IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 25.06.2019

PRONOUNCED ON : 23.07.2019

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

A.S.No.687 of 2009
and
M.P.Nos.1 and 2 of 2009

1.K. Kalidass (deceased)
Appellant No.1/2nd defendant

2. Kamalam
3. Natchimuthu
4. Thangamani
5. Rajarathinam ... Appellants/2 to 5

Appellants 2 to 5 brought on record as LRS of the deceased sole Appellant vide order of court 23.10.2017 by MDJ made in CMP Nos.15582 & 15583/2017 in AS No. 687 of 2009

Vs.

1. P. Munusami ... Respondent No.1/Plaintiff

2. G. Palanisamy ...Respondent No.2/1st Defendant

Prayer: First Appeal filed under Section 96 of Civil Procedure Code, against the judgment and decree dated 19.09.2008 made in O.S. No.333 of 2007 on the file of the Additional District Court, Fast Track Court No.4, Bhavani.

For Appellants : Mr.S.Parthasarathy, Senior Counsel for M/s. S.Lakshmanasamy

For Respondents: Mr. N. Manokaran for R1
R2 - No appearance. Set exparte vide order dated 25.06.2019.

JUDGMENT

Aggrieved over the judgment and decree dated 19.09.2008 passed in O.S. No.333 of 2007 on the file of the Additional District Court, Fast Track Court No.4, Bhavani, the second defendant has preferred the appeal.

2. For the sake of convenience, the parties are referred

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to as per their rankings in the trial court.

3. Suit for declaration and possession.

4. The case of the plaintiff, in brief, is that the first defendant is the elder brother's son of the second defendant and the plaintiff purchased item No.1 of the suit properties by virtue of the sale deed dated 09.03.1998 and item No.2 of the suit properties by virtue of the sale deed dated 21.01.2000 and the second item was purchased as a vacant site and thereafter, the plaintiff had put up the construction and built five houses therein and the plaintiff is a barber by caste and regularly bidding in auction for human hair obtained on tonsure in Hindu temples and selling such hair after cleaning it and in order to meet out the necessary expenditure in the family and for the business, he borrowed amounts from the creditors and as required by the creditors, executed sale agreements as well as power of attorney deeds in favour of the creditors and the plaintiff subsequently discharged the said debts and cancelled the abovesaid deeds. On 24.04.1998, the plaintiff borrowed a sum of Rs.1,00,000/- from one Gurusamy Gounder and entered into the sale agreement with him with regard to item No.1 of the suit properties as recited therein and the said agreement was executed as a security for the loan and the said Gurusamy Gounder is none other than the brother of the second defendant and on 12.04.1999, the abovesaid sale agreement was cancelled after discharging the debt with interest by way of the registered instrument. On 12.04.1999, the plaintiff had borrowed a sum of Rs.2,00,000/- from the second defendant and entered into a sale agreement with him with regard to item No. 1 of the suit properties as recited therein. The abovesaid sale agreement was intended as a security for the loan abovestated and on 27.04.2001, the period of sale agreement was extended for a further period of six months and on that day, the plaintiff received a sum of Rs.10,000/- from the second defendant and on 11.10.2001, the abovesaid sale agreement and the deed of extension of time were cancelled after discharging the debt by way of a registered instrument and on 11.10.2001, the plaintiff borrowed a sum of Rs.1,50,000/- from the first defendant and entered into a sale agreement with regard to item No. 1 of the suit properties as recited therein and the abovesaid sale agreement was also discharged by a registered deed of cancellation dated 23.09.2002. On 23.09.2002, the plaintiff borrowed a sum of Rs.2,00,000/- from the second defendant and executed a power of attorney regarding item No. 1 of the suit properties as required by the second defendant appointing the second defendant as his power agent and handed over the original documents and the plaintiff paid the entire loan amount to the second defendant and at that time, the second defendant returned the original registered power of attorney deed to the plaintiff. In the meantime, on 17.12.2002, the second defendant, as the power agent of the plaintiff, entered into the sale agreement with the first defendant and in the

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said agreement, it was recited that the sale consideration was Rs.3,00,000/-, advance amount Rs.25,000/- and the period of performance was two years and subsequently, on 13.06.2003, the defendants 1 and 2 cancelled the abovesaid sale agreement by way of the registered instrument. On 13.03.2000, the plaintiff borrowed a sum of Rs.1,20,000/- from Anthiyur Co-oopeerative Housing Society Ltd., along with his wives Subbulakshmi and Jayalakshmi and daughter Radhamani by pledging item No.2 of the suit properties and executed a simple mortgage deed in favour of the society and as per the terms of the mortgage, the debt should be discharged within 10 years period from the date of mortgage with interest and in case of default, the mortgaged property as well as the other properties of the mortgagor would be sold by the society and the plaintiff was unable to pay the installments regularly because of the second defendant's demand for his money which was borrowed under the power of attorney deed dated 23.09.2002 and for more than five months from 30.01.2003, no money was paid by the plaintiff to the society and apprehending that the mortgaged property would be sold by the society for default, the plaintiff decided to borrow a sum of Rs.2,00,000/- from some creditors and pay the entire debt due to the society and then he approached the defendants and told them about the sale and wanted Rs.2,00,000/- as loan and at that time, the defendants required the plaintiff to execute the power of attorney in favour of the first defendant and hand over the original documents as well as the possession of the suit properties and that they would collect the rent from the tenants in Item No. 2 of the suit properties and the plaintiff would have to sign in some stamp papers and blank papers and assured that they would return all the documents when the plaintiff settled the debts with interest or in the alternative, the plaintiff would sell the suit properties to them. On all the previous occasions of borrowing money, the defendants asked the plaintiff to sell the suit properties to them but the plaintiff refused to do so. The defendants who are doing money lending business for the past several years and as it is usual for the defendants asking the debtors to execute the abovesaid documents while giving loans, the plaintiff also executed the required documents as demanded by the defendants when borrowing money on previous occasions and as the defendants would cancel all the deeds executed as security on repayment of the loans and accordingly, the plaintiff agreed to the abovesaid proposal of the defendants and executed the power of attorney deed dated 13.06.2003 appointing the first defendant as his power agent with regard to the suit properties for the loan of Rs.2,00,000/- from the first defendant and on 13.06.2003 the plaintiff paid the entire loan to the society out of the amount borrowed from the first defendant and his earnings and subsequently, the plaintiff paid the entire loan amount with interest before the end of May 2006. But, the defendants are receiving the rent of nearly Rs.5,000/- per month from the date of borrowing money till today from the houses situated in item No. 2 of

