IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.03.2019

CORAM :

THE HON'BLE MRS.VIJAYA K.TAHILRAMANI, CHIEF JUSTICE

AND

The HON'BLE MR.JUSTICE M.DURAISWAMY

C.R.P.(NPD).No.2841 of 2012 and
M.P.No.1 of 2012

Ragath Begum
represented by her Power of Attorney
Reghuman Khan .. Petitioner

Vs.

1.Indian Bank,
Park Town Branch (now transferred to ARMB),
rep by its Chief Manager,
No.55, Ethiraj Salai, Egmore,
Chennai – 600 008.

2.M/s.Samna Exports (India Pvt Ltd.,)
3C, Okland Apartments,
No.9, Meloni Street,
T.Nagar, Chennai – 17.

3.Abdul Aziz Chowdry

4.Ayesha Aziz Chowdry .. Respondents

Petition filed under Article 227 of the Constitution of India against the order dated 02.07.2012 in R.A.No.88 of 2007 on the file of the Debt Recovery Appellate Tribunal, Chennai reversing the order dated 26.06.2007 in O.A.No.856 of 2001 on the file of the Debts Recovery Tribunal- II, Chennai.

For Petitioner : Mr.B.Ravi

For Respondents : Mr.Jayesh B.Dolia (R1)

R2 to R4 – no appearance

O R D E R

(ORDER OF THE COURT WAS MADE BY M.DURAISWAMY, J.)

Challenging the order passed in R.A.No.88 of 2007 on the file of the Debt Recovery Appellate Tribunal, Chennai, reversing the order passed in O.A.No.856 of 2001 on the file of the Debts Recovery Tribunal - II, Chennai, the 4th defendant in O.A.No.856 of 2001 has filed the above Civil Revision Petition.

2.The 1st respondent – Bank filed Original Application in O.A.No.856 of 2001 for recovery of a total sum of Rs.99,99,990.85p together with interest.

3.The Debts Recovery Tribunal – II, Chennai, by order dated 26.06.2007 decreed the suit as against the respondents 2 to 4/defendants 1 to 3 and discharged the petitioner from the liabilities. Aggrieved over the order passed by the Debts Recovery Tribunal – II, Chennai, the 1st respondent – Bank preferred an appeal in R.A.No.88 of 2007 and the Debt Recovery Appellate Tribunal, by order dated 02.07.2012, set aside the order passed by the Debts Recovery Tribunal insofar as the petitioner is concerned and allowed the appeal. Further, the Debt Recovery Appellate Tribunal directed the Presiding Officer to recall the Recovery Certificate issued and to issue a fresh Recovery Certificate depicting the petitioner/4th defendant as the 4th Certificate Debtor in the Recovery Certificate, in addition to the existing 3 Certificate Debtors. Aggrieved over the order passed by the Debt Recovery Appellate Tribunal, the petitioner has filed the above Civil Revision Petition.

4.It is the case of the petitioner that the 2nd respondent is a Private Limited Company and the respondents 3 & 4 are its Directors. The respondents 2 to 4 availed loan from the 1st respondent - Bank. The petitioner, who was the 4th defendant in O.A.No.856 of 2001, executed a registered Power of Attorney Deed dated 27.07.1993 in favour of the 3rd respondent.

5.It is not in dispute that the petitioner and the 3rd respondent are "Sammandhis" (i.e.) the petitioner's daughter is married to the 3rd respondent's son. Pursuant to the Power of Attorney, the 3rd respondent executed a mortgage in favour of the 1st respondent – Bank on 16.08.1993 and the petitioner through her Power Agent, the 3rd respondent stood as a guarantor for the loan availed by the respondents 2 to 4. The 3rd respondent, as the Power Agent of the petitioner, deposited the Title deeds in respect of the property bearing No.9, Pasumarthy Street, Kodambakkam, Chennai, on 13.08.1993 in favour of the 1st respondent – Bank with an intention to create equitable mortgage as and by way of security for due payment of advances/credit facilities granted to the 2nd respondent. Since the respondents 2 to 4 committed default in repaying the loan amount, the 1st respondent – Bank filed O.A.No.856 of 2001 claiming a total sum of Rs.99,99,990.85p together with further interest.

6.The contention of the petitioner is that there is no recital in the Power of Attorney Deed to mortgage the property in favour of the 1st respondent – Bank and that the petitioner had revoked the registered Power of Attorney Deed dated 27.07.1993 by executing a registered Revocation Deed on 12.08.1993 and therefore, the mortgage created on 16.08.1993 by the 3rd respondent – Power Agent is not valid.

7.The learned counsel appearing for the petitioner submitted that the petitioner has also sent a registered letter to the Power Agent with regard to the revocation of the general Power of Attorney Deed dated 27.07.1993.

