vendor and his signature not found. Further the seal which was affixed in the said stamp paper does not contain the date on which it was released by the treasury. Under the said circumstances, a serious doubt arises as to whether actually the said sale agreement was entered on 17.01.1991. Even assuming that the said agreement was entered on 17.01.1991, in the said document, it is not stated that the said Sambandam entered sale agreement as power agent of the owners of the property. On the contrary, he has stated that he himself owner of the property mentioned in the said document. As per Section 204 of the Indian Contract Act, if the power agent exercised the authority partly and thereafter, the principals cannot revoke the authority given to his agent. But, in this case, since the said Sambandam has entered sale agreement in his personal capacity and not as power agent, Section 204 of the Indian Contract Act will not attract.

16. In M.Masilamani Vs. M. Veeramani and another (2017) 3 MWN (Civil 350), the first defendant executed a registered general power of attorney in favour of the second defendant on 23.01.2009. In pursuance of the said power of attorney, the second defendant entered into a sale agreement with the plaintiff on 01.07.2009. Thereafter, the first defendant executed a deed of revocation of power of attorney on 14.09.2009 and thereafter, he issued notice to the second

defendant stating that the said power of attorney was cancelled. The plaintiff has filed a suit for specific performance impleading principal and the power agent as defendants. The trial court has decreed the suit for specific performance. On appeal, the Hon'ble Division Bench of this court has confirmed the said Judgment of the trial court. But in this case, as already stated, the original power agent viz., Sambandam has not entered into a sale agreement as power agent. He entered into sale agreement with the plaintiff stating that he is the owner of the property. Further, the plaintiff after knowing fully well that the principals have revoked the power of attorney which was executed in favour of the said Sambandam and executed deeds of power of attorney in favour of one Gnanasekaran and also the fact that the said Gnanasekaran has executed a registered sale deed in favour of the defendant on 05.08.1991, got sale deed in his favour on 20.12.1991 from the said Sambandam. As per Section 3 of the Transfer of Property Act, it has to be presumed that the plaintiff got constructive notice with regard to the revocation of power of attorney which was executed in favour of Sambandam, execution of the power of attorney in favour of Gnnasekaran and execution of sale deed in favour of the defendant. The plaintiff had knowledge that even before execution of the sale deed in his favour by the said Sambandam, the second power agent Gnanasekaran has sold the property in favour of the defendant and possession also given to the defendant. If really the plaintiff has entered a sale agreement on 17.01.1991, with the first power agent viz., Sambandam, he should have filed a suit for specific performance impleading principals, power agents and the purchaser as defendants. If any such suit was filed by the plaintiff, and the court also accepted the case of the plaintiff, then it could have granted decree directing all the parties to execute a sale deed in favour of the plaintiff. Then only title will be conveyed properly. But instead of doing so, the plaintiff has obtained a sale deed from the said Sambandam knowing fully well that already property was sold to the defendant. Therefore, the aforesaid decision will not help the plaintiff in this case. Accordingly, these questions are answered against the appellant/plaintiff.

17. Question No.3:

This question is relating to the suit 'B' schedule properties. Suit 'B' schedule properties contain four items situated in Pachayankuppam village, Cuddalore Taluk. Item No.1 situated in SR.No.30/1 measuring about 13 cents. Item No.2 situated in SR.No. 31 measuring about 40 cents. Item No.3 situated in S.R.No.30/2 measuring about 10 cents and Item No.4 situated in S.R.No.30/3 measuring about 9 cents. Totally, it comes to about 72 cents.

18. According to the plaintiff, the suit 'B' schedule properties were purchased by his father Appavu Padayachi and his brother Krishna Padayachi by two sale deeds dated 05.11.1933. He has produced the said sale deeds and marked as Ex.A5 and Ex.A6 respectively.

19. The plaintiff has stated in his plaint that the said Krishna Padayachi died without issues and his wife also died and hence, the said 'B' schedule properties devolved upon him and his brothers. He further stated that in an oral partition about 20 years back, the suit 'B' schedule properties were allotted to his share, but in his evidence, he has admitted that his paternal uncle Krishna Padayachi got a son by name Arumugham. Therefore, the share of the said Krishna Padayachi would have devolved on the said Arumugham. Further, the plaintiff has stated in the plaint that in the oral partition took place 20 years back between himself and his two brothers, the suit 'B' schedule properties were allotted to his share. In the reply statement, he has stated that his family got properties in the Vazhuthalampattu village and in the oral partition, the properties situated in the Vazhuthalampattu village were allotted to the share of his brothers. However, he has not produced any documentary evidence to show that his family got properties in the Vazhuthalampattu village. The plaintiff has admitted in his cross examination that he has not produced any documentary evidence to show that his father got any other property other than the properties which are mentioned in Ex.B1 and Ex.B2 mortgage deeds. In Ex.B1 and Ex.B2, it is clearly stated that his father got only 65½ cents.