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the suit properties and hence no amount is due to the defendants and as the several attempts made by the plaintiff requesting the defendants to return back the original documents and signed stamp papers and blank papers ended in vain, the plaintiff became suspicious about the behaviour of the defendants and got the registration copies of the documents from the concerned registrar office and on perusing the same, was shocked to find that on 16.06.2003, the first defendant had entered into a sale agreement with the second defendant with regard to the suit properties and on 07.11.2003, the first defendant had executed two sale deeds with regard to the suit properties in favour of the second defendant and the sale agreement was found to be executed by the first defendant, as the power agent of the plaintiff, plaintiff's wives and daughter and however, the abovesaid power of attorney was executed only as the security for the amount borrowed by him and the sale deed dated 07.11.2003 was executed by the first defendant, as the power agent of the plaintiff, infavour of the second defendant with regard to the item No.1 of the suit properties for Rs.1,38,500/- after deducting the amount of Rs.50,000/- and the first defendant had received the balance amount of Rs.88,500/- and the possession of the property was delivered to the second defendant and similarly on the same date, the first defendant, as the power agent of the plaintiff, executed another sale deed in favour of the second defendant with regard to Item No. 2 of the suit properties for Rs.2,61,500/- and received the said amount and delivered the property to the second defendant. The power of attorney deed dated 13.06.2003 was executed by the plaintiff in favour of the first defendant only as a security for the amount borrowed and as per the demand of the first defendant and hence the first defendant has no authority to sell the suit properties and the first defendant has misused the abovesaid power of attorney deed and on 22.06.2007, the plaintiff cancelled the power of attorney deed and the first defendant also knows that he has no authority to sell the suit properties to the second defendant and the sale deeds had been created by the defendants in an illegal manner and further without the knowledge of the plaintiff and therefore, the abovesaid sale deeds are not binding upon the plaintiff and the abovesaid sale deeds are sham and nominal and not acted upon and the same would not, in any manner, affect the plaintiff's title in respect of the suit properties and on the strength of the abovesaid sale deeds, the defendants have refused to return the original borrowal deeds to the plaintiff and hence, according to the plaintiff, he had been necessitated to institute the suit against the defendants for appropriate reliefs.

5. The second defendant had filed the written statement, which was adopted by the first defendant and by way of the same, the defendants contended that the plaintiff's suit is not maintainable either in law or on facts and disputed the so called avocation of the plaintiff and also disputed that the

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plaintiff used to borrow loans from others for his business purposes and family needs and executed sale agreements and power of attorneys with reference to the same and accordingly, disputed the various sale agreements said to have been executed by the plaintiff on various dates in favour of Gurusamy Gounder, the second defendant and the first defendant as a security for the loans said to have been obtained by the plaintiff from them and according to the defendants, the abovesaid sale agreements and power deeds had been executed by the plaintiff only with an intention of selling the suit properties belonging to him and for one reason or the other, as the parties to the sale agreements and the power deeds could not act further based on the same, the abovesaid sale deeds and power deeds had come to be cancelled and disputed the claim of the plaintiff that the plaintiff's documents had been cancelled on the repayment of the alleged loans said to have been borrowed by the plaintiff from various persons, likewise disputed the case of the plaintiff that he had approached the defendants for the loan of Rs.2,00,000/- for discharging the loan incurred by him from the society and that the defendants had directed the plaintiff to execute the power of attorney in favour of the first defendant, entrustment of the title deeds of the suit properties and the possession of the suit properties with them and the adjustment of the rent from the suit properties and also disputed the case of the plaintiff that they had directed the plaintiff to sign in stamped papers and blank papers and disputed the case of the plaintiff that as the defendants are engaged in money lending business, they used to take such documents and on that line, the plaintiff had come forward to execute the documents as directed by the defendants and according to the defendants, all the abovesaid facts are totally false and also further disputed that the plaintiff had discharged the loan amount before the end of May 2006 and the defendants had been receiving the rent from the suit properties and the defendants had failed to entrust the documents to the plaintiff despite discharging the alleged amount and that only after the obtainment of the documents from the registrar office, the plaintiff came to know about the sale transactions impugned in the matter and according to the defendants, the abovesaid facts are totally false to the knowledge of the plaintiff and also disputed the fact that the first defendant is not entitled to sell the suit properties as the power agent of the plaintiff based on the power of attorney deed dated 13.06.2003 and disputed the fact that the first defendant has exceeded his power and disputed the fact that the sale deeds executed by the first defendant in favour of the second defendant are not valid and binding upon the plaintiff. According to the defendants, the power deeds dated 13.06.2003 and 16.06.2003 had been given in favour of the first defendant by the plaintiff, plaintiff's wives and daughter, respectively for managing the suit properties and also for the purpose of alienating the same and accordingly, the first defendant was managing the suit properties and on the strength of the same,

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entered into the sale agreement with the second defendant and also executed the sale deeds in favour of the second defendant qua the suit properties and delivered the possession of the suit properties to the second defendant and accordingly, following the same, the second defendant had taken possession, effected service connection, water connection, tax mutation in his name in respect of the suit properties and enjoying the same absolutely. The power deeds executed in favour of the first defendant had not been cancelled at the time of purchase of the suit properties by the second defendant from the first defendant and the power deeds had not been cancelled lawfully by the plaintiff and therefore, the execution of the sale agreement and the sale deeds executed by the first defendant in favour of the second defendant are well known to the plaintiff, valid and binding upon the plaintiff and the plaintiff cannot be allowed to avoid the same and the plaintiff has no cause of action and hence the suit laid by the plaintiff is liable to be dismissed.

6. On the basis of the abovesaid pleas put forth by the respective parties, the following issues were framed by the trial court for consideration.

1) Whether plaintiff is entitled to claim the relief of declaration and possession as prayed for in the plaint?
2) Whether the plaintiff is entitled to claim the relief of declaration and possession without seeking the cancellation of the sale deeds dated 07.11.2003 executed in favour of the second defendant in respect of the suit properties?
3) Whether the plaintiff has cause of action?
4) To what relief the plaintiff is entitled to?