7.1.The learned counsel for the petitioner, in support of his contentions, relied upon the following judgments:

(i)AIR 2005 Supreme Court 3401 [State of Rajasthan and ors. Vs. Basant Nahata] wherein the Apex Court held as follows:

> "...
>
> 53.Execution of power of attorney in terms of the provisions of the Indian Contract Act as also the Power of Attorney Act is valid. A power of attorney, we have notified hereinbefore, is executed by the donor so as to enable the donee to act on his behalf. Except in cases where power of attorney is coupled with interest, it is revocable. The donee in exercise of his power under such power of attorney only acts in place of the donor subject of course to the powers granted to him by reason thereof. He cannot use the power of attorney for his own benefit. He acts in a fiduciary capacity. Any act of infidelity or breach of trust is a matter between the donor and the donee."

(ii)1968-2-M.L.J. 574 [Anantha Pillai Vs. Rathnasabapathy Mudaliar and others] wherein this Court held as follows:

> "...
>
> The general principles regarding the construction of a power-of-attorney are well-settled. Powers-of-attorney must be strictly construed as giving only such authority as they confer expressly or by necessary implication. Where an act

purporting to be done under the power-of-attorney is challenged as being in excess of the power, it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument either by express terms of by necessary implication. Some of the principles governing the construction of a power-of-attorney are: (1) the operative part of the deed is controlled by the recitals; (2) where an authority is given to do particular acts, followed by general words, the general words are restricted to what is necessary for the performance of the particular acts; (3) the general words do not confer general powers but are limited to the purpose for which the authority is given and are construed as enlarging the special powers only when necessary for that purpose; (4) a power-of-attorney is construed so as to include all medium powers necessary for its effective execution."

(iii)(2012) 8 Supreme Court Cases 706 [Church of Christ Charitable Trust and Educational Charitable Society represented by its Chairman Vs. Ponniamman Educational Trust represented by its Chairperson/Managing Trustee] wherein the Apex Court held as follows:

"...

19.Next, we have to consider the power of attorney. It is settled that a power of attorney has to be strictly construed. In order to agree to sell or effect a sale by a power of attorney, the power should also expressly authorise the power to agent to execute the sale agreement/sale deed i.e. (a) to present the document before the Registrar; and (b) to admit execution of the document before the Registrar. A perusal of the power of attorney, in the present case, shows that it only authorises certain specified acts but not any act authorising entering into an agreement of sale or to execute sale deed or admit execution before the Registrar."

8.Countering the submissions made by the learned counsel appearing for the petitioner, the learned counsel appearing for the 1st respondent – Bank submitted that there are recitals in the Power of Attorney Deed with regard to obtaining loan from the Bank and Financiers and also submitted that the revocation of the Power of Attorney Deed on 12.08.1993 is only to defeat the claim of the 1st respondent – Bank.

9.On a careful consideration of the materials available on record, the submissions made by the learned counsel on either side and the judgments relied upon by the learned counsel for the petitioner, it could be seen that the respondents 2 to 4 had availed loans on various dates from the 1st respondent – Bank. The petitioner executed a registered Power of Attorney Deed dated 27.07.1993 in favour of the 3rd respondent, who is her "Sammandhi". Subsequently, on 12.08.1993, the petitioner executed a Revocation Deed, revoking the Power of Attorney Deed dated 27.07.1993.

Pursuant to the Power of Attorney Deed dated 27.07.1993, the 3rd respondent had given the property bearing No.9, Pasumarthy Street, Kodambakkam, Chennai, as collateral security by depositing the original Title Deeds in favour of the 1st respondent – Bank on 16.08.1993.

10.Now, the petitioner's contentions are two fold. First contention is that, since the equitable mortgage was executed on 16.08.1993 subsequent to the revocation of the Power of Attorney Deed, the mortgage is not binding on the petitioner and the next contention of the petitioner is that there is no recital in the Power of Attorney Deed for mortgaging the petitioner's property by the Power Agent.

11.On a perusal of the recitals in Clause nos.9 & 10 of the general Power of Attorney Deed dated 27.07.1993, it is clear that the petitioner has given power to the 3rd respondent to approach any individual, Financier, Banker and borrow money on the security of the property and also to negotiate and obtain loan and offer the property as security till the loan is discharged. Therefore, from the above, it is clear that the 3rd respondent was given power to execute necessary documents for availing loan on security of the property belonging to the petitioner. Therefore, the contention of the petitioner that the Power of Attorney Deed was not executed for giving the petitioner's property as security for the loan, cannot be accepted.

12.There cannot be any dispute with regard to the ratio laid down in the judgments relied upon by the learned counsel for the petitioner. It is settled position that a Power of Attorney Deed has to be strictly construed and that the Power of Attorney only acts in the place of the principal as per the powers granted to him in the document. Therefore, strictly construing the Power of Attorney Deed executed by the petitioner, which expressly authorized the Power Agent to execute the necessary documents for availing the loan from the Banks and Financial Institutions, we are of the considered view that the Power Agent was authorized to execute the equitable mortgage in favour of the 1st respondent – Bank.

