

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 27.06.2019

PRONOUNCED ON : 23.07.2019

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

S.A.No.5 of 2016

D.Deboral ..Appellant/Respondent/Plaintiff

Vs.

1.J.Rajkumar

2.Hema Rajkumar

3.Ronald Stephen

..Respondents/Appellants/Defendants

Prayer :- Second Appeal has been filed under Section 100 of CPC against the Judgement and Decree dated 16.07.2015 passed in A.S.No.33 of 2013 on the file of the Subordinate Court, Kanchipuram, reversing the Judgment and Decree dated 30.10.2012 passed in O.S.No.95 of 2009 on the file of the District Munsif -cum - Judicial Magistrate Court, Sriperumbudur.

For Appellant : Mr.T.Jayalakshmi
for M/s.Paul & Paul

For Respondents : Mr.R.Subramanian
for M/s.V.V.Sairam

JUDGMENT

Challenge in this second appeal is made to the Judgement and Decree dated 16.07.2015 passed in A.S.No.33 of 2013 on the file of the Subordinate Court, Kanchipuram, reversing the Judgment and Decree dated 30.10.2012 passed in O.S.No.95 of 2009 on the file of the District Munsif -cum - Judicial Magistrate Court, Sriperumbudur.

2.For the sake of convenience, the parties are referred to as per their rankings in the trial Court.

3.Suit for declaration and permanent injunction.

4.Briefly stated, according to the plaintiff, the vacant land measuring 9 cents in survey No.239 /12 in the suit village was acquired by Allen Mathew Samuel S/o. J.Rajkumar by virtue of the sale deed dated 14.05.1998 and Allen Mathew Samuel died

intestate and his right in the abovesaid property devolved on his father as per the provisions of the Indian Succession Act and his father viz., J.Rajkumar, the first defendant acquired title to the suit property and he desired to sell the same and execute deeds of power of attorney on 17.08.2005 and 21.06.2006 in favour of M.Daniel Dhanapaul, the plaintiff's husband and handed over the possession of the suit property to the power agent and the power agent by virtue of the power granted to him had sold the suit property to the plaintiff by way of the deed of sale on 02.04.2008 and thus, the plaintiff has become the owner of the suit property and enjoying the same by paying tax, obtaining service connection etc., while so, the first defendant attempted to disturb the possession of the plaintiff considering the increase of the market value of the suit property and in this connection, the defendants along with the others called for discussion with the plaintiff and took her and her husband to Hotel Pleasant day at Poonamallee and forced the plaintiff to execute a deed of cancellation and apprehending trouble, the plaintiff and her husband cried for help and got out of the Hotel and the first defendant on 13.10.2008 sent a letter of revocation of the deeds of power of attorney dated 17.08.2005 and 21.06.2006 and however, the power agent had already executed the sale deed in favour of the plaintiff on the strength of the power deed and with a view to deprive the plaintiff's right, title and interest in respect of the suit property, it is put forth that the defendants 1 & 2 had executed a deed of settlement dated 22.10.2008 in respect of the entire 9 cents including the suit property in survey No.239 / 12 in favour of the third defendant and the abovesaid settlement deed is not true, invalid and void and not binding upon the plaintiff and hence, according to the plaintiff, as the defendants attempted to interfere with her possession and enjoyment, she had been necessitated to institute the suit against the defendants for appropriate reliefs.

5.The defendants, in toto, challenged the plaintiff's suit and admitted that the 9 cents comprised in survey No.239/12 was acquired by Allen Mathew Samuel, the son of the defendants 1 & 2 by virtue of the sale deed dated 14.05.1998 and put forth the case that their son Allen Mathew Samuel suddenly passed away in an accident on 11.04.2005 and the plaintiff's husband was known to the defendants' family and accordingly, the plaintiff's husband requested them to permit him to stay in the house situated in the eastern half of the property and taking advantage of his closeness with the defendants 1 & 2, obtained the unregistered power deed dated 17.08.2005 authorising him to sell the vacant land situated on the western side and the abovesaid power deed was not granted in respect of the eastern side consisting of the house bearing Door No.1 / 55 and the abovesaid power deed was intended only to sell the western half