Additional issues framed on 27.06.2008

1. Whether the power of attorney deed dated 13.06.2003 executed by the plaintiff in favour of the first defendant had been given only as a security towards the loan borrowed by the plaintiff from the first defendant?
2. Whether the power deed is not enforceable?
3. Whether the plaintiff is entitled to obtain the relief of declaration that the sale deeds dated 07.11.2003 is not valid?

7. In support of the plaintiff's case P.Ws.1 and 2 were examined and Exs.A1 to A20 were marked. On the side of the defendants D.Ws.1 to 4 were examined Exs.B1 to B20 were marked.

8. On consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial court was pleased to decree the suit in favour of the plaintiff as prayed for. Impugning the same the second defendant has come forward with the present first appeal.

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9. The following points arise for determination in this appeal.

1. Whether plaintiff is entitled to seek the relief of declaration prayed for in the plaint?

2. Whether the plaintiff is entitled to recover the possession of the suit properties from the second defendant as claimed in the plaint?

3. To what relief the plaintiff is entitled to?

4. To what relief the second defendant / appellant is entitled to?

Point Nos.1 and 2

10. From the materials placed on record, it is found that it is only the plaintiff who had originally acquired the suit properties by virtue of the sale deeds dated 09.03.1998 and 21.01.2000 and the copies of the abovesaid documents had come to be marked as Exs.A2 and A1 respectively. There is no dispute with reference to the abovesaid fact. Furthermore, it could be seen that admittedly, the plaintiff has executed the power of attorney deed in favour of the first defendant in respect of the suit properties on 13.06.2003, which document has come to be marked as Ex.A14 and on a perusal of the same, it is found that the plaintiff has given the power to the first defendant to manage and protect the suit properties and enjoy the same on his behalf and also empowering him to alienate the suit properties on his behalf and do all such acts necessary with reference to the same inclusive of the institution of lis, if any, with reference to the same and accordingly, it is found that the first defendant , on the strength of the abovesaid power of attorney deed executed in his favour by the plaintiff as well as supplemented by the power of attorney deed executed in his favour by the plaintiff's two wives and daughter dated 16.06.2003, the copy of which document has come to be marked as Ex.B15, it is found that the first defendant, as the power agent of the plaintiff, had alienated the suit properties in favour of the second defendant by way of the two sale deeds dated 07.11.2003, the copies of which documents have come to be marked as Exs.A17 and A18. With reference to the abovesaid facts, the plaintiff examined as P.W.1, during the course of cross examination has admitted that he had executed the power of attorney deed in favour of the first defendant and also admitted clearly that on the basis of the abovesaid power of attorney deed, the first defendant had alienated the suit properties in favour of the second defendant on 07.11.2003 and furthermore, the plaintiff has also admitted that the title deeds of the suit properties are only in the custody of the first defendant and also further admitted that since the date of the sale deeds dated 07.11.2003, it is only the second defendant, who has been collecting the rents in respect of the suit properties

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and that he had not received the rent and only the defendants are receiving the rent and further admitted that he had obtained only two water connections and at present there are four water connections in the suit properties and also admitted that it is only the second defendant who has been paying the current charges and also admitted that the defendants have mutated the service connection and house tax in respect of the suit properties in their names and also admitted that on the date of the suit, it is only the defendants who are in the possession and enjoyment of the suit properties and also admitted that he has not taken any steps to cancel the power of attorney deed executed in favour of the first defendant or cancel the sale deeds executed by the first defendant in favour of the second defendant by instituting civil action. Therefore, it is found that only on the strength of the power of attorney deed executed by the plaintiff in favour of the first defendant, the first defendant is found to have conveyed the suit properties in favour of the second defendant by virtue of the sale deeds dated 07.11.2003 and it is seen that there is no material on the part of the plaintiff evidencing that pursuant to the power of attorney deed and the sale deeds abovestated, he has been in the possession and enjoyment of the suit properties as the owner thereof and on the other hand, as above pointed out, admitted that it is only the defendants who are in the possession and enjoyment of the suit properties and the defendants have mutated the service connection, water connection, house tax in their names and it is only the defendants who have been collecting the rents in respect of the suit properties and accordingly it is found that it is only the defendants who are at present enjoying the suit properties, more particularly, the second defendant who is enjoying the suit properties as the absolute owner of the same.

11. The plaintiff has admitted that he has two wives. The plaintiff has averred that he is engaged in the business of selling human hair and it is seen that the plaintiff is indulging in the abovesaid business to the tune of several lakhs of rupees and according to the plaintiff, only in connection with the abovesaid business in particular and also for the family needs, he had been borrowing debts from various persons including the defendants 1 and 2. Furthermore, it is found that the plaintiff is found to be the owner of the various properties and according to the plaintiff, it is he, who had put up the construction of five houses in the second item of the suit properties after purchasing the same as a vacant site. Therefore, considering the above status of the plaintiff and the avocation he has been running and also his acquisition of various properties and managing the same one way or the other, in such view of the matter, the plaintiff cannot be characterised or be called as a gullible, naive, innocent and novice person and on the other hand, the plaintiff is found to be a person of worldly knowledge,

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accordingly, it is seen that he has been able to run the business abovestated running to several lakhs of rupees and also had come to acquire the various properties and it is also found that he has contracted two marriages and therefore, the claim of the plaintiff's counsel that the plaintiff has been duped by the defendants on false promises while they had obtained the power of attorney deeds, sale agreements, etc., from him when the plaintiff had approached them for obtaining the loans, as such, cannot be countenanced. Nowhere in the plaint, the plaintiff has whispered that the defendants had obtained the agreements of sale, power of attorney deeds from him on the earlier occasions as well as during the last occasion by exercising fraud, undue influence or by misrepresentation or using force or intimidation. On the other hand, considering the pleas put forth by the plaintiff in the matter, it is found that the plaintiff being a man of the abovesaid stature, knowing the consequences of the instruments, which he had been executing all along in favour of the defendants cannot now turn around and argue that the abovesaid documents had been brought out by the defendants by exercising fraud, undue influence, misrepresentation, force, intimidation, etc.