20. According to the defendant, the plaintiff and his two brothers have partitioned the aforesaid 65½ cents orally in the year 1972 and to evident the same, a koorchit was executed and in the said partition, the plaintiff was allotted one-third share on the northern side with specific boundaries and his brothers Jayaraman and Vairakannu were allotted one-third share each and they have sold their shares to him wide sale deeds dated 02.05.1988 and 30.03.1991 (Ex.B16 and Ex.B17 respectively). His further case is that he is in possession of the properties which were purchased by him through the aforesaid sale deeds. The said koorchit has been marked as Ex.B15. Though the plaintiff has denied the execution of the said koorchit, he has admitted in his plaint, 20 years back an oral partition was effected between himself and his two brothers. In the absence of any evidence to show that the plaintiff's family got any other property, it has to be presumed that the plaintiff and his two brothers have divided only the suit 'B' schedule properties. The plaintiff's brothers have sold their shares in favour of the defendant vide Ex.B16 and Ex.B17. Ex.B16 was executed on 02.05.1988 and Ex.B17 was executed on 30.08.1991. In the said

documents Ex.B15 has been referred to. It shows that Ex.B15 has been acted upon. Therefore, though Ex.B15 has not been registered, it can be looked into for collateral purposes such as nature of possession. The defendant has not claimed any right over the property which was allotted to the plaintiff through the koorchit(Ex.B15). So the plaintiff is entitled for declaration only in respect of the properties allotted to him in the oral partition and subsequently reduced into writing as koorchit dated 22.07.1972 (Ex.B15). As already pointed out that the defendant has not claimed any right over the said property. So the question of delivery of possession of the said share does not arise. Accordingly, this question is answered.

21. In the result, the second appeal is partly allowed and the Judgments and Decrees passed by the courts below are modified as follows:

- (i) that the plaintiff is entitled for declaration that he is the owner of the properties which are situated on the north of the defendant's properties as described in the koorchit (Ex.B15);
- (ii) that since the defendant has not claimed any right over the said properties and that the plaintiff also failed to prove that the defendant is in possession of the said properties, there is no necessity to grant decree for delivery of possession of the said properties;
- (iii) that in other aspects, the decrees and judgments passed by the courts below are confirmed; and
- (iv) that since the defendant has not contested the second appeal, cost is not awarded in this second appeal.

Sd/-
Assistant Registrar(CS V)

//True Copy//

सत्यमेव जयते
Sub Assistant Registrar

To

1. The Subordinate Judge
Cuddalore.
2. The Principal District Munsif,
Cuddalore.

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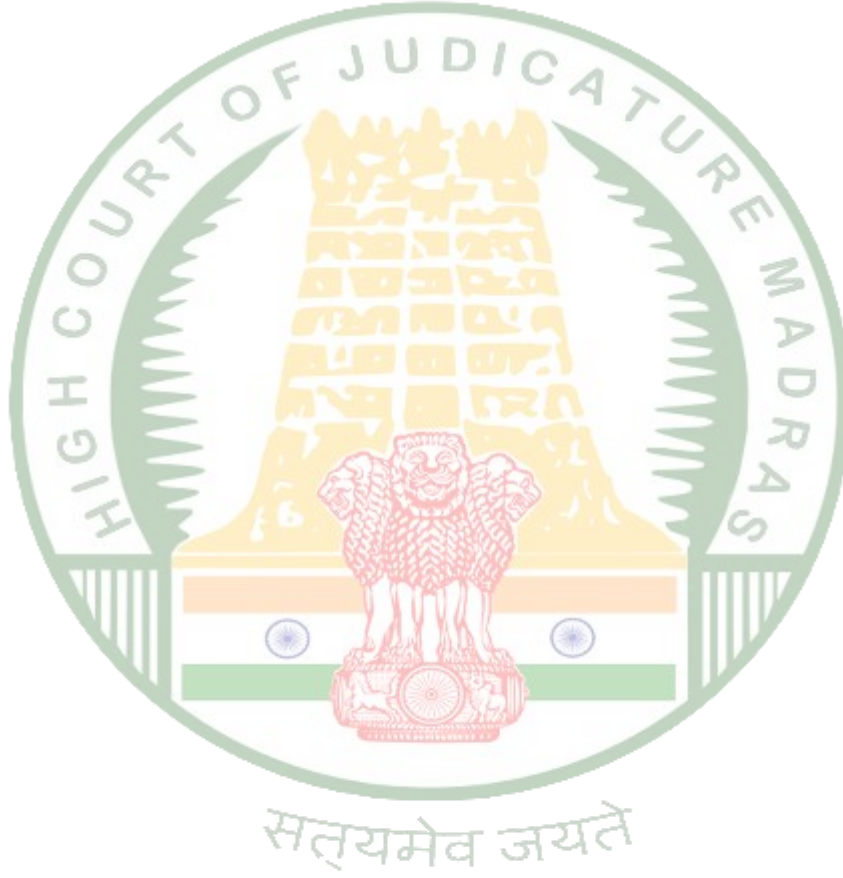
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The Section Officer,
V.R.Section,
High Court, Madras.

+1cc to Mr.R.Meenal, Advocate, S.R.No.42505

S.A.No.173 of 2000

KJI (CO)
GSP (06/08/2018)



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