to the A.G.Church and however, based on the unregistered power deed, the power agent was unable to execute the sale deed in favour of the AG church and accordingly, the plaintiff's husband represented the matter and got another power deed registered for the same property i.e. western side on 21.06.2006 and instead of negotiating with the A.G. Church to sell the western half of the vacant land, the power agent had joined hands with his wife, the plaintiff and without any right, executed a nominal sale deed in favour of his wife, the plaintiff in respect of the eastern half of the abovesaid property, for which, no power had been given and when the unregistered power deed authorised only to sell 2100 sq.ft lying on the western half, which does not have any building much less electrical connection etc., the claim of the plaintiff that she had purchased the building portion by virtue of the sale deed executed by her husband cannot be accepted in the eyes of law and therefore, it is put forth by the defendants that the power of attorney had exceeded his authority and on coming to know of the above, the first defendant had cancelled the power deeds executed in favour of the plaintiff's husband on 17.08.2005 and 21.06.2006 on 24.09.2008 and thereafter, settled the entire property in favour of his second son i.e. the third defendant on 22.10.2008 and resultantly, the plaintiff had come forward with the suit with ulterior motive and with the aid of the sale deed, the plaintiff had obtained the service connection, despite the existence of the previous connection in the suit property in the name of the deceased Allen Mathew Samuel and also endeavoured to change the house tax in her name and therefore, according to the defendants, the plaintiff is not entitled to the suit property and the plaintiff's husband had taken advantage of the permission granted to him to occupy the house in the eastern side and the plaintiff and her husband trespassed into the house on the eastern side and the sale deed in favour of the plaintiff is void as it is against the provisions of Registration Act and the power agent had exceeded his power and on the strength of the sale deed, the plaintiff and her husband had trespassed into the suit property and hence, prayed for the dismissal of the plaintiff's suit.

6.In support of the plaintiff's case, PW1 was examined and Exs.A1 to A12 were marked and on the side of the Defendants, DW1 was examined and Exs.B1 to B26 were marked. Exs.C1 to C3 were also marked.

7.On a consideration of the materials placed on record by the respective parties and the submissions made, the trial Court was pleased to decree the suit in favour of the plaintiff. However, the first appellate Court, on an appreciation of the materials available on record and the submissions made, was pleased to set aside the judgment and decree of the trial Court and by way of allowing the appeal preferred by the defendants,

dismissed the suit laid by the plaintiff. Challenging the same, the present second appeal has been preferred.

8. At the time of admission of the second appeal, the following substantial questions of law were formulated for consideration:

"(1). Whether the Lower Appellate Judge is right in law in holding that the suit has been filed for the "western portion" without any evidence or pleading in support of the same and in the face of evidence and pleading that the suit is in report of the eastern portion only?

(2). Whether the Lower Appellate Judge could deny the relief of permanent injunction on the ground of title when the said relief is clearly available to the plaintiff even on the ground of settled possession admitted by the defendant?

(3). Whether the decision of the Lower Appellate Court judge in rejecting the relief of permanent injunction on the ground of title is sustainable in view of the settled principle of law enunciated in AIR 1989, 2007, 2009 (3) CTC 493 and 2004 (1) SCC 769, that even the possession of a trespasser could be protected?

(4). Whether the learned judge was right in holding in favour of the respondents without considering that in the light of the admission of possession of this appellant by the 1st respondent (DW1), the same need not be proved?

(5). Whether the learned judge was right in relying upon Exhibits (Ex.B4), (Ex.B11), (Ex.B12), (Ex.B15), (Ex.B17), (Ex.B19), (Ex.B20), (Ex.B21), (Ex.B26) when the said documents are subsequent to the institution of the suit and created for the purpose of the suit?"