12. Now according to the plaintiff, in connection with his business needs and family requirements, he had been borrowing money from the defendants and been executing sale agreements and power of attorney deeds in their favour and accordingly, it is put forth by the plaintiff that on 24.04.1998, he had borrowed a sum of Rs.1,00,000/- from one Gurusamy, who is the brother of the second defendant and admitted that he has executed the sale agreement in favour of Gurusamy with reference to the same and also admitted that the sale agreement recites that the sale consideration was fixed at Rs.1,20,000/- and the sale deed should be executed within one year after receiving the balance amount of Rs.20,000/-. Though the plaintiff would claim that the abovesaid sale agreement had been executed only as a security for the loan of Rs.1,00,000/- said to have been obtained from Gurusamy Gounder, the abovesaid sale agreement projected as Ex.A3, does not support the plaintiff's case. On the other hand, the abovesaid sale agreement Ex.A3, is found to be a pucca sale agreement and there is no averment in the same that the same had been intended and executed by the plaintiff as a security towards the loan which had been obtained by the plaintiff from Gurusamy Gounder. No doubt, the abovesaid sale agreement had been cancelled on 12.04.1999 by a deed of cancellation marked as Ex.A4 and even Ex.A4 cancellation does not recite that the same had been cancelled only on the discharge of the alleged loan said to have been borrowed by the plaintiff from Gurusamy Gounder. Though the plaintiff would claim that the attestors to the abovesaid sale agreement and the cancellation deed marked as Exs.A3 and A4 are aware of the nature of the abovesaid transactions, for the reasons best known to him, the plaintiff has not examined those persons.

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13. The plaintiff would further state that on 12.04.1999, he had borrwoed a sum of Rs.2,00,000/- from the second defendant and executed the sale agreement in his favour as a security, which document has come to be marked as Ex.A5. On a perusal of Ex.A5, it recites that it is a pucca sale agreement entered into between the parties thereto for a sale consideration of Rs.2,25,000/- and the period of agreement had been fixed as two years and the balance amount has been recited as Rs.25,000/-. The abovesaid agreement is a registered one. Though the plaintiff claims that it has been secured as a security for the alleged loan, the recitals contained in the abovesaid document, do not advance the said case of the plaintiff. Furthermore, it is found that in continuation to the abovesaid sale agreement, the period fixed has been extended for a further period of six months and the plaintiff had received a sum of Rs.10,000/- towards the sale consideration on 27.04.2001, which could be evidenced from the document marked as Ex.A6 and as per Ex.A6, the balance amount to be received is only Rs.15,000/- for the completion of the sale transaction. Though the abovesaid sale agreement has been found to be cancelled on 11.10.2001, though it is put forth by the plaintiff that the same had come to be cancelled only on the discharge of the loan amount, the deed of cancellation marked as Ex.A7 does not vouchsafe the abovesaid version of the plaintiff and the plaintiff would claim that the attestors to the abovesaid documents are aware of the purpose for which the abovesaid documents had come into existence but for the reasons best know to him, he had not endeavoured to examine those persons to sustain his case.

14. Further according to the plaintiff, he had borrowed a sum of Rs.1,50,000/- from the first defendant and executed the sale agreement in his favour, which document has come to be marked as Ex.A9 registered instrument. The sale agreement Ex.A9 recites that it has been entered into for a sale consideration of Rs.2,25,000/- and nothing has been recited that it has been executed as a security for the loan said to have been borrowed by the plaintiff from the first defendant. No doubt, the abovesaid sale agreement had been cancelled by a deed of cancellation on 23.09.2002, which document has come to be marked as Ex.A10 and the plaintiff has not whispered in the plaint that Ex.A10 cancellation deed had been brought about on the discharge of the loan said to have been borrowed by him from the first defendant. Even Ex.A10 does not recite so. The plaintiff has not examined any attestors to the abovesaid deeds to sustain his claim that the abovesaid documents namely Exs.A9 and A10 had been brought about only as a security towards the alleged loan said to have been received by him from the first defendant.

15. The plaintiff would also put forth the case that on 23.09.2002 he had borrowed a sum of Rs.2,00,000/- from the second defendant and executed a power of attorney deed as regards the first item of the suit properties and admitted

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that he had handed over the original document. The abovesaid document, namely, the power of attorney deed has been marked as Ex.A11. Though the plaintiff would claim that Ex.A11 has been executed only as a security to the loan borrowed by him, Ex.A11 recitals do not advance the abovesaid case of the plaintiff. Now according to the plaintiff, the abovesaid power of attorney deed had come to be returned to him by the second defendant on the discharge of the loan amount. However, with reference to the same, the plaintiff has not endeavoured to examine the attestors to the abovesaid deed Ex.A11 to sustain his case and the plaintiff has also not pleaded and proved as to when he had discharged the loan, in whose presence he had discharged the same, etc.

16. In addition to that, the plaintiff has also admitted that pursuant to the power of attorney deed Ex.A11, on 17.12.2002, the second defendant had entered into an agreement, which document has come to be marked as Ex.A12, with the first defendant for the alienation of the first item of the suit properties for a sale consideration of Rs.3,00,000/- and received an advance of Rs.25,000/- by fixing the time for the completion of the sale transaction as two years and also pleaded that the abovesaid sale agreement had been subsequently cancelled on 13.06.2003, which document has come to be marked as Ex.A13. However, the plaintiff has failed to establish that Ex.A12 sale agreement has been cancelled only account of his discharge of the alleged loan amount said to have been borrowed by him from the second defendant on 23.09.2002. Therefore, it is found that pursuant to Ex.A11 power of attorney deed, it is seen that to the knowledge of the plaintiff, the second defendant had endeavoured to alienate the first item of the suit property in favour of the first defendant, however, for one or the other reason, the abovesaid sale transaction could not be proceeded further and the parties had chosen to cancel the same.

