

IN THE HIGH Court OF JUDICATURE AT MADRAS

DATED: 21.12.2018

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.87 of 2016
&
C.M.P.No.2167 of 2016

P.C.Kandasamy ... Appellant/Plaintiff

Vs

1.A.Seerangasamy
2.S.Muthulakshmi ... Respondents/Defendants

Prayer: Second Appeal filed under Section 100 of the Code of Civil Procedure against the Judgment and Decree dated 17.12.2014 made in A.S.No.12 of 2014 on the file of the learned Sub Court, Perundurai confirming the Judgment and Decree dated 29.04.2014 made in O.S.No.110 of 2009 on the file of the learned District Munsif Cum Judicial Magistrate, Perundurai.

For Appellant : Mr.N.Manokaran

For Respondents 1 & 2: Mr.T.Murugamanickam
Senior Counsel
for Ms.P.T.Ramadevi

JUDGMENT

The plaintiff is the appellant before this Court. The Second Appeal arises against the concurrent Judgment and Decree passed in A.S.No.12 of 2014 on the file of the Sub Court, Perundurai confirming the Judgment and Decree of learned District Munsif Cum Judicial Magistrate, Perundurai in O.S.No.110 of 2004. The parties are referred to in the same litigative status as in the suit.

2.Plaintiff's Case:

2.1.The plaintiff had filed a suit O.S.No.110 of 2009 for declaring the sale deed dated 01.09.2005 executed by the 1st defendant in favour of the 2nd defendant as null and void and for the consequential injunction restraining the defendants from interfering with the plaintiff's peaceful possession and enjoyment of the suit property.

2.2.It is the case of the plaintiff that the property belongs to the plaintiff and his two sons, though the sale deed stands in the name of the plaintiff. On 17.04.2003, he had borrowed a sum of Rs.1,00,000/- from the 1st defendant and as security for the said loan he has executed a pronote as well as a registered agreement of sale which has been marked as Ex.A.1 in the suit.

2.3.It is the case of the plaintiff that he had been regularly paying the interest which is charged at 12% per annum. Thereafter on the request of 1st defendant the plaintiff had executed a cancellation deed (Ex.A.2 = Ex.B.3) and on the very same day the Power of Attorney was executed in favour of the 1st defendant as a collateral security for the loan amount.

2.4.The plaintiff had avered that he had executed Power of Attorney reposing full faith on the 1st defendant and believing that he would not misuse the Power of Attorney, since it was specific understanding between the parties that the Power of Attorney would not be used for the purpose recited in the Deed (viz; to sell the property). However, contrary to that understanding it appears that the 1st defendant as power agent of the plaintiff has executed a sale deed in favour of his own wife, the 2nd defendant under Ex.A.4 (Ex.A.4 = Ex.B.6). This factum came to the knowledge of the plaintiff only in the first week of September 2008 and thereafter the plaintiff stopped paying interest to the 1st defendant.

2.5.The plaintiff had also contended that he continued to be in possession and enjoyment of the property and though the sale deed contains recitals that the possession was handed over to the 2nd defendant, the same was not actually done and the sale deed was only a nominal document. The plaintiff's legal notice dated 03.11.2008 calling upon defendants to cancel Ex.A.4 sale deed did not yield the desired result and hence the suit.

3.Defendant's case:

3.1.The Defense to the the above suit was that the sale agreement dated 17.04.2003 was intended only as an agreement of sale and not as security. Though the defendant had been ready to make the payment of the balance sale consideration of Rs.2,00,000/- it was the plaintiff who was postponing his part of the contract under one pretext or the other. Infact the defendants tendered the balance sale consideration, many a time but the plaintiff did not come forward to execute the sale agreement. Therefore, it is the case of the defendants that the plaintiff had received the balance sale consideration of Rs.2,00,000/- and executed a Power of Attorney and thereafter

cancelled the sale agreement dated 17.04.2003 as the same was unnecessary. To that effect, the plaintiff had already executed a vartha mana letter in favour of the defendant and to acknowledge the receipt of the amount the plaintiff has also passed receipts to that effect.

3.2.It was also the case of the defendant that the contention of the plaintiff that he had borrowed sum of Rs.1,00,000/- and the sale agreement was only given by way of security is totally false since the plaintiff had received the entire sale consideration and the 2nd defendant had purchased the property for a valuable consideration and is now in possession and enjoyment of the suit property. It was also the case of the defendant that the plaintiff has no right, title or interest to the suit property. For these reasons, the defendant sought for the dismissal of the suit.