9. The plaintiff claims title to the suit property as described in the plaint by virtue of the sale deed dated 02.04.2008 said to have been executed in her favour by her husband on the strength of the power of attorney deed dated

17.08.2005. As could be seen from the materials placed on record, it is not in dispute that the total extent of 9 cents in the suit survey number had been acquired in the name of the deceased Allen Mathew Samuel, son of the defendants 1 & 2. It is found that Allen Mathew Samuel had died and thereafter, at one stage, the first defendant upon whom the abovesaid property devolved, had executed two power deeds in favour of the plaintiff's husband on 17.08.2005 and 21.06.2006, it is seen that the power of attorney deed dated 17.08.2005 is not a registered instrument and another power of attorney deed dated 21.06.2006 is a registered instrument. The execution of the abovesaid power of attorney deeds in favour of the plaintiff's husband is not in dispute as such. It is further seen that out of the abovesaid total extent of 9 cents in the suit survey number, only in the eastern portion the house is situated with service connection, etc., and the western portion of the abovesaid suit property is a vacant land and it is found that the power of attorney deed dated 17.08.2005 has been given only in respect of the western portion of the property i.e. the vacant land. The unregistered power of attorney deed dated 17.08.2005 is given in respect of the property comprised in survey No.239/12 in respect of 0.02.0 ares out of 0.03.5 ares i.e. 0.05 cents out of 0.09 cents i.e. of a total extent of 2100 sq.ft of vacant site bounded, on the North by vacant site of Sakkaravarthi Naidu, East by vacant site of Sumathi ammal, South by Panchayat Road and West by vacant site of Krishnanandha Naidu. The abovesaid power deed has been marked as Ex.A2. On the strength of the abovesaid power deed, the power agent viz., the plaintiff's husband is found to have executed a sale deed in favour of the plaintiff on 02.04.2008, which document has come to be marked as Ex.A4/B25, in which, the property had been described as comprised in S.No.239/12 (0.03.5 ares), 2100 sq.ft of vacant site in 0.09 cents, bounded on the North by the vacant site of Sakkaravarthi Naidu, on the South by the vacant site of Sumathi ammal, on the East by Panchayat Road and on the West by the vacant site of Krishnanandha Naidu. As rightly found by the first appellate Court, the boundary recitals contained in Exs.A2 and A4 differ on the eastern side and on the southern side. Though the boundaries on the northern and western side are found to be same, however, when the abovesaid eastern and southern boundary recitals differ in both the documents, it is evident that the identity of the property in the abovesaid two documents are totally different from each other and when according to the plaintiff, she had acquired title to the property based on the power deed granted in favour of her husband marked as Ex.A2, it does not stand to reason as to how come the property differs in both the documents.

10.Considering the commissioner's report and plan marked in the proceedings and it is also admitted that only on the eastern

side of the property of 9 cents, the old house is lying and on the western side, the vacant land lies. The advocate commissioner has noted that the plaintiff is residing in the eastern portion of the property and not in the western portion of the property. Therefore, when the power deed Ex.A2 is found to have been granted in favour of the plaintiff's husband only as regards the western portion consisting of the vacant site, it does not stand to reason as to how come the plaintiff is in the occupation of the house lying in the eastern side of the suit survey number and accordingly, it is seen that as rightly put forth by the defendants, on the strength of the sale deed and taking advantage of the power deed standing in the name of the plaintiff's husband, it is found that the eastern portion had been trespassed by the plaintiff and accordingly, it is evident that the boundary recitals contained in Ex.A2 and Ex.A4 sale deed differ. When the plaintiff has not established her husband's entitlement to sell the eastern portion of the house property and when the power has been conferred on her husband only in respect of the western portion i.e. the vacant portion, it is for the plaintiff to establish as to how come she had acquired the right over the property inclusive of the house portion on the eastern side. Though the plaintiff would claim that after her purchase by way of Ex.A4, she had put up the construction in the property, however, unable to sustain the abovesaid case by placing acceptable and reliable materials. If really the plaintiff had put up the construction after her purchase and when the plaintiff has admitted that she has materials to substantiate and prove the same, for the reasons best known to the plaintiff, she had not endeavoured to place the requisite materials available in her custody in support of her case. However, as could be seen from the commissioner's report and plan, the plaintiff is in the occupation of the house property lying in the eastern side. Admittedly the plaintiff has not put forth any objection to the commissioner's report. If really, according to the plaintiff, she had put up the house construction after her purchase, the same being a new building, effectively she would have obtained only one service connection in her name. On the other hand, as could be seen from the commissioner's report and plan, the service connection available in the house portion in the suit property, wherein, service connection No.523 stands in the name of Allen Mathew Samuel and the another service connection No.735 stands in the name of the plaintiff. It does not stand to reason as to how come two service connections are found to be available in the house situated in the suit property. Furthermore, the plaintiff has also admitted during the course of her evidence that her husband had been put in jail by way of remand on account of cheating the first defendant and also further admitted that she has also secured Anticipatory Bail in the case preferred against them by the first defendant and the plaintiff has failed to explain as