17. As abovenoted, when the plaintiff is found to be a worldly wise man engaged in the business running to several lakhs of rupees and had acquired various properties and had contracted two marriages, to say that, he had, without knowing the consequences of the abovesaid documents, executed them in favour of Gurusamy Gounder and the defendants as a security for the alleged loan borrowed from them, cannot be accepted, particularly, when as above discussed, the documents executed by the plaintiff do not lend support to his abovesaid version and the plaintiff had also not examined the attestors to the abovesaid documents to sustain his case with reference to the same, though the plaintiff would aver in the evidence that the attestors to the abovesaid deeds are well aware of the reasons as to why he had executed the abovesaid documents in favour of Gurusamy Gounder and the defendants. Furthermore, the plaintiff has not whispered in the plaint or during the course of evidence that the abovesaid documents had been secured from him by Gurusamy Gounder or the defendants, as the case may be,

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by exercising fraud, misrepresentation, undue influence, intimidation, force, etc., and on the other hand, it is seen that the plaintiff had executed those documents knowing the nature of the contents of the said documents without any demur or protest and mainly on the footing that the abovesaid sale agreements and the power of attorney deeds had come to be cancelled subsequently and when according to the defendants, only for the reasons recited in the cancellation deeds, the abovesaid documents had come to be cancelled and not otherwise, accordingly when it is seen that for one or the other reason, as the parties had not endeavoured to proceed further based upon the abovesaid sale agreements and power of attorney deeds, it is found that the abovesaid instruments had come to be cancelled subsequently, the plaintiff cannot be allowed to plead and contend against the contents of the said documents that they are intended only as security towards the alleged loan transaction. However, the position remains that the defendants have not exercised fraud, undue incluence, misrepresentation or force or intimidation in securing the abovesaid documents from the plaintiff and on the other hand, it is only the plaintiff who had voluntarily executed the abovesaid documents knowing the consequences thereof.

18. Now according to the plaintiff, he has borrowed a sum of Rs.1,20,000/- from Andiyur Cooperative Housing Society Ltd., on 13.03.2000 and also admitted that he along with his wives and daughter pledged item No. 2 of the suit properties and executed the simple mortgage deed in favour of the abovesaid society. The plaintiff would claim that he had been unable to repay the borrowed sum from the society as agreed to and according to the plaintiff, apprehending that the society would bring his properties including the suit properties for sale, it is his case that he had decided to borrow Rs.2,00,000/- from the creditors and accordingly, put forth the case that he had approached the defendants and sought for the loan of Rs.2,00,000/- from them. Further according to the plaintiff, the defendant had admitted to advance the abovesaid loan to the plaintiff, however, required the plaintiff to execute the power of attorney deed in favour of the first defendant and hand over the original documents as well as the possession of the suit properties and that they would collect the rent from the tenants in Item No.2 of the suit properties and that the plaintiff would have to sign some stamped papers and blank papers and according to the plaintiff, as the abovesaid requirements of the defendants for advancing the loan are usually made by the defendants while lending loans, according to the plaintiff, he had executed the required documents demanded by the defendants and it is the case of the plaintiff, accordingly, he had executed the power of attorney deed dated 13.06.2003 in favour of the first defendant with reference to the suit properties, which document has come to marked as Ex.A14. However, though the plaintiff would claim that the abovesaid power of attorney deed had been executed in favour of the first defendant only as a security for the loan of Rs.2,00,000/-, the recitals contained in Ex.A14 would go to

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show that the abovesaid power of attorney deed had been executed in favour of the first defendant empowering him to manage and protect the suit properties and also alienate the suit properties and do all such further acts necessary for the completion of the sale transaction and also to institute suits, etc., and even though according to the plaintiff, the attestors to the abovesaid sale deeds are very well aware of the purpose for which the said power of attorney deed had come to be executed by him in favour of the first defendant, the plaintiff has not endeavoured to examine the said attestors to Ex.A14 deed and the plaintiff has not whispered in the plaint that there has been any exercise of fraud, undue influence, misrepresentation, force, etc., on the part of the defendants in the obtainment of the power of attorney deed Ex.A14 and on the other hand when it is seen that the plaintiff had executed the said deed knowing the legal consequences thereof and when there is no proof on the part of the plaintiff evidencing that the same had been executed only as the security for the loan borrowed by him, in such view of the matter, the plaintiff being a man of worldly knowledge and cannot claim to be a green horn and an innocent person and when he had admitted to have executed the abovesaid power of attorney deed in favour of the first defendant knowing the legal consequences thereof, in such view of the matter, it is found that the plaintiff cannot now turn around and contend that he had executed the power of attorney deed in favour of the first defendant without knowing the consequences thereof on account of necessity of obtainment of loan from the defendants as put forth by him.

19. According to the plaintiff, based on the abovesaid alleged loan of Rs.2,00,000/- said to have been received from the defendants and other means, he had discharged the loan obtained from the society. However, the plaintiff has not placed any material to show that it is he who had discharged the alleged loans said to have been borrowed from the society. On the other hand, the plaintiff, during the course of cross examination, has admitted that it is only the first defendant who had paid the amount to the society and furthermore, also admitted that receipts have been issued in his favour for the discharge of the loan by the society and also state that he does not remember whether he had obtained the receipts from the society with reference to the same, on the other hand, considering the documents projected by the defendants marked as Exs.B3 and B4, it is found that it is only the defendants who had discharged the loan obtained from the society based on the power of attorney deed executed in favour of the first defendant on 13.06.2003 and accordingly the plaintiff had also admitted that it is only the first defendant who had discharged the said loan on his behalf and resultantly the receipts pertaining to the same had come to be marked only on the part of the first defendant. The abovesaid position would go to disclose that inasmuch as the plaintiff had executed the power of attorney deed Ex.A14 in favour of the first defendant

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empowering him to manage and protect the suit properties and also alienate the same and do such further acts as necessary in respect of the suit properties as the full owner thereof, accordingly, it is seen that the first defendant in accordance with the abovesaid terms of the power of attorney, had endeavoured to discharge the loan of the society on behalf of the plaintiff and in such view of the matter, the case projected by the plaintiff that it is he who had discharged the loan, as such, cannot be accepted and the further case projected by the plaintiff that Ex.A14 power of attorney deed had come to be executed by him only as a security for the borrowal of the loan also cannot be countenanced and on the other hand, considering the recitals found in the abovesaid power of attorney deed, when it is seen that the plaintiff is unable to manage the suit properties owing to his pre-occupation and his occupation requires him to travel to various places and accordingly it is seen that he had been necessitated to alienate the suit properties and accordingly granted the power in favour of the first defendant to manage and protect the suit properties on his behalf and also alienate the same, accordingly it is seen that the first defendant, as the power agent, had endeavoured to discharge the loan of the society and also proceeded to alienate the suit properties in favour of the second defendant on the strength of the power of attorney deed executed in his favour by the plaintiff.