4.Trial Court:

4.1.The learned District Munsif, Perundurai had framed the following issues:

"a)Whether the plaintiff is entitled to the relief of declaration as prayed for?

b)Whether the plaintiff is entitled to the relief of permanent injunction? and

c)To what other reliefs the plaintiff was entitled to?"

4.2.The plaintiff had examined himself as P.W.1 and had examined two other persons as P.W.2 and P.W.3 who are the attestors of the Power of Attorney and examined attesting witness of Ex.A.1 as P.W.2 and attesting witness of Ex.A.2 and Ex.A.3 as P.W.3. The learned District Judge however proceeded to dismiss the suit holding that the plaintiff having admitted execution of the documents cannot now seek to have a deeds cancelling.

5.Appellate Court:

The above Judgment and Decree was taken up on appeal by the plaintiff to the Subordinate Court, Perundurai in A.S.No.12 of 2014 where also the plaintiff turned unsuccessful.

6.Second Appeal:

Challenging this concurrent Judgment and Decree the plaintiff is before this Court. The Second Appeal was admitted on the following Substantial Question of law:

"a)When a person acts in a fiduciary capacity with another and the latter is in a position of active confidence, whether the Courts below are right in placing the burden of proof on the plaintiff that there was no fair-play in the transaction as against the principle ingrained under Section 111 of the Indian Evidence Act?

b)Whether the Courts below erred in validating the sale deed executed by the first defendant being the power agent of the plaintiff in the name of his wife/second defendant especially when the power agent acts in a fiduciary capacity cannot use the power of attorney for his own benefit?

c)Whether the Judgments of the Courts below are perverted in appreciating the validity of the sale deed dated 01.09.2005 (Ex.A4 = Ex.B.6) executed by the first defendant as the power agent in the name of his wife (Second defendant) on the basis of the Power of Attorney dated 25.05.2005 (Ex.A.3=Ex.B.4) which was substituted in the place of a Sale Agreement dated 17.04.2003 towards security for the loan of the plaintiff?

d)Whether the Courts below erred in ignoring evidence of the plaintiff particularly when oral evidence is admissible under Section 92(1) of the Evidence Act to show that document executed was never intended to operate as an agreement but that some other agreement altogether, not recorded in the document, was entered into between the parties?"

7.Heard Mr.N.Manokaran, learned counsel for the appellant. The following is the crux of the argument put forward by the learned counsel. He would contend that the entire transaction was only a loan transaction and that the Ex.A.1 was executed only as a Collateral security for the said loan and both the parties had executed the said deed known fully it is only a security. He would argue that the document was executed as security has been proved by the plaintiff by examining P.W.2 who has attested Ex.A.1 agreement of sale. He would further draw the Court's attention through the evidence of P.W.1.

8.He would further argue that D.W.1 in his pleading had contended that he had to have the sale deed cancelled and Power of Attorney executed only because the plaintiff was not willing to execute the sale deed. Thereafter, in his cross examination he would contend that it was the plaintiff who had himself volunteered to cancel the Ex.A.1 agreement of sale. He also contended that in the evidence in chief of the defendant, he has contended that the plaintiff had received the entire balance sale consideration of Rs.2,00,000/- on 25.05.2005 and would place a question that when the entire sale consideration was

received the 1st defendant would have proceeded to have the sale deed executed instead of getting the Power of Attorney executed in his favour.

9.He would also point out the discrepancies in the evidence of the plaintiff with reference to his readiness and willingness, but to the question put as to why the sale deed had not been executed at the first instance, the defendant as D.W.1 would contend on the day of agreement, stamp papers were not available and therefore parties decided to execute an agreement of sale. However, in Ex.A.2 it has been stated that since the 2nd defendant was not interested in proceedings with the sale and the 1st defendant was facing certain problems the two had decided to cancel the agreement of sale Ex.A.1. Thereafter, in his cross examination the defendant would once again elaborate that the parties had not proceeded with the agreement of sale, since it was not auspicious for the defendant to proceed with the sale. The counsel would therefore contend that the defendant has been giving different reasons at different instances and it appears to be a case of the defendants developing his pleadings as the case progressed.