to the difference in the description of the properties comprised in the power deed dated 17.08.2005 and the sale deed dated 02.04.2008 and on being confronted with the same, she would only give evasive answers and it is further seen that quite inconsistent to the power of attorney deed Ex.A2 and the sale deed Ex.A4, in the description of the suit property furnished in the plaint, the plaintiff has described the same as comprised in survey No.239/12 measuring to an extent of 2100 sq.ft, out of 9 cents bounded on the North by the site of Chakkaravarthi Naidu, South by Panchayat Road, East by the land belonging to Kabir and West by the remaining land owned by the defendants. Therefore, when it is found that the description of the properties comprised in Ex.A2 power of attorney deed and Ex.A4 sale deed and the description of the property as given in the plaint, in such view of the matter, as rightly found and determined by the first appellate Court, as the plaintiff's husband had not been granted the power to sell the eastern portion comprising of the house structure, despite the same, it is found that he and the plaintiff in collusion had endeavoured to acquire title to the eastern portion comprising of the house structure and on the strength of the sale deed, found to have trespassed into the house portion on the eastern side and obtained the service connection and accordingly, it is seen that the abovesiad contradictions had occurred and the same had been rightly pointed out by the first appellate Court and determined that the description of the suit property in the plaint schedule is quite and totally inconsistent to the description of the properties in Ex.A2 power deed and Ex.A4 sale deed.

11.As rightly contended by the defendants' counsel, it is seen that when the power deed Ex.A2 is only given for the vacant land and it is only an unregistered instrument, in such view of the matter, in the light of the provisions of Sections 17 and 33 of the Registration Act, 1908, on the strength of such an unregistered power of attorney deed, the plaintiff's husband would not be entitled to alienate the property in favour of his wife, the plaintiff and on that score alone, it is found that the sale deed obtained by the plaintiff is defective and lacking legal sanction. It is thus noted that by giving the description of the property in the plaint schedule that the suit property is bounded on the West by the remaining land owned by the defendants, it is evident that the plaintiff by way of Ex.A4 sale deed is scheming and claiming title only to the eastern portion and furthermore, when the power deed Ex.A2 directs the power agent i.e. plaintiff's husband to sell the suit property only to the third party and when the plaintiff cannot be construed as a third party and the same has also been admitted by the plaintiff during the course of her evidence, it is made clear that the sale deed in favour of the plaintiff is without any consideration and on the strength of the abovesaid sale

deed, it is found that the plaintiff and her husband had unlawfully trespassed into the eastern portion of the property comprised in the suit survey number without any entitlement and laid the suit falsely.

12.The defendants have projected a letter dated 20.08.2008 given by the plaintiff's husband marked as Ex.B2. The abovesaid letter has been admitted by the plaintiff during the course of her evidence and despite the abovesaid letter, it is found that thereafter, the plaintiff and her husband had intruded into the eastern portion of the property and laid the false suit against the defendants and in such view of the matter, the plaintiff is not entitled to claim any title to the suit property on the strength of the invalid sale deed and the power granted in favour of her husband having been cancelled though subsequent to the alleged sale transaction as put forth by the plaintiff, however, considering the invalidity of the sale deed projected forth by the plaintiff for the reasons aforesaid and accordingly, it is found that the defendants 1 & 2 being the owners of the entire property comprised in the suit survey number, is found to be entitled to settle the same in favour of the third defendant and accordingly, the first appellate Court is found to be justified in rejecting the plaintiff's case by setting aside the judgment and decree of the trial Court.