20. At this juncture, though the plaintiff had chosen to examine P.W.2 in support of his case to show that the various sale agreements, power deeds, etc., had been executed by him only as a security for the loans said to have been borrowed by him on various occasions, P.W.2, Dharmasivam, though would claim in the chief examination that he was also present at the time when the abovesaid vaious sale agreements, power deeds, etc., had been executed by the plaintiff in favour of Gurusamy Gounder and the defendants as such, during the course of cross examination, P.W.2 has clearly admitted that he does not know directly as to when and how much debt had been borrowed by the plaintiff from the defendants and also further admitted that he does not know directly as to the nature of the documents executed by the plaintiff in favour of the defendants and that he had not attested the sale agreements and power of attorney deeds executed by the plaintiff at any point of time and does not know the loan said to have been borrowed by the plaintiff and therefore, such being the evidence of P.W.2 and even though the plaintiff would claim that the attestors to the various sale agreements, power of attorney deeds are very well aware the nature and reasons for which the abovesaid documents had come to be executed by the plaintiff i.e. the abovesaid documents had been executed only as a security for the loans said to have been received by the plaintiff, for the reasons best known to him, the plaintiff had not endeavoured to examine the abovesaid persons and on the other hand, had chosen to examine only P.W.2 Dharmasivam and when as

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abovenoted P.W.2 is totally unaware of the loans borrowed by the plaintiff at any point of time from the defendants and the nature of the documents said to have been executed by the plaintiff with reference to the same and that he had not attested the abovesaid documents, in such view of the matter, his claim in the chief examination that he was also present at the relevant point of time, cannot, at all, be believed and accepted and in such view of the matter, when it is found that there is no other reliable proof other than ipsi dixit testimony of the plaintiff that the abovesaid various sale agreements and the power of attorney deeds had come to be executed by him only as the security for the loans obtained by him, the case projected by the plaintiff cannot be believed, particularly when the documents pertaining to the same do not lend support to the abovesaid case of the plaintiff and when as above discussed and pointed out, when there has been no exercise of any fraud, undue influence, misrepresentation, force, etc., on the part of the defendants in the obtainment of the said documents from the plaintiff and when the sale agreements and the power of attorney deeds on earlier occasion had come to be cancelled for one reason or the other, however, the cancellation of the abovesaid documents are not shown to be effected on the discharge of the alleged loan said to have been borrowed by the plaintiff. The position being above, the argument has been made by the plaintiff's counsel in the present appeal that the plaintiff, without knowing the consequences of the abovesaid documents, particularly Ex.A14 power of attorney deed, had been necessitated to execute the same under the compelling situation i.e. for the obtainment of the loan and accordingly his further contention that the courts should consider the plight of the plaintiff's situation to which he had been forced to and the necessity on the part of the plaintiff to execute the documents demanded by the defendants and accordingly requested this court to view the case of the plaintiff in the abovesaid angle. However, when there is no exercise of fraud, misrepresentation, undue influence, force, etc., on the part of the defendants in the obtainment of the loans and when the plaintiff is found to be not a gullible person and on the other hand found to be an experienced and worldly knowledgeable person and accordingly the plaintiff is also found to be engaged in the business running to several lakhs of rupees, in such view of the matter, to say that the plaintiff without knowing the nature of the documents had executed the same, cannot be believed and accepted. On the other hand, considering the nature of the events put forth by the plaintiff qua the execution of various sale agreements, power of attorney deeds, etc., for the alleged loan said to have been borrowed by him, one after another in sequence, the only conclusion that could be arrived at is that the plaintiff is found to be a person not leading a life on his own income, but is found to be a person who is entertaining a life with two wives and engaged in the business transaction only on the alleged loans said to have been borrowed by him one way or the other from various sources,

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this court wonder as to whether any indulgence should be extended to such a person as now sought to be projected by his counsel.

21. As abovenoted, the plaintiff has admitted that on the strength of the power of attorney deed Ex.A14 executed by him in favour of the first defendant, the first defendant had alienated the suit properties in favour of the second defendant on 07.11.2003. According to the plaintiff, on coming to know of the same subsequently, he had chosen to cancel the power of attorney deed Ex.A14 on 22.06.2007, which document has come to marked as Ex.A19. Meanwhile, it is found that on the strength of Ex.A14 power of attorney deed, it is seen that the first defendant had entered into a sale agreement with the second defendant for the sale of the suit properties on 16.06.2003, which document has come to marked as Ex.B16 and following the same, it is seen that the first defendant had alienated the suit properties in favour of the second defendant by way of the registered sale deed dated 07.11.2003. Therefore, when it is found that on the strength of Ex.A14 power of attorney deed, the first defendant had proceeded to enter into the sale agreement with the second defendant qua the sale of the suit properties and following the same, had indeed executed the sale deeds in favour of the second defendant on 07.11.2003 and as above pointed out, the second defendant had also taken the possession of the suit properties and effected the service connection, water connection, mutation of tax in respect of the suit properties pursuant to the sale deeds dated 07.11.2003 and the plaintiff has miserably failed to establish that he has been in the possession and enjoyment of the suit properties right from 13.06.2003 and when as above noted, it is only the first defendant who had discharged the loan of the society on the strength of the power of attorney deed and when the first defendant is found to have executed the sale deeds in favour of the second defendant by virtue of the power entrusted or given to him by the plaintiff and the recitals in Ex.A14 go to disclose clearly that the first defendant had been duly empowered by the plaintiff to sell the suit properties and do all such further acts as are necessary with reference to the same, in such view of the matter, as rightly put forth by the second defendant's counsel,all the acts done by the first defendant as the power of attorney agent of the plaintiff could only be construed as the acts of the plaintiff and accordingly it is found that the counsel for the second defendant is justified in basing his arguments upon the legal maxim - QUI PER ALIUM FACIT PER SEIPSUM FACERE VIDETUR, which means he who does an act through another is deemed in law to do it himself. As rightly put forth by the counsel for the second defendant, the abovesaid maxim enunciates the general doctrine of law relative to the rights and liabilities of principal and agent depends. It is thus found that on the basis of the abovesaid maxim, when a contract is entered into with A as agent for B, it is deemed, in contemplation of law,