10.He would further submit that the defendant was holding a fiduciary capacity since as the Power Agent he was under the obligation to be honest and open with his principal which he had failed. He would also draw the attention of the Court to the evidence of P.W.2 and P.W.3 who had deposed that the document which was executed was only meant to be a security for the loan. The Counsel had also relied upon the following Judgements:

i)Krishna Mohan Kul Alias Nani Charan Kul and another Vs. Pratima Maity and others reported in (2004) 9 SCC 468 in support of his contentions regarding the fact that the person standing in a fiduciary relationship to another is bound to protect the interest given to his care.

ii)Samba Sivam, Minor Suguna, Minor Kalai Arasi and Minor Thilagam Vs. Mr.Gunasekaran reported in (2003) 2 MLJ 676 where this Court had also dealt with the same issue and this Court has held that the Power Agent is expected to act in the interest of the owner of the property and not for his personal convenience or benefit.

11.He also drew this Court's attention to Judgement in Suraj Lamp and Industries Private Limited through Director Vs. State of Haryana and another reported in (2012) 1 SCC 656 where the honourable Supreme Court has dealt with in great detail about the concept of Power of Attorney and had concluded that an immovable property can be transferred only by a deed of

conveyance (Sale deed) duly stamped and registered and not by way of executing a Power of Attorney.

12.He would further argue that the suit filed is well within the period of limitation since he had come into the knowledge of the sale deed only in the month of September 2008 and further since he has alleged fraud against the defendant who was the Power Agent the period of limitation given was three years by the provisions Article 59 of the Limitation Act. In support of the said argument he has relied upon the Judgement of the Honourable Supreme Court in U.Nilan Vs. Kannayyan (Dead) Through Lrs. reported in (1999) 8 SCC 1954.

13.He would also argue that there is no bar under Section 92 of the Indian Evidence Act, for arguing against the terms of the agreement and in support of which he has relied upon Judgement in Kamireddi Sattiaraju and another Vs. Kandamuri Boolaeswari reported in 2007-3-L.W.580 as well as Judgment in Thirumalai Vadivu Amma (died) and four others Vs. Muthammal and another reported in 1999 (II) CTC 275.

14.Per contra, Mr.T.Murugamanickam, Senior Counsel appearing on behalf of Ms.P.T.Ramadevi, learned counsel for the respondent would contend that the question of fiduciary capacity would arise in a case where there is a single transaction. However, in the instant case there is a series of transactions. He would further submit that P.W.2 has got into the box and stated that they were not aware about the contents of the document or the agreement between the parties when Ex.A.1 and Ex.A.2 were executed. He would submit that the plaintiff has acknowledged the receipt of Rs.2,00,000/- which is proved by Ex.B.5 and he would also draw the attention of the Court to the evidence of a P.W.1, the plaintiff in his cross examination wherein, he has admitted to the execution of Ex.B.5 and therefore the learned Senior Counsel would contend that the plaintiff cannot go behind the document.

15.He would also point out that the plaintiff had obtained the revenue records standing in his name on 03.01.2014 and the plaintiff had entered the box as P.W.1 on 08.01.2014. On the contrary the 2nd defendant got the revenue records mutated in her name as early as in 17.04.2003. He would draw the attention of this Court to the Judgment and Decree in K.M.Madhavakrishnan Vs. S.R.Sami and others reported in (1980) 2 MLJ 398 in paragraph 39 wherein the Court has held that "whenever a person of full age and understanding puts his signature to a legal document without taking the trouble of reading it or without asking the document

to be read and explained to him but signs it relying on the word of another as to its character, content or effect, he cannot be heard to say that it is not his document."

16. Heard the counsels and perused the records. The case of the plaintiff is that he had entered into Ex.A.1 agreement of sale only as security for a sum of Rs.1,00,000/- that was borrowed by him and that is the reason why he had subsequently agreed to execute the cancellation deed under Ex.A.2 = Ex.B.3 and execute the Power of Attorney in favour of the plaintiff Ex.A.3 = Ex.B.4 as there was a clear understanding between the parties that the documents which were being executed was only as security for the loan.

17. It is also seen that though the sale agreement prescribed two year period for the execution of the sale deed the defendant had not moved a little finger to have the sale deed executed. In fact in his evidence the defendant would contend that it was the plaintiff who was putting off the execution of the sale deed under one pretext or other which necessitated obtaining the Power of Attorney after the cancellation deed. However it is stated that the 1st defendant who was described as Power Agent did not desire to go ahead with the agreement of sale as it was not an auspicious time and he therefore desired to have the deed in some other name. This is the reason that is given for the cancellation of the agreement of sale.