13.The counsel for the defendants placed reliance upon the decision reported in AIR 2005 SUPREME COURT 3401 (State of Rajasthan and Ors. Vs. Basant Nahata). The principles of law outlined in the abovesaid decision are taken into consideration and followed as applicable to the case at hand.

14.In the light of the abovesaid discussions, the second appeal is found to be devoid of merits. In my considered opinion, no substantial question of law is found to be involved in the second appeal. Be that as it may, the substantial questions of law formulated in the second appeal are accordingly, answered in favour of the defendants and against the plaintiff.

Resultantly, the second appeal is dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-

Assistant Registrar (CS-V)

//True Copy//

Sub Assistant Registrar

sms

To

1.The Subordinate Court, Kanchipuram.

2.The District Munsif -cum - Judicial Magistrate Court,
Sriperumbudur.

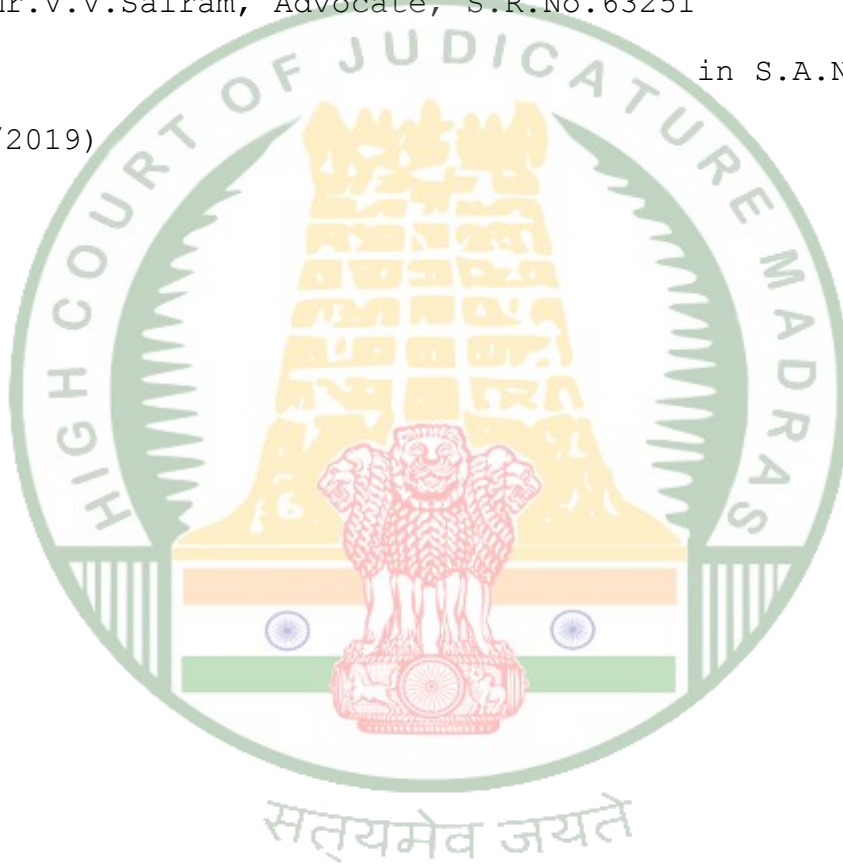
3.The Section Officer, V.R.Section, High Court, Madras.

+1 cc to M/s.Paul & Paul, Advocate, S.R.No.63900

+1 cc to Mr.V.V.Sairam, Advocate, S.R.No.63251

in S.A.No.5 of 2016

RSV(CO)
SSM(15/10/2019)



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