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to be entered into with B and the principal is, in most cases, the proper party to sue or be sued for a breach of such contract - the agent being viewed simply as the medium through which it was effected. The abovesaid principles of law had been applied and followed in the decision reported in 2009-4-L.W. 650 (M.Abdul Muthalip vs. M.Samsudeen) wherein it has been held that when a person is endeavouring to convey the sale deeds in respect of his properties though power of attorney deeds, the said person is deemed to be a party to such sale deeds and in such events, he ought to have filed a suit for cancellation of the said sale deeds and for the declaration that the impugned sale deeds are null and void and he ought to have paid court fee under Section 40 of the Tamil Nadu Court Fees and suits ValuationAct and the position of law has been outlined in the head note of the abovesaid decision, which is extracted as under:

> Tamil Nadu Court Fees and Suits Valuation Act, Sections 25, 40 / Principal-Agent Relationship/Sale deeds by General Power of Attorney, setting aside of, by Principal / Scope of.
>
> Respondent/plaintiff filed a suit for declaration that the sale created by the appellant / defendant on the strength of the general power of attorney deed executed by the respondent is invalid and cannot confer title to the defendant also for declaration that the plaintiff is the absolute owner of the suit property and consequentially for recovery of possession directing the defendant to had over the poss' of the suit property and on his failure to hand over the possession order delivery through process of court - Held: He ought to have filed a suit for cancellation of the sale deeds and for declaration that the impugned sale deeds are null and void and he ought to have paid the court fee under Section 40 of the Section 25(a) of the "Act" - The suit itself is not maintenable - Second appeal allowed.

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The same principle has also been outlined in the decision of this court dated 27.01.2012 passed in A.S.No.570 of 2006 (P.Stanley Buck and others Vs. Dr.E.Krishnan and another), wherein also it has been held that based on the maxim Qui Per Alium Facit Per Seipsum Facere Videtur - he who does through another does it himself and accordingly in the abovesaid case, it has been pointed out and held that the sale deed in question having been admittedly executed by the power of attorney of the plaintiff and in such a case, the plaintiff having been in his very name, so to say eo nominee party as vendor, cannot wriggle himself out of his liability to seek for cancellation of sale deed by contending that the power of attorney defrauded him and further it has been held in the

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abovesaid decision if at all the power of attorney of the plaintiff is proved to have committed any fraud , even then the plaintiff should pray for setting aside the sale deed and cannot simply pray for declaring the sale deed as null and void. Applying the abovesaid principles of law to the facts and circumstances of the case, when it is seen that the sale deeds dated 07.11.2003 had come to be executed by the first defendant as the power of attorney agent of the plaintiff and pursuant to the sale deeds, it is only the second defendant who is admittedly found to be enjoying the suit properties as the absolute owner thereof by effecting mutation with reference to the suit properties in all aspects and when the plaintiff has failed to establish that the power of attorney deed E.A14 had been brought about by the defendants using fraud, misrepresentation, undue influence, coercion, force, etc., and when no pleas with reference to the same are furnished in the plaint and the plaintiff has also not pleaded that the defendants had been standing in a fiduciary relationship while lending the alleged loans to him on various occasions including the transaction involved in the present suit and when the plaintiff as above noted is found to have voluntarily and suomotu executed the power of attorney deed in favour of the first defendant knowing the legal consequences thereof and the plaintiff cannot be characterised as a novice and innocent person and that he had come to execute the abovesaid power of attorney deed without knowing the legal consequences thereof and in such view of the matter, when the abovesaid elements of fraud, misrepresentation, undue influence, force, etc., are not at all put forth by the plaintiff in any manner against the defendants for the obtainment of the power of attorney deed from him and there is no question of any fiduciary relationship between the defendants and the plaintiff as sought to be projected, it is seen that in such view of the matter, the plaintiff cannot be allowed to contend that the duty is cast upon the defendants to establish that the execution of the power of attorney deed is proper, perfect, fair, adequate and based on equity and accordingly in the absence of any pleas as well as materials on the part of the plaintiff with reference to the same, in my considered opinion, the principles of non est factum put forth by the plaintiff for avoding the power of attorney deed Ex.A14 as well as the sale deeds dated 07.11.2003 cannot be countenanced and accepted and in such view of the matter, the various authorities cited below and relied upon by the plaintiff's counsel with reference to the plea of the application of non est factum for shifting the burden upon the defendants and for his other contentions,as such, cannot be made applicable to the case at hand in the light of the absence of any pleas, materials on the part of the plaintiff with reference to the same as above pointed out and discussed.

1. 1990(1) SCC 207 (Bismillah vs. Janeshwar Prasad and others)

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2. 1990 (Supp) SCC 216 (Dularia Devi vs.

Janardan Singh and others)

3. 1995 (1) SCC 242 (Noorduddin vs. Dr. K.L. Anand)

4. 2000 (1) SCC 434 (Ishwar Dass Jain (dead) through Lrs. vs. Sohan Lal (dead) by Lrs.)

5. 2004 (9) SCC 468 (Krishna Mohan Kul Alias Nani Charan Kul and another vs. Pratima Maity and others)

6. 2006(5) SCC 353 (Prem Singh and others vs. Birbal and others)

7. 2010 (8) SCC 383 (Megmala and others vs. G.Narasimha Reddy and others)

8. 2011 (9) SCC 126 (Khatri Hotels private Limited and another vs. Union of Indian and another)

9. 2012 (3) CTC 416 (SC) (Marcel Martins vs. M.Printer and ors)

10. 2007 (3) LW 580 (DB) (Kamireddi Sattiaraju and another vs. Kandamuri Boolaeswari)

11. AIR 1952 MAD 552 (Ponnammal alias Guruvammal and others vs. Kanthammal and others)

12. 1997 (2) LW 197 (Selvaraju Kounder vs. Sahadeva Kounder)

13. 2006 (5) CTC 255 (Siddha construction (P) Ltd., vs. M.Shanmugam and others)

14. (2012) 1 SCC 656 (Suraj Lamp and industries private Ltd., vs. State of Haryana and another)

15. (2003) 2 MLJ 676 (Samba Sivam and others vs. Gunasekaran and others)

16. (1999) 8 SCC 511 (U. Nilan vs. Kannayyan (dead) through Lrs.