18. Therefore, it is clear that the parties did not agree to sell the property, but they had entered into the agreement only as a security. In fact in Ex.A.2 it has been clearly stated that possession of the property continues to remain with the plaintiff which is the another pointer to the fact that the parties never intended the agreement to be acted upon as the intent was otherwise. The Courts below have placed great reliance upon Ex.B.5 to contend that the entire sale consideration have passed to the plaintiff which gave the defendant the right to use the Power of Attorney and execute the sale deed in favour of his wife, the second defendant.

19. A perusal of the Ex.B.5 would show that the date as well as the amount and the document number with reference to Power of Attorney have been filled up in ink. It is interesting to know that the receipt Ex.B.5 is dated 25.05.2005 where it is stated that the Power of Attorney has been registered as document No.83 of 2005.

20.A perusal of the certified copy of the Power of Attorney marked as Ex.A.3, would clearly show the registration and filing of the deed was only on 26.05.2005 and therefore on 25.05.2005 the defendant or plaintiff would not be aware about the number of the power deed. This clearly turns on the suspicion in the mind of this Court with reference to suit agreement of sale and that these documents and papers have been created with the signature obtained by the defendant from the plaintiff in blank sheets. That apart, the defendant at one stage would state that the plaintiff had not gone ahead with the sale deed and therefore the same had to be cancelled, at another stage he would contend that on the date of the agreement of sale the stamp papers were not available and therefore entered into an agreement of sale. In another place he would depose that the sale deed was not taken in his name since it was not auspicious to purchase property in his name. Therefore, the evidence of D.W.1 is not reliable.

21.The defendant is also not able to explain date of the agreement, date of the cancellation and when the remaining amount was paid to the plaintiff, why the sale deed was not taken from the plaintiff and the Power of Attorney attorney executed by the plaintiff in favour of the defendant all these put together clearly indicates that the parties had only executed the document as a Collateral security for the loan borrowed by the plaintiff.

22.It is also seen that in the Ex.A.2 the defendant has clearly stated that the possession was not handed over to him therefore it is not known as why the defendant would now contend that possession is with them. This is clearly a case where the person who is holding the fiduciary capacity, as power agent has misused the power and trust granted to him. As pointed out by the counsel appearing for the appellant the burden is upon the defendant to say that the action in executing sale deed in favour of the 2nd defendant is shorn of any fraud or undue influence and that it is only as per the instructions. This has not been discharged by the defendant, on the contrary it is further seen that though, under the agreement of sale the total sale consideration has been fixed at Rs.3,00,000/- property has been sold by the 1st defendant to his wife for a sum of Rs.34,000/- without knowing such need be said.

23.Therefore, I answer Substantial questions of law A, B and C in favour of the appellant. As regards question of law No.D this Court draws strength from the earlier Judgement and

Decree of this Court in Thirumalai Vadivu Ammal (died) and four other Vs. Muthammal and another reported in 1999 (II) CTC 275 wherein the Court was called in to consider whether document was liable to set aside on the ground that the mind does not accompany the signature. The learned Judge has finally held as follows:

"It is on the person who is contending that the document was executed with the full knowledge of the executant to prove the same". In the instant case the defendant was not able to prove the case that what the plaintiff had executed was an agreement of sale to the defendant. Another Judgment and Decree of this Court reported in 2007-3-L.W. 580, the Honorable Bench has also held that the plaintiff is not prohibited under section 92 of the Indian Evidence Act from proving that document which has been executed was not intended for the reason for which it is executed and in this case the parties had not intended that the agreement of sale should be used as agreement of sale but that had to be used only as security for the loan that the plaintiff had borrowed from the defendant.

A reading of the above would clearly show that the Judgment and Decree of the Courts below are erroneous and are liable to set aside. Accordingly, the Second Appeal is allowed. However there shall be no order as to costs. Consequently, connected Civil Miscellaneous Petition is also closed.

-s/d-

Assistant Registrar (CS-IV)

True Copy

Sub-Assistant Registrar

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To

1. The Sub Judge,
Perundurai.

2. The District Munsif,
Perundurai.

3. The Section officer
VR Section, High Court, Madras 104.

+1 CC to Mr.N.Manokaran, Advocate sr 89723.

+1 CC to Ms.P.T.Ramadevi, Advocate sr 249.

S.A.No.87 of 2016 &
C.M.P.No.2167 of 2016

CNR (CO)
SP(24/04/2019)