14.So far as the Revocation Deed is concerned, the petitioner contended that the Power of Attorney Deed was revoked on 12.08.1993 by executing a registered Revocation Deed and the petitioner has also written a letter on 12.08.1993 to the 3rd respondent cancelling the Power of Attorney Deed dated 27.07.1993. On a perusal of the said letter, it could be seen that the said letter was addressed to the 3rd respondent mentioning the address at No.53/17, Pantheon Road, Srirangam Avenue, Egmore, Chennai – 600 008. As already stated, this letter is dated 12.08.1993. However, in the Power of Attorney Deed dated 27.07.1993 (i.e.) executed 16 days before 12.08.1993, the address of the 3rd respondent was mentioned as No.41, New Colony, Madras-87. That apart, the petitioner has not produced any receipt/acknowledgement for sending the letter dated 12.08.1993 to the 3rd respondent by Speed Post. Conveniently, the respondents 2 to 4 remained absent before this Court.

15.Even with regard to the Revocation Deed, admittedly, the petitioner has not given any paper publication informing the public that she has cancelled the Power of Attorney Deed dated 27.07.1993. In the absence of any such publication issued by the petitioner, one cannot expect the 1st respondent – Bank to know about the Revocation Deed, executed within 16 days from the date of the Power of Attorney Deed. As already stated, the equitable mortgage was made by the 3rd respondent/Power Agent on 16.08.1993. The 1st respondent – Bank would not have had an opportunity to know about the Revocation Deed which was executed within few days from the date of Power of Attorney Deed for the reason that with regard to the entries in respect of the execution of Power of Attorney Deed and Revocation Deed would not have appeared in the Encumbrance Certificate in respect of the said property. In other words, the entries with regard to the Power of Attorney Deed and Revocation Deed shall not appear in the Encumbrance Certificate in respect of the property. That being the case, the 3rd respondent had executed the equitable mortgage in favour of the 1st respondent based on the Power of Attorney Deed dated 27.07.1993 executed by the petitioner. If the 3rd respondent had defrauded the petitioner, the remedy open to the petitioner is to proceed against the 3rd respondent and claim damages from him.

16.It is brought to the notice of this Court that the petitioner has filed a Civil Suit in C.S.No.686 of 2007 on 26.07.2006 before this Court. However, the suit was dismissed for non-prosecution on 31.10.2014. The learned counsel for the petitioner submitted that subsequently the suit was restored to file and transferred to the file of the City Civil Court and re-numbered as O.S.No.163 of 2015.

17.When the equitable mortgage was made as early as on 16.08.1993 and the O.A. was filed by the 1st respondent – Bank in the year 2001, the petitioner chose to file the suit for damages against the 3rd respondent only on 26.07.2006. The petitioner has not explained for what reason she chose to file the suit only on 26.07.2006 when the mortgage was made in the year 1993 and the O.A. was filed in the year 2001.

18.Above all, though the petitioner contended that she revoked the Power of Attorney Deed dated 27.07.1993, when the 3rd respondent executed the equitable mortgage on 16.08.1993, the Power Agent viz., the 3rd respondent handed over all the original Title Deeds in respect of the property to the 1st respondent – Bank. When there is no recital found in the Power of Attorney Deed with regard to handing over of the original documents to the Power Agent by the petitioner, how the 3rd respondent came into possession of the original Title Deeds of the petitioner has not been explained by the petitioner. Infact, the petitioner had no answer for the said query. According to the petitioner, when the Power of Attorney Deed was revoked on 12.08.1993, the 3rd respondent/Power Agent not only executed the equitable mortgage in favour of the 1st respondent, but also handed over all the original Title Deed to them for creating an equitable mortgage. The said fact would falsify the case of the petitioner. Therefore, we are of the view that the Revocation Deed dated 12.08.1993 was executed by the petitioner only to defeat the rights and claim of the 1st respondent – Bank. Because of the close relationship between the petitioner and the 3rd respondent, the said Revocation Deed was executed by the petitioner.

19.Though the Debt Recovery Appellate Tribunal had rightly allowed the appeal insofar as the petitioner is concerned making her liable for the claim amount, the finding of the Appellate Tribunal that the Power of Attorney Deed is coupled with consideration is without any basis. The recitals in the document would only establish that it is a general Power of Attorney Deed not coupled with any consideration. Therefore, the finding of the Appellate Tribunal with regard to the same alone is set aside.

20.The petitioner/4th defendant is also jointly and severally liable to pay the decree amount along with the respondents 2 to 4/defendants 1 to 3. The Appellate Tribunal has rightly set aside the order passed by the Debts Recovery Tribunal and allowed the appeal. We do not find any ground to interfere with the order passed by the Debt Recovery Appellate Tribunal. The Civil Revision Petition is liable to be dismissed. Accordingly, the same is dismissed. No costs. Consequently, the connected miscellaneous petition is closed.

Index : Yes/No **(V.K.T., CJ.) (M.D., J.)**
Internet : Yes **20.03.2019**
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THE HON'BLE CHIEF JUSTICE
AND
M. DURAISWAMY,J.

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To

1.The Chief Manager,
Indian Bank,
Park Town Branch (now transferred to ARMB),
No.55, Ethiraj Salai, Egmore,
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