22. The trial court without considering the abovesaid case of the plaintiff in the proper perspective as well as the principles of law outlined in the same, found to have accepted the plaintiff's case merely on the footing that the defendants have not established the truth of the receipt marked as Ex.B5 said to have been issued by the plaintiff. No doubt, EX.B5 has not been pleaded by the defendants in the written

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statement and also not established by the defendants to have been issued by the plaintiff and the evidence of D.W.2 pertaining to the same, as such, does not inspire the confidence. However, when it is seen that the power of attorney deed Ex.A14 had come to be voluntarily executed by the plaintiff in favour of the first defendant and on the strength of the same, the first defendant had executed the sale deeds in favour of the second defendant, if at all, as per the power of attorney deed, the first defendant is required to pass on the consideration received by him to the plaintiff, as rightly put forth, the said issue is only between the plaintiff and the first defendant and the second defendant is in no way connected with the same and the remedy of the plaintiff as the principal against his power of attorney agent, namely, the first defendant does not fall within the scope and ambit of this lis and if the said remedy is available to the plaintiff, the same has to be worked out by him independently against the first defendant. The trial court has not considered the abovesaid factors of the matter properly and seem to have accepted the plaintiff's case based on the failure of the defendants to establish the receipt Ex.B5.

23. The trial court seems to have also accepted the plaintiff's case on the footing that there is no need on the part of the plaintiff's wives and daughter to execute the power of attorney in favour of the first defendant, as according to the trial court, they are not the owners of the suit properties. When even according to the plaintiff's case, while obtaining the loan from the society, he along with his wives and daughter had pledged item No. 2 of the suit properties and executed a simple mortgage deed in favour of the society, it is seen that the power of attorney deed had also been taken from the wives and daughter of the plaintiff out of the abundant caution and in such view of the matter, the abovesaid factum of obtainment of the power deed from the wives and daughter of the plaintiff would not, in any manner, vitiate the defence projected by the defendants.

24. When as above noted, the execution of various sale agreements, power of attorney deeds and subsequent cancellation of those instruments are not shown to be executed by the plaintiff only as a security towards the alleged loans said to have been received by him from the defendants and the others and the similar plea taken by the plaintiff with reference to Ex.A14 power of attorney deed also has not been established by the plaintiff and when there is no plea of fraud, undue influence, misrepresentation, force, etc., exercised on the part of the defendants in the obtainment of the power of attorney deed, in such view of the matter, and more particularly, when the defendants have also chosen to examine the attestor of the power of attorney deed Ex.A14 as D.W.4 and D.W.4 in his evidence has clearly deposed about the same and also repudiated the case of the plaintiff that the same had been executed only as a security for the loan obtained by the plaintiff and despite the cross examination,

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nothing has been culled out from him to dis believe his evidence, in such view of the matter and furthermore, considering the stature of the plaintiff, he being a person of having worldwide knowledge and also found to be a person engaged in the avocation running to several lakhs of rupees and owning considerable properties, to say that he had been required to execute the abovesaid sale deeds, power of attorneys, etc., by the defendants by taking advantage of their alleged dominant position and that he had executed the abovesaid instrument without knowing the legal consequences thereof, in my considered opinion, cannot at all be accepted and therefore, the plea of non est factum is found to be, as such, not applicable to the case at hand, particularly, in the absence of pleas and materials pointing to the same.

25. In the light of the abovesaid position, the sale deeds having come to be executed by the first defendant in favour of the second defendant in respect of the suit properties on the strength of the power of attorney deed given to him by the plaintiff as per law, the sale deeds in question dated 07.11.2003 had been indeed executed only by the plaintiff, in such view of the matter, the plaintiff being a party to the abovesaid sale deeds as outlined in the abovesaid decisions relied upon by the second defendant's counsel, in such view of the matter, the plaintiff cannot be allowed to contend that he would continue to be the owner of the suit properties without endeavouring to cancel the abovesaid sale deeds in the manner known to law by paying the court fees under the Tamilnadu Court Fees and Suits Valuation Act and in such view of the matter, the relief of declaration sought for by the plaintiff cannot at all be granted and on that score alone it is seen that the plaintiff's suit is not maintainable.

26. In the light of the fact that the first defendant had executed the sale deeds in favour of the second defendant as the power of attorney agent of the plaintiff and the abovesaid sale deeds had been executed when the power of attorney deed had been in force and only at a later stage, the same had come to be cancelled on 22.06.2007, it is found that the abovesaid cancellation deed dated 22.06.2007 would have no effect, whatsoever, on the alienations made by the first defendant on 07.11.2003 and accordingly it is seen that by way of Ex.A19 cancellation deed, it cannot be construed and held that the sale deeds dated 07.11.2003 had ceased to be the valid documents and as above seen when pursuant to the abovesaid sale deeds, it is only the second defendant, who is found to be enjoying the suit properties as the absolute owner thereof by effecting mutations in his name, in all spheres, as abovepointed out and in such view of the matter, the plaintiff having failed to establish that he continues to possess a valid title to the suit property as an date, in such view of the matter, it is found that the plaintiff is not entitled to seek and obtain the relief of possession from the second defendant as prayed for.

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27. In the light of the abovesaid discussions, the point Nos. 1 and 2 are accordingly answered against the plaintiff and in favour of the defendants.

Point Nos. 3 and 4

In conclusion, the judgment and decree dated 19.09.2008 passed in O.S. No.333 of 2007 on the file of the Additional District Court, Fast Track Court No.4, Bhavani, are set aside and resultantly, the suit laid by the plaintiff in O.S. No.333 of 2007 is dismissed with costs. Accordingly, the first appeal is allowed with costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar (CS-IV)

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Sub Assistant Registrar

bga

To

1. Additional District Court,
   Fast Track Court No.4, Bhavani.

2. The Section officer,
   V.R. Section, High Court,
   Madras.

+1cc to Mr.N.Manokaran, Advocate, S.R.No. 62985
+1cc to Mr.S.Lakshmanasamy, Advocate, S.R.No. 62673

A.S.No.687 of 2009

SSV(CO)
GN(02/12/2